CIVIL CASE LAW DIGEST
BY
ADVOCATE SRIDHARA BABU

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ENVIRONMENT AND LAND LAWS

AIR 2006 SC 1350, INTELLECTUALS FORUM, TIRUPATHI VS STATE OF A.P. & ORS. BENCH: RUMA PAL & DR. AR. LAKSHMANAN

GRIEVANCE: Systematic destruction of percolation, irrigation and drinking water tanks in Tirupathi Town, namely, Avilala and Peruru Tank and alienation of the Avilala Tank bed land to Tirupathi Urban Development Authority.

The responsibility of the State to protect the environment is now a well-accepted notion in all countries. It is this notion that, international law, gave rise to the principle of ``state responsibility'' for pollution emanating within one's own territories.

Thus, there is no doubt about the fact that there is a responsibility bestowed upon the Government to protect and preserve the tanks, which are an important part of the environment of the area.

The debate between the developmental and economic needs and that of the environment is an enduring one, since if environment is destroyed for any purpose without a compelling developmental cause, it will most probably run foul of the executive and judicial safeguards. However, this Court has often faced situations where the needs of environmental protection have been pitched against the demands of economic development. In response to this difficulty, policy makers and judicial bodies across the world have produced the concept of ``sustainable development''.

Merely asserting an intention for development will not be enough to sanction the destruction of local ecological resources. The principle of sustainable development should be followed and a balance be found between the developmental needs which the respondents assert, and the environmental degradation, that the appellants allege.

The Doctrine of Public Trust says that natural resources, which include lakes, are held by the State as a ``trustee'' of the public, and can be disposed of only in a manner that is consistent with the nature of such a trust. Though this doctrine existed in Roman and English Law, it related to specific types of resources. The US Courts have expanded and given the doctrine its contemporary shape whereby it encompasses the entire spectrum of the environment.

The judgment in National Audubon Society's case is an articulation of the doctrine from the angle of the affirmative duties of the State with regard to public trust. Formulated From a nugatory angle, the doctrine does not exactly prohibit the alienation of the property held as a public trust. However, when the State holds a resource that is freely available of the use of the public, it provides for a high degree of judicial scrutiny upon any action of the Government, no matter consistent with the existing legislations that attempt to restrict such free use. To properly scrutinize such actions of the Government, the Courts must make a distinction between the Government's general obligation to act for the public benefit, and the special, more demanding obligation which it may have as a trustee of certain public resources.

The following three types of restrictions on Governmental authority are often thought to be imposed by the public Trust Doctrine:-
(a) the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public;
(b) the property may not be sold, even for fair cash equivalent.
(c) the property must be maintained for particular types of use,
(i) either traditional uses, or (ii) some uses particular to that form or resources.

Article 48-A and 51-A are not only fundamental in the governance of the country but also it shall be the duty of the State to apply these principles in making laws and further these two articles are to be kept in mind in understanding the scope and purport of the fundamental right guaranteed by the Constitution including Articles 14, 19 and 21 of the Constitution of India and also the various laws enacted by the Parliament and the State Legislature.

On the other hand, this Court cannot also shut its eyes that shelter is one of the basic needs just next to food and clothing. Need for a National Housing and Habitat Policy emerges from the growing requirements of shelter and related infrastructure. These requirements are growing in the context of rapid pace of urbanization, increasing migration from rural to urban centres in search of livelihood, mismatch between deemed and supply of sites and services at affordable cost and inability of most new and poorer urban settlers to access formal land markets in urban areas due to high costs and their own lower incomes, leading to a non-sustainable situation. This policy intends to promote sustainable development of habitat in the country, with a view to ensuring equitable supply of land, shelter and services at affordable prices.

The World has reached a level of growth in the 21st Century as never before envisaged. While the crisis of economic growth is still on, the key question which often arises and the Courts are asked tot adjudicate upon is whether economic growth can supersede the concern for environmental protection and whether sustainable development which can be achieved only by way of protecting the environment and conserving the natural resources for the benefit of the humanity and future generations could be ignored in the grab of economic growth or compelling human necessity. The growth and development process are terms without any content, without an inkling as to the substance of their end results. This inevitably leaves one to the conception of growth and development which sustains from one generation to the next in order to secure `our common future'. In pursuit of development, focus has to be on sustainability of development and policies towards that end have to be earnestly formulated and sincerely observed.

It is now an accepted social principle that all human beings have a fundamental right to a healthy environment, commensurate with their well being, coupled with a corresponding duty of ensuring that resources are conserved and preserved in such a way that present as well as the future generations are aware of them equally.

The Parliament has considerably responded to the call of the Nations for conservation of environment and natural resources and enacted suitable laws. The Judicial Wing of the country, more particularly, this Court has laid down a plethora of decisions asserting the need for environmental protection and conservation of

natural resources. The environmental protection and conservation of natural resources has been given a status of a fundamental right and brought under Art. 21 of the Constitution of India. This apart, the Directive Principles of State Policy also the fundamental duties enshrined in Part IV and Part IV A of the Constitution of India respectively also stresses the need to protect and improve the natural environment including the forests, lakes, rivers and wild-life and to have compassion for living creatures.

The set of facts in the present case relates to the preservation of and restoration of status quo ante of two tanks, historical in nature being in existence since the time of Srikrishnadevaraya, The Great, 1500 A.D., where the cry of socially spirited citizens calling for judicial remedy was not considered in the right perspective by the High Court despite there being overwhelming evidence of the tanks being in existence and were being put to use not only for irrigation purpose but also as lakes which were furthering percolation to improve the ground water table, thus serving the needs of the people in and around these tanks. The High Court, in the impugned order, has given precedence to the economic growth by completely ignoring the importance and primacy attached to the protection of environment and protection of valuable and most cherished fresh water resources.

No doubt, the wishful thinking and the desire of the appellant-forum, that the Tanks should be there, and the old glory of the tanks should be continued, is laudable. But the ground realities are otherwise. Nowadays because of the poverty and lack of employment avenues, migration of people from rural areas to urban areas is a common phenomenon. Because of the limited infrastructure of the towns, the towns are becoming slums. The submissions made by the appellant in regard to the complete restoration and revival of two tanks cannot be countenanced in the peculiar facts and circumstances of this case. At the same time, the Government cannot be prevented from proceeding with the proper development of Tirupathi town. The two Government Orders which are impugned have been issued long before and pursuant to the issuance of the Government Orders, several other developments have taken place. Constructions and improvements have been made in a vast measure. Because of spending crores and crores of rupees by various authorities, the only option now left to Committee is implemented in its letter and spirit and all the respondents shall cooperate in giving effect to the Committee's report.

It is true that the tank is a communal property and the State authorities are trustees to hold and manage such properties for the benefits of the community and they cannot be allowed to commit any act or omission which will infringe the right of the Community and alienate the property to any other person or body.

This court in the case of Essar Oil v. Halar Utkarsh Samiti, [2004 (2) SCC 392, Para 27] was pleased to expound on this. Their Lordships held: "This, therefore, is the sole aim, namely, to balance economic and social needs on the one hand with environmental considerations on the other. But in a sense all development is an environmental threat. Indeed, the very existence of humanity and the rapid increase in population together with the consequential demands to sustain the population has resulted in the concreting of open lands, cutting down of forests, filling up of lakes and the pollution of water resources and the very air that we breathe. However there need not necessarily be a deadlock between development on the one hand and the environment on the other. The objective of all laws on environment should be to create harmony between the two since neither one can be sacrificed at the altar of the other. "

A similar view was taken by this Court in Indian Council for Enviro-Legal Action v. Union of India, [1996 (5) SCC 281, Para 31] where their Lordships said: "While economic development should not be allowed to take place at the cost of ecology or by causing widespread environmental destruction and violation; at the same time the necessity to preserve ecology and environment should not hamper economic and other developments. Both development and environment should go hand in hand, in other words, there should not be development at the cost of environment and vice versa, but there should be development while taking due care and ensuring the protection of the environment. "

The concept of sustainable development also finds support in the decisions of this court in the cases M.C. Mehta v. Union of India (Taj Trapezium Case), (1997) 2 SCC 653, State of Himachal Pradesh v. Ganesh Wood Products,(1995) 3 SCC 363 and Narmada Bachao Andolan v. Union of India, (2002) 10 SCC 664. In light of the above discussions, it seems fit to hold that merely asserting an intention for development will not be enough to sanction the destruction of local ecological resources. What this Court should follow is a principle of sustainable development and find a balance between the developmental needs which the respondents assert, and the environmental degradation, that the appelants allege. Public Trust Doctrine Another legal doctrine that is relevant to this matter is the Doctrine of Public Trust.

This doctrine, though in existence from Roman times, was enunciated in its modern form by the US Supreme Court in Illinois Central Railroad Company v. People of the State of Illinois, [146 US 537 (1892)] where the Court held: The bed or soil of navigable waters is held by the people of the State in their character as sovereign, in trust for public uses for which they are adapted. [] the state holds the title to the bed of navigable waters upon a public trust, and no alienation or disposition of such property by the State, which does not recognize and is not in execution of this trust is permissible. What this doctrine says therefore is that natural resources, which includes lakes, are held by the State as a "trustee" of the public, and can be disposed of only in a manner that is consistent with the nature of such a trust. Though this doctrine existed in the Roman and English Law, it related to specific types of resources. The US Courts have expanded and given the doctrine its contemporary shape whereby it encompasses the entire spectrum of the environment.

The doctrine, in its present form, was incorporated as a part of Indian law by this Court in the case of M.C. Mehta v. Kamal Nath , (supra) and also in M.I. Builders v. Radhey Shyam Sahu, (1999) 6 SCC 464. In M.C. Mehta, Kuldip Singh J., writing for the majority held: [our legal system] includes the public trust doctrine as part of its jurisprudence. The state is the trustee of all natural resources which are by nature meant for public use and enjoyment. The state as a trustee is under the legal duty to protect the natural resources.

This Court in the case of A.P. Pollution Control Board vs Prof. M.V. Nayudu & Ors. (1999) 2 SCC 718 in paragraph 53 held as under: "The principle of inter-generational equity is of recent origin. The 1972 Stockholm Declaration refers to it in principles 1 and 2. In this context, the environment is viewed more as a resource basis for the survival of the present and future generations. Principle 1 - Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for the present and future generations Principle 2 The natural resources of the earth, including the air, water, lands, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of the present and future generations through careful planning or management, as appropriate."

This Court in Dahanu Taluka Environmental Protection Group and Ors. Vs. Bombay Suburban Electricity Supply Co. Ltd. & Ors. (1991) 2 SCC 539 held that the concerned Government should "consider the importance of public projects for the betterment of the conditions of living people on one hand and the necessity for preservation of social and ecological balance and avoidance of deforestation and maintenance of purity of the atmosphere and water free from pollution on the other in the light of various factual, technical and other aspects that may be brought to its notice by various bodies of laymen, experts and public workers and strike a balance between the two conflicting objectives." However, some of the environmental activists, as noted in the "

The Environmental Activities Hand Book' authored by Gayatri Singh, Kerban Ankleswaria and Colins Gonsalves, that the Judges are carried away by the money spent on projects and that mega projects, that harm the environment are not condemned. However, this criticism seems to be baseless since in Virender Gaur & Ors. Vs. State of Haryana & Ors., (1995) 2 SCC 577, this Court insisted on the demolition of structure which have been constructed on the lands reserved for common purposes and that this Court did not allow its decision to be frustrated by the actions of a party. This Court followed the said decision in several cases issuing directions and ensuring its enforcement by nothing short of demolition or restoration of status quo ante. The fact that crores of rupees was spent already on development projects did not convince this Court while being in a zeal to jealously safeguarding the environment and in preventing the abuse of the environment by a group of humans or the authorities under the State for that matter.

TRANSFER OF PROPERTY

AGREEMENT TO RECONVEY

Plaintiff purchased certain property and on the same day executed an agreement to reconvey after six years. Subsequently, the vendors executed an agreement P. 1, that they would release the agreement of reconveyance and the plaintiff sued for specific agreement of Ex. P. 1. Defendant 3 claimed to have purchased the right to reconveyance from the vendors without notice of Ex. P. 1 for consideration. In the agreement to reconvey it was stated that before the properties are reconveyed the costs of major repairs should be paid to the plaintiff. Held, but for wilful absention from inquiry, defendant 3 would have come to know the facts and hence he should be deemed to have notice of the rights of the plaintiff. Further, since plaintiff was in actual possession as owner, but for the reconveyance which is a concession given by the vendee and if not enforced within the time stipulated, the right becomes barred. — **Narayanaswamy Naidu H.N. v Deveeramma and Others, AIR 1981 Kant. 93.**

CONSTRUCTIVE NOTICE OF MORTGAGE BY DEPOSIT OF TITLE DEED

Vendee who is bound to make enquiry for title deed but fails to do it should be held to have notice of mortgage effected by vendor by deposit of title deed in town where such mortgage is valid by virtue of notification issued by State Government. The property in question was mortgaged in favour of the plain tiff-bank by way of deposit of title deeds. The place Hospet, where mortgage was created has been notified town within the meaning of clause (f) of Section 58 of the Transfer of Property Act, 1882. The relevant notification is dated 29-1-1981, wherein Hospet has been notified at SI. No. 106- .... Section 59 of the T.P. Act specifically provides that mortgage by deposit of title deeds is not required to be registered. Further, it is also" well-settled that wilful abstinence from making enquiry regarding actual state of affairs amounts to 'notice' within the meaning of Section 3 of the T.P. Act, ... In the present case, the vendor though obliged to disclose the defects in the property at the time of sale and on demand to produce the documents of title but admittedly he had failed to do so. In that situation, it was incumbent upon the purchaser to insist for production of title deeds or enquire regarding whereabouts thereof. But no evidence has been placed on record to show that any

such effort was made. .... In that view of the matter it has to be held that the defendant-appellant has wilfully abstained from making enquiry, as such she will be deemed to have the notice of the defects in the title. — **Smt. Kori Gowramma v The Vysya Bank Limited, Kampli and Others, 2001(2) Kar. L.J. 524 (DB).**

ONLY THE PERSON WHO IS SAID TO BE THE EXECUTOR OF A DOCUMENT MUST DENY THE EXECUTION OF THE DOCUMENT AND NONE OTHERS

Suit for declaration of title and possession under deed of — Where party who had executed registered sale deed has admitted execution thereof, dismissal of suit on ground that execution of sale deed has not been proved by examining at least one of attesting witnesses, held, is legally unsustainable — Relief sought for in suit is to be granted to party by-decreeing suit. Denial of execution of the document must be made by the person who purports to have executed it. In the written statement filed by the 7th defendant he has admitted execution of the sale deed in favour of the father of plaintiffs. He being the executant of the document, having admitted the execution, question of further proof is not necessary. . . Once the sale deed is held duly executed, it follows that the plaintiffs had title to the suit schedule property. As long as it is in force and not set aside or declared void by any competent Court, the right of the plaintiffs has to be protected. Defendants have utterly failed to prove independent right over the suit schedule property or that the same is joint family property. It follows that plaintiffs are entitled to the judgment and decree sought for by them in the suit. — **Raghavendra Rao and Others v N. Veeravenkatmo and Others, 2002(3) Kar. L.J. 150.**

BEQUEATH OF PROPERTY UNDER *WILL* IS NOT TRANSFER OF PROPERTY

Transfer of property — Temporary injunction restraining party from effecting — Bequeath of property - Will executed during pendency of temporary injunction — Validity of Will —Held, valid — Bequeath of property under Will is not transfer of property, as transfer effected under Will is not transfer inter vivos — Will is only legal declaration of intention of party with respect to his property which he desires to be carried into effect after his death — Will creates no right or title or interest in favour of anyone during lifetime of testator. No Court has the power to make an order, that too an interim order, restraining an individual from exercising his right to execute a Will and thereby regulate succession on his death. A direction to a party to maintain status quo in regard to a property does not therefore bar him from making a testamentary disposition in regard to such property. By making a Will, the testator neither changes title nor possession in regard to a property nor alters the nature or situation of the property nor removes or adds anything to the property. In short the testator, by making a Will does not alter the existing state of things in regard to the property. It follows therefore that making of a Will in regard to a property does not violate an order of status quo in regard to such property, and consequently, the testamentary disposition is neither void nor voidable. — **N. Ramaiah v Nagaraj S. and Another,** AIR 2001 Kant 395

MEANING OF STATUS QUO

The Court while making an order to maintain status quo, should endeavour to clarify the conditions, in the context of which or subject to which, such direction is issued, as the words status quo take contextual meaning and may give room for several different interpretations. Let us illustrate.
Illustration (i):
If a person puts up a construction in his site violating the set back requirements and if the owner of a property approaches the Court seeking an injunction restraining the adjoining owner from proceeding with the construction in violation of building bye-laws and the Court orders status quo, the order may mean that no further construction shall be made and the construction shall be maintained in the same position as on the date of the order.
Illustration (ii):
If a member of a joint family files an application seeking an injunction in a suit for partition, restraining the kartha from alienating the joint family property and the Court grants an order of status quo, it may mean that the defendant should not alienate the property.
Illustration (iii):
If a plaintiff seeks an injunction restraining the defendant from harvesting a crop in the suit land and the Court orders status quo, it may mean that defendant should not harvest the standing crop.
Illustration (iv):
In a service litigation, if the employee seeks a direction to employer not to terminate his services and the Court directs defendant to maintain status quo, it may mean that defendant should not terminate the service of the employee. — **N. Ramaiah v Nagaraj S. and Another,** AIR 2001 Kant 395

TRANSFER DEED AND WILL

Transfer is conveyance of property by means of deed and transaction is between living persons — Deed operates co instanti and Will become operative on death of testator — Deed is irrevocable, but Will can be revoked by testator — Court can rectify mistake in deed, but cannot rectify Will — Consideration is basis of deed, but no consideration is required for making Will. The word "transfer" is defined with the reference to the word "convey". .A Will differs from a deed in the following respects: a deed operates co instanti, i.e., from the date of its execution; a Will comes into operation on the death of the testator; a deed is ordinarily irrevocable, unless there is an express power of revocation; a Will can be revoked at any time by the testator during his life time. It is ambulatory and it becomes effective and irrevocable on the death of the testator; in

case of mistake in a deed, the Court has power to rectify it; a will cannot be rectified by any Court of law. No consideration is required for making a will. Thus disposition of property takes place posthumously after the death of the testator. Therefore there is no transfer co instanti as in case of any other deed like a sale deed, gift, exchange, mortgage, lease or assignment. — **Korgappa Gowda v Jinnappa Gowda and Others, ILR 1998 Kar. 436.**

PARTITION AND FAMILY ARRANGEMENT - RECORDS OF A PREVIOUSLY COMPLETED- REGISTRATION :

The parties are decendants of a common ancestor, who had two sons. These two branches of the family had joint properties, both agricultural and residential. The agricultural land was partitioned in 1955 and the names of the respective parties were duly mutated in the revenue records. This was followed by a partition of their residential properties including the house, ghers, ghetwars etc. Held that : "Partition, unlike the sale or transfer which consists in its essence of a single act, is a continuing state of facts. It does not require any formality, and therefore if parties actually divide their estate and agree to hold in severalty, there is an end of the matter.

If the arrangement of compromise is one under which a person having an absolute title to the property transfers his title in some of the items thereof to the others, the formalities prescribed by law have to be complied with, since the transferees derive their respective title through the transferor. If, on the other hand, the parties set up competing titles and the differences are resolved by the compromise, there is no question of one deriving title from the other, and therefore the arrangement does not fall within the mischief of s. 17 read with s. 49 of the Registration Act as no interest in property is created or declared by the document for the first time. it is assumed that the title had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary.

It is well-settled that while an instrument of partition which operates or is intended to operate as a declared volition constituting or severing ownership and causes a change of legal relation to the property divided amongst the parties to it, requires registration under Section 17(l)(b) of the Act, a writing which merely recites that there has in time past been a partition, is not a declaration of will, but a mere statement of fact, and it docs not require registration. The essence of the matter is whether the deed is a part of the partition transaction or contains merely an incidental recital of a previously completed transaction. The use of the past tense does not necessarily indicate that it is merely a recital of a past transaction. It is equally well-settled that a mere list of properties allotted at a partition is not an instrument of partition and does not require registration. Section 17(l)(b) lays down that a document for which registration is compulsory should, by its own force, operate or purport to operate to create or declare some right in immovable property. Therefore, a mere recital of what has already taken place cannot be held to declare any right and there would be no necessity of registering such a document.

Two propositions must therefore flow: (1) A partition may be effected orally; but if it is subsequently reduced into a form of a document and that document purports by itself to effect a division and embodies all the terms of bargain, it will be necessary to register it. If it be not registered, Section 49 of the Act will prevent its being admitted in evidence. Secondly, evidence of the factum of partition will not be admissible by reason of Section 91 of the Indian Evidence Act, 1872; (2) Partition lists which are mere records of a previously completed partition between the parties, will be admitted in evidence even though they are unregistered, to prove the fact of partition. . Partition, unlike the sale or transfer which consists in its essence of a single act, is a continuing state of facts. It does not require any formality, and therefore, if parties actually divide their estate and agree to hold in severally, there is an end of the matter. The true principle that emerges can be stated thus: If the arrangement of compromise is one under which a person having an absolute title to the property transfers his title in some of the items thereof to the others, the formalities prescribed by law have to be complied with, since the transferees derive their respective title through the transferor. If, on the other hand, the parties set up competing titles and the differences are resolved by the compromise, there is no question of one deriving title from the other, and therefore, the arrangement does not fall within the mischief of Section 17 read with Section 49 of the Registration Act as no interest in property is created or declared by the document for the first time. — **Roshan Singh and Others V Zail Singh and Others, AIR 1988 SC 881.**

RELEASE – SALE- GIFT

That the plaintiff-appellant filed the suit claiming decree for declaration declaring the release deed dated ……..executed between the plaintiff and defendant to be null and void ab initio. The plaintiff further prayed for a decree in the nature of direction directing the defendant and other persons who are residing along with the defendant to vacate and handover vacant possession of the suit schedule property to the plaintiff and on their failure to comply with the direction, the Hon'ble Court will be pleased to evict the defendant and others residing in the suit schedule property and handover the vacant possession to the plaintiff-appellant.

The plaintiff as per the allegations in the plaint asserted that she is the absolute owner in possession with title and enjoyment of the immoveable property …….. The plaintiff claimed to have purchased the said property under a registered sale deed …….. The plaintiff claims to be in actual possession of the same and paying taxes etc. According to the plaintiffs case, it was purchased by the plaintiff from her own funds. The plaintiffs further case is that thereafter she had constructed the house and occupied the suit schedule

property, and later on it so happened that the landlord of the defendant started harassing the defendant and also filed a police complaint. The landlord of defendant prevailed upon the defendant to vacate the house in which the defendant, his uncle ……..., his wife ……. and his wife and children were living. Therefore they wanted shelter and requested the plaintiff to accommodate the defendant and those persons for short time and looking to the pitiable condition according to the plaintiff she had accommodated them in the suit schedule property on ……. along with the plaintiffs family. The plaintiffs case is that in ……... when the plaintiffs son's house had been renovated after having falling vacant and for want of accommodation the plaintiff and her family moved over to the house of the plaintiffs son. The plaintiff-appellant averred in the plaint that she is the absolute owner in possession of the suit property and alleged that it was the self acquired property of the plaintiff. The plaintiffs further case is that with ulterior motive of grabbing the property the defendant hatched criminal conspiracy and on the pretext of obtaining signature for the sake of getting a loan for house construction required the plaintiff to put her signature to help the defendant to acquire loan and made the plaintiff affix her signature on the document which the defendant wanted the plaintiff to sign and even the plaintiff was not allowed to know the exact character of the document. The plaintiff relying on defendant's representation, in order to help him to get the loan signed the document which later on came to the plaintiffs knowledge to be the release deed dated …….... The plaintiffs case is that her signatures were obtained by misrepresentation and fraud. So the release deed which is filed along with the plaint is null and void. The plaintiff's case is that when she had gone to the Municipal Office to pay tax, then correct facts came to the notice of the plaintiff and the plaintiff came to know that by playing fraud and misrepresentation her signatures were obtained on the document of different nature viz., the release deed. ……... The defendant filed the written statement denying the plaintiffs case and asserting that the defendant is the actual and real owner of the suit schedule property on having acquired the same from the plaintiff out of her own free will on the basis of the release deed dated …….. which deed the plaintiff had executed after receiving the valuable consideration and katha has been mutated in favour of the defendant-respondent. The defendant asserted that the plaintiff was never in possession of the suit schedule property at any point of time after the release deed and was residing along with her son …….. The defendant pleaded that the suit schedule property did not exclusively belong to the plaintiff and really it was purchased by ……..., who was the paternal uncle and brother-in-law of both the plaintiff and defendant from Sri …….... The defendant asserted that the deed in the name of the plaintiff was sham transaction and the real purchaser was ……... The defendant further alleged that the defendant has repaid a sum of Rs. 75,000/- to the plaintiff and then got the release deed executed from the plaintiff-appellant in his favour out of her own free will, free from coercion, fraud or misrepresentation. He admits that the sale deed dated 4-7-1984 ostensibly was no doubt in the name of the plaintiff-appellant. The defendant denied that he forced the plaintiff to go to the Sub-Registrar's Office on the pretext of obtaining loan and made her execute the release deed in favour of the defendant. The defendant asserts that the case pleaded by the plaintiff does not hold much water. The defendant took the plea that the plaintiff had kept silent for one and half years and this is a circumstance to show that her plea is incorrect. The defendant asserted that he is the rightful owner and the release deed is a legitimate document validly executed in favour of the defendant-respondent out of her own free will by the plaintiff after having received a sum of Rs. 75,000/-. - There is no mention that any money was paid before the Sub-Registrar. The defendant has also not produced any of the witnesses who are alleged to be present to prove payment at Sub-Registrar's Office, nor there is any mention by the Sub-Registrar in the document. - The plaintiff whatever evidence she could produce to prove misrepresentation or fraud made to her was herself a victim and witness thereof and she appeared as a witness and deposed. It is only witnesses of the deed who could have explained the situation and circumstances, who could have stated that whether it was the mental act of the plaintiff-appellant and that there was no misrepresentation or fraud done or made to the plaintiff about the nature and character of the transaction and they could have stated that the contents of the deed was read over and explained to her or she read the document, understood it and then signed it, but none of them has been produced by the defendant who was relying on Ex. D-1 as basis for his title to the suit property and burden lies on him to produce the attesting witnesses of the deed-Ex. D-1. There is no explanation or reason shown for their non-production.- That mere signature on the deed does not amount to execution or proof of execution. Proof of execution means, proof of execution as physical and mental act both.- That payment is not established. It is a fact as found earlier that the defendant had no title to the property in dispute and as in his deposition he claims that he got title to the property on the basis of the release deed only. It means he had no earlier interest or title therein. Release deed means the conveyance of a person's right or interest which he has in a thing or property to another that has the possession thereof or some estate therein. It is the relinquishment of some right or benefit to a person who has some interest in the property and such interest as qualifies him for receiving or availing himself of the right or benefit so relinquished - The release can be made only in favour of a person who has got some title, right or interest in the property subject-matter of release itself and not in favour of a stranger. The deed in question has wrongly been called a release deed. The title may be transferred or conveyed may be made in favour of a stranger it may take the form of sale, gift, or in the form of Will to take effect after the death of testator. A gift is a transfer as per Section 122 of the Transfer of Property Act, made voluntarily and it should be without consideration. The complete absence of consideration is hallmark of gift which distinguishes the gift from other transaction for valuable or a desirable consideration.- The motive or purpose of gift is not to be confused with consideration which is the subject-matter of gift, love, affection or spiritual benefit and so any such factor may enter in the intention of the donor to make gift, but these filial consideration cannot be called to be consideration in law. It is the passing of monetary consideration that is foreign to the concept of gift- Section 123 of the Transfer of Property Act, requires the specific mode in the matter of execution of gift of immoveable property. That gift of immoveable property can be made only by the execution of the registered deed attested by two witnesses. Section 123 of the Transfer of Property Act, reads as under:

"123. Transfer how effected.--For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses".
23. The law prescribes this specific mode that it must be effected by a registered instrument or deed signed by or on behalf of the donor and attested by at least two witnesses. Section 68 of the Indian Evidence Act, 1972 required the production of at least one of the attesting witness to prove its execution. Thus it provides specific mode of proof of execution of the document as is required by law to be attested and reads -- "If a document is required by law to be attested, it shall not be used as evidence, until one attesting witness at least has been called for the purpose of proving the execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. That compliance with the provisions of Section 68 or 69 of the Indian Evidence Act is necessary to make gift deed admissible in evidence. —**Smt. Flora Margaret v A. Lawrence, 2000(6) Kar. L.J. 27**

RIGHT TO FUTURE MAINTENANCE CANNOT BE ASSIGNED

Right to future maintenance cannot be assigned at all — Assignment deed silent as to whether it is limited to arrears of maintenance alone — Held, assignment bad in law. Section 6 of the Transfer of Property Act, 1882, prohibits the transfer of a right to future maintenance, in whatsoever manner arising, secured or determined. The assignment deed in question speaks as though the entire decree for maintenance is assigned in their favour. The right to future maintenance cannot be assigned at all. It does not speak that the arrears of maintenance alone have been assigned to them. Therefore, under these circumstances the assignment itself is bad at law. — **Devanidhi Thimmakka v Dodda Thimmappa, ILR 1985 Kar. 1759.**

RIGHT OF RESIDENCE - NOT TRANSFERABLE

The right of residence given to a Hindu widow in a family house till her death is a personal right and under Section 6(d) of the Transfer of Property Act, it is not transferable. Hence, a lease created by the widow having personal right of residence is illegal. Even assuming that the widow was competent to create a valid lease, it is determined by her death, by virtue of Section lll(c) of the Act. The tenancy having been determined by the lessor's death, the question of determining the same by notice under Section lll{h) does not arise. — **Bhujabalappa Anandappa Baragali v Veerappa Mahabaleshappa Doddamani, 1966(2) Mys. L.J. 56.**

SECTION 23 OF THE INDIAN CONTRACT ACT

Validity of a transfer of property must be tested in the light of Section 23 of the Indian Contract Act — Section 24 of the Indian Contract Act is not applicable to a transfer of property under the Act. — section 24 of the Indian Contract Act does not apply to a completed transaction of a transfer of property ; the provisions of the Indian Contract Act apply to the transfer of property only to the extent they are made appplicable. Section 6(h) of the Transfer of Property Act makes applicable the provisions of section 23 of the Indian Contract Act to transfer of property. Section 23 of the Indian Contract Act does no prohibit enforcement of the valid portion of the transfer of property or debt, if it is severable from the invalid portion. The principle governing such consequences of illegality is not however, just a twig of any particular branch of the law but is rooted deeply in public policy - that the courts are not to be instruments for aiding illegality in contract, but may be instruments for aiding illegality in other branches of the law. It is accordance with this substantial public policy nature of the courts' refusal of aid to illegality that such illegality is not treated as a matter of pleading or a matter merely as between the parties but as a matter of which the court will, of its own initative take cognisance irrespective of pleadings or wishes of the parties. The objection to aiding illegality is thus not limited in its origin in public policy to any particular form of action. **Life Insurance Corporation v Devendrappa Bujjappa Kabadi, ILR 1986 Kar. 3759.**

INTENTION OF PARTIES MUST BE GATHERED FROM DOCUMENT ITSELF

Express and clear words must be given effect to — Extraneous enquiry permissible only in case of ambiguity in language employed — Real question is legal effect of words used and not what parties intended or meant. Where a document has to be construed, the intention must be gathered, in the first place, from the document itself. If the words are express and clear, effect must be given to them and any extraneous enquiry into Rectial mis thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of thy words which they used. If however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended. - where a document has to be construed, the intention must be gathered, in the first place, from the document itself. If the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used. If however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended (AIR 1954 SC 345 Ref)— **Ramu and others v Papaiah and others, AIR 1996 KANT 51.**

WHETHER SALE DEED OR MORTGAGE DEED

The intention of the parties is to be gathered from the document itself, an extraneous enquiry of what was thought is ruled out. A perusal of the deed, itself, shows that it was not intended to be a mortgage, but, its entire tenure shows that the parties i.e. vendor executed the Sale Deed as it is and it is the duty of the Court to give legal effect to the terms. The recital in the Sale Deed that possession has been delivered of the land to vendee is prima facie evident in the form of admission of the person, who executed the Sale Deed and admitted the execution of the Sale Deed before the Registrar. That as such really, the burden shifted on the defendant to rebut it. — once the documents, particularly in this case, i.e. the certified copies of the two Sale Deeds had been filed and admitted in evidence and marked as Exs.P5 and P4, without any objection being taken to their admissibility or to the mode of their proof, it was not open then to the respondents to raise the question about their admissibility on the ground of mode of proof. Further, the endorsement which has been made by the Registrar in the two Sale Deeds at the time of registration to the effect that the vendor had admitted the execution of sale deeds and his thumb impression and the vendor in both the Sale Deeds admitted the passing of sale consideration from vendee to the vendor and he (vendor) was identified by certain persons. According to Section 60(2) of the Indian Registration Act, the certificate endorsed shall be admissible for the purpose of proving that the document has been duly registered in the manner provided by the Act and the facts mentioned in the endorsement as required in Section 59, have occurred as in the endorsement. **-** When the document is in itself inadmissible, irregular or insufficient, it is essential that objection should be taken at the trial before the document is marked as exhibit and taken to record. The party cannot lie and wait until the case comes up before a Court of appeal and then complain for the first time as to the mode of proof, otherwise. It is not open to a party to raise objection on the ground of insufficiency of proof of the document. **Hanumappa Bhimappa Koujageri v Bhimappa Sangappa Asari,** ILR 1996 KAR 1517

LIFE-ESTATE OR ABSOLUTE ESTATE

Deed of transfer of property — Construction of —The averments are to the effect that the property in question is being gifted to Sharadamma who in turn is permitted to use one-half of the property during her lifetime and she was given the option of donating the other half of the property to a temple or for religious purposes to an institution of her choice for the benefit of the family. The document goes on to state that the choice of the institution shall be left to Sharadamma as far as one-half of the property is concerned but it states that as far as the other half is concerned which is retained by Sharadamma, that it will go to Rajamma and her sons after Sharadamma's death. There is one more clause which states that if the option to donate half the property for religious purposes is not exercised and if Sharadamma retains the whole of the property then, that on her death the whole of it will devolve on Rajamma and her sons. There is a general embargo both on Sharadamma and Rajamma as far as alienation of the property is concerned which appears to signify that Sadamma desired that save and except the possible donation of one-half of the property for religious purposes, that neither of her daughters were permitted to alienate the property to a third party insofar as obviously she desired that it should stay in the family and that too with the sons of Rajamma since Sharadamma had no children. When a gift is made, the vesting is absolute and if there are clauses that are repugnant to the absolute and beneficial enjoyment of that property, those conditions are void and it will not affect the gift itself. In other words, the property vests dehors the restrictions. The transfer in the first instance was to Sharadamma. That transfer in law must be an absolute transfer, that is so, there is no residuary interest left with the retransfer considering the law that is applicable to a gift. More importantly, the most vital aspect of the matter is that the document itself conferred on Sharadamma the absolute right to alienate one-half of that property which means that she could sell or legally transfer that half provided it was done for religious purposes, This power that was vested in Sharadamma indicates two legal implications, the first of them being that she could only execute such a transfer of half the property provided she was the rightful holder of that property and not otherwise and secondly if the intention was to create only a life interest in her, that then she could not have been vested with the power of transfer. The power of transfer is not confined to a particular half of the property. There is a reference that in her discretion she could transfer any or either half of that property. This presupposes the fact that it has vested in her absolutely and it was left to her to decide which part of the property was to be transferred. This could not ever have been done by a life interest holder and Sadamma could not have conferred this power on Sharadamma if her intention was only to create a life interest. Had Sadamma's intention been that the property must vest in Rajamma's branch absolutely, then the document would have stipulated that if at all such alienation is to be done, that it would have to be done with the joint consent of Rajamma and Sharadamma and not by the latter alone. Viewed at from any angle the transfer was an absolute gift in favour of Sharadamma. The subsequent provisions with regard to the property vesting in Rajamma's branch of the family after Sharadamma's death is nothing more than a desire on the part of Sadamma, those stipulations in the document will have to be ignored for the reason that once it is held that the property was vested in Sharadamma, it would act as a restrictive clause, vis-a-vis her absolute and beneficial enjoyment. Therefore, the bar on alienation and the requirement that the property must go to Rajamma's branch of the family would have to be ignored. The aforesaid document must be treated as having conferred absolute rights in respect of the whole of the property on Sharadamma and on her death, since she had no children, by operation of the provisions of Section 15 of the Hindu Succession Act, property must devolve equally on Rajamma or her heirs. — **Vimala vs Narayanaswamy** ILR 1995 KAR 3376

LIFE INTEREST IN PROPERTY - INJUNCTION RESTRAINING ALIENATION CANNOT BE GRANTED

Injunction is not maintainable because if such injunction is granted it will be against the very tenor, tone and ambit of the Transfer of Property Act. On this ground the suit is not maintainable. . . . .Life interest of the first defendant can be alienated, but it shall be subject to the right of the plaintiff who is the ultimate owner of the

property and who shall be entitled to possession after the life time of the first defend ant/first appellant. — **Badigera Veeravva and Others v Badigera Bhadrachari and Another, ILR 1997 Kar. 3089.**

PARTITIONS AND FAMILY ARRANGEMENTS — CONDITION RESTRICTING POWER OF ALIENATION

Section 10 of the Transfer of Property Act can have no application unless there is a transfer of property from one person to another and the transfer is accompanied by a condition absolutely restraining alienation. When a partition takes place between two or more members of a Hindu joint family, it would be difficult to regard the partition as involving a transfer of any property from one co-sharer to another. Hence, a condition in a partition deed to which one of the parties agreed that he would not alienate certain properties but would only enjoy them during his and his wife's lifetime cannot be regarded as a ' void condition. An arrangement entered into between the adopted son and his adoptive father (to which the wife and foster son of the adoptive father were parties), which provided that the adoptive father and his wife should both be entitled to enjoy certain properties during their lifetime, cannot be regarded as a partition between coparceners under Hindu Law. It is really in the nature of a family settlement. Section 10 of the Transfer of Property Act can have no application to a family arrangement into which two or more persons may choose to enter, under which an absolute estate is created in favour of some parties and a limited estate is created in favour of others. An arrangement of that description is not one under which there is any creation of a prior absolute estate, the diminution of which is brought about by the annexation of a condition imposing a restraint against alienation. A restriction on alienation in a deed dividing properties of the family for purpose of convenience of enjoyment is valid.

GOVERNMENT GRANTS – NON ALIENATION CONDITIONS.

Section 10 of the Transfer of Property Act, or the rule against perpetuities do not apply to Government grants. Hence, a condition prohibiting alienation for ever or a permanent restraint on alienation of granted lands if authorised by law regulating such grants, is not void but a valid condition. — **Laxmiamma v State o/ Karnataka and Others, AIR 1983 Kant. 237.**

REGISTERED AGREEMENT CONSTRUCTIVE NOTICE TO ALL

Transaction with respect to immovable property which is compulsorily registrable and has been duly registered operates as constructive notice to subsequent transferees. If a particular transaction with respect to immoveable property is required by law to be registered and has been effected by a registered instrument then any person subsequently acquiring such property or any interest therein shall be deemed to have 'notice' of such instrument as from the date of its registration. In other words, by this statutory fiction registration of compulsorily registrable instrument under the Registration Act effecting transfer of property is by itself sufficient notice of such transaction to any person who thereafter acquires any right or interest whatsoever in that property, although in reality such a transferee may not be having actual notice of that prior registration of such document. Thus the registration of compulsorily registrable instrument creates the doctrine of constructive notice in law. This presumption of constructive notice could be successfully dislodged by him only when he satisfactorily proves that despite his honest enquiry and search of relevant registration records in the office of concerned Sub-Registrar he could not come across the entries therein disclosing the fact of prior registration of a document creating any charge on or encumbering the particular property in favour of any third person in any manner whatsoever. But for this doctrine to come into play the legal requirements stipulated in proviso to Explanation 1 must be shown to have been duly complied with. These requirements are that a compulsorily registrable instrument effecting conveyance of a right or interest in immoveable property from transferor to the transferee must be registered by the Registering Authority strictly in the manner prescribed by the Indian Registration Act, 1908; and the relevant entries thereof are duly entered or filed in accordance with Sections 51 and 55 of the Act. Then alone that registration operates in law as a notice to the subsequent transferee and presumption of implied or constructive notice could be drawn against him. — **Sha Champaial Oswal v Peralu Achanna and Another, ILR1997 Kar. 3434.**

IN A SALE TRANSACTION, POSSESSION PLAYS AN IMPORTANT ROLE

Owner agreeing to sell property to tenant and accepting part payment of consideration and permitting tenant to effect improvement — Tenant's suit for specific performance of contract — Possession of tenant is sufficient notice to subsequent purchaser of tenant's equitable interests including interest arising out of agreement of sale — Where property is in possession of tenant it is duty of purchaser to make enquiries and where he has chosen to make no enquiry of tenant, he cannot claim to be bona fide purchaser for value without notice — Tenant's interest arising from agreement of sale — Tenant is entitled to decree of specific performance in his favour. In a sale transaction, possession plays an important role and it is normally expected of a purchaser to enquire about the possession of the property and to find out whether he would get vacant possession or khas possession (constructive possession) from the tenant. Had the second defendant made the smallest of smali enquiry with the plaintiff and enquired about his possession and his position after the intended purchase by the defendant 2, the second defendant would have immediately come to know of the agreement of sale in favour of the plaintiff. The simplest of simple enquiry expected of the second defendant has not been embarked upon him. This one ground is sufficient to hold that he has not purchased without notice. . . . .Whenever the possession of a property is at the hands of the tenant, the intended

purchaser must make enquiry with that tenant to ascertain the nature of possession and also to find out how he will get possession after he purchased the property. The plaintiff is a tenant in possession and admittedly no enquiry is made in this case by the second defendant. Added to that, the second defendant and her husband were the silent spectators to the improvements made to the property by the plaintiff and did not even care to find out whv such an improvement Us the extent of changing their roof itself is being indulged by the plaintiff. In this view it has to be held that the purchase made by the second defendant is without proper enquiry and he cannot be considered as a bona fide purchaser without notice. — **Smt. Shobha Sadanand Ramanakatti v Smt. Vasantibai and Other?, ILR 1998 Kar. 485.**

HINDU LAW - PARTITION - LIMITED ESTATE

Suit schedule property allotted to share of father and mother with condition that they were entitled to enjoy during their lifetime and that after their death the property should devolve in equal shares to their two sons — Sale of property by parents to one of their sons — Validity of sale — Where opening para of partition deed gives absolute estate and not limited estate in property allotted to share of each party, addition of such stipulation at end of deed in regard to share of parents only, cannot be interpreted as restraint on alienation — Sale, held, cannot be declared invalid. A plain reading of the partition deed suggests that " 'A', 'B' and 'C' schedule properties are given to the shares of the respective parties with a emphasis added that each one of them should get their khata of the property mutated in their names and should enjoy the properties in the manner they like . This would give no doubt and difficulty to appreciate that what is granted is a absolute estate and not a limited estate. The latter stipulation provides mat after the demise of the parents, the plaintiff and the defendant shall equally take the property. This cannot be interpreted to override the clear terms of grant under partition. The restrictive covenants should be cautiously and carefully interpreted. The restrictions which are express would render no difficulty. However, while implied restrictions if they are to be read into terms of the document should be so clear and unambiguous to suggest the one and only inference in favour of the restrictive covenant set up or pleaded otherwise, if stipulations are ambiguous, susceptible to contrary or alternative meaning, it would not be permissible to read into the said stipulation by inference restrictive covenant. In the instant case, it is possible to assume from the stipulation that an absolute estate is granted in favour of the parents in view of the terms that they should enjoy the property in the manner they like and in the event of they dying intestate and that fuli or any part of the property available is left for intestate succession, in such a situation latter stipulation may come into effect, otherwise not. — **K. Munisivamy (Deceased) by LR's v K. Venkataswamy, 2000(6) Kar. L.J. 487.**

GIFT OVER TO UNBORN PERSON

Where the donor transferred a property in favour of defendant and by the very transfer created an interest for the benefit of the unborn sons of B, the case is governed, not by the provisions of Section 13 of the Transfer of Property Act but by the provisions of Section 20. The son of B gets a right immediately on his birth. Sections 13 and 20 refer to creation of interests of different characters. Section 20 refers to the creation of a limited interest in the first instance and the creation of successive interest in someone thereafter. In a case like that what Section 13 forbids is the creation of an interest in favour of the second person unless that interest is the entire interest possessed by the transferor. — **Konahally Vasanthappa v Konahally Channbasappa and Others, AIR 1962 Mys. 98.**

ORAL GIFT — Daughter in occupation of her deceased father's property and claiming title thereto under — Claim, held, is not maintainable in absence of registered gift deed — Mere possession is not sufficient, where deceased had gifted suit property under registered gift deed to his wife, who in turn, had sold same to third party, again under registered deed of sale — Daughter's claim is not maintainable against vendee claiming title under registered sale deed. The plea of title set up by the appellant in the petition property is not tenable and acceptable in law. The property in question is an immovable property valuing more than Rs. 100/-, it is necessary that any transfer of interest in an immovable property under Section 17 of the Registration Act, 1908 has to be by a registered document. Therefore, any claim of right or interest in the immovable property by way of oral gift or oral transfer is totally untenable and it is not also the case that the transfer of interest by way of family partition and as a part of the transaction of oral partition or oral family settlement. Therefore, it cannot be held that the appellant has any legal interest in the property to set up title adversely against the first respondent herein. The title deeds like gift deed and sale deed produced by the first respondent clearly indicate the valid transfer of the property by Ramaiah Setty in favour of his wife Padmavathamma and in turn frorr Padmavathamma to the first respondent who gets the interest and title in the property by way of registered sale deed. — **Smt. T.S. Prameela v Balakrishna ana Another, 2001(6) Kar. L.J. 102.**

VESTED AND CONTINGENT INTEREST

For the purpose of determining the date of vesting of the interest in the bequest it is necessary to bear in mind the distinction between a vested interest and a contingent interest. An interest is said to be a vested interest when there is immediate right of present enjoyment or a present right for future enjoyment. An interest is said to be contingent if the right of enjoyment is made dependent upon some event or condition which may or may not happen. On the happening of the event or condition a contingent interest becomes a vested interest. The Transfer of Property Act, 1882 as well as the Indian Succession Act, 1925 recognise this distinction between a vested interest and a contingent interest. — **Usha Subbarao vs B.E. Vishveswariah & Ors,** 1996 SCC (5) 201

Namburi Basava Subrahmanyam vs. Alapati Hymavathi & Ors. reported in (1996) 9 SCC 388. In this case also the question was whether the document is a will or settlement. Their Lordships held that the nomenclature of the document is not conclusive one. It was observed as follows: " The nomenclature of the document is not conclusive. The recitals in the document as a whole and the intention of the executant and acknowledgment thereof by the parties are conclusive. The Court has to find whether the document confers any interest in the property in praesenti so as to take effect intra vivos and whether an irrevocable interest thereby, is created in favour of the recipient under the document, or whether the executant intended to transfer the interest in the property only on the demise of the settlor. Those could be gathered from the recitals in the document as a whole. The document in this case described as 'settlement deed' was to take effect on the date on which it was executed. The settlor created rights thereunder intended to take effect from that date, the extent of the lands mentioned in the Schedule with the boundaries mentioned there under. A combined reading of the recitals in the document and also the Schedule would clearly indicate that on the date when the document was executed she had created right, title and interest in the property in favour of her second daughter but only on her demise she was to acquire absolute right to enjoyment, alienation etc. In other words, she had created in herself a life interest in the property in praesenti and vested the remainder in favour of her second daughter. It is settled law that the executant while divesting herself of the title to the property could create a life estate for her enjoyment and the property would devolve on the settlee with absolute rights on the settlor's demise. Thus the document in question could be construed rightly as a settlement deed but not a s a Will. The settlor, having divested herself of the right and title there under, had, thereafter, no right to bequeath the same property in favour of her first daughter. "

Kokilambal v. N. Raman (2005) 11 SCC 234. "Settlement is one of the recognized modes of transfer of moveable and immovable properties under Hindu law. The Courts have accepted such mode as legal and valid mode of transfer of properties. Courts have emphasized that in order to find out the correct intent of the settlor the settlement deed has to be read as a whole and draw their inference of its content. Therefore, it has always been emphasized that the terms of the settlement should be closely examined and the intention of the settlor should be given effect to. Sometimes there is absolute vesting and sometimes there is contingent vesting as contemplated in Sections 19 and 21 of the Transfer of Property Act, 1882. In order to ascertain the true intention of the settlor one has to closely scrutinize the settlement deed, whether the intention of the settlor was to divest the property in his life time or to divest the property contingently on the happening of certain event. Quoted the example that " So, where a testator clearly expressed his intention that the benefits given by his will should not vest till his debts were paid, the intention was carried into execution, and the vesting as well as payment was held to be postponed."

In Navneet Lal v. Gokul (AIR 1976 SC 794) after referring to the earlier decisions, court summed up the principles emerging therefrom as follows:
(1) In construing a document whether in English or in vernacular the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered; but that is only for the purpose of finding out the intended meaning of the words which have actually been employed.
(2) In construing the language of the will the court is entitled to put itself into the testator's armchair and is bound to bear in mind also other matters than merely the words used. It must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense. But all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document.
(3)The true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory.
(4) The court must accept if possible, such construction as would give to every expression some effect rather than that which would render any of the expressions inoperative. The court will look at the circumstances under which the testator makes his will, such as the state of his property, of his family and the like. Where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Further where one of the two reasonable constructions would lead to intestacy, that should be discarded in favour of a construction which does not create any such hiatus.
(5). To the extent that it is legally possible effect should be given to every disposition contained in the will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect but a Court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the will."

In Balwant Kaur v. Chanan Singh (AIR 2000 SC 1908) it was held that where the legatee is described as full owner of the bequeathed property in earlier part of the will and later showing him to be only a limited owner, the later part prevails and the legatee gets only limited ownership. Referring to Section 88, it was held thus: "S. 88 provides that where two clauses of gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail. This is obviously on the principle that the last clause represents the latest intention of the testator. Thus where in the earlier part of the will the testator has stated that his daughter shall be the heir owner and title-holder of his entire remaining moveable and immovable property but in the later part of the same Will he has clearly stated that on the death of the daughter, the brothers of the testator shall be the heirs of the property of the two inconsistent clauses the recitals in the later part of the Will would operate and make his daughter only a limited estate holder in the property bequeathed to her."

Sadhu Singh v. Gurdwara Sahib Narike ((2006) 8 SCC 75) was a case where one R held some self-acquired properties. He had no progeny and only his wife and his two nephews were alive and he wanted to dispose of the property during his life time. He was the absolute owner of the property and wanted to provide management of the properties in such a manner that after his death his wife so long as she remains alive will be the absolute owner and party in possession of all the properties and after her death rights over the properties would be inherited by his two nephews. During her lifetime, his wife, however, would not be entitled either to transfer the properties by way of any will or to mortgage or sell them to anyone else. After the death of R, his widow purported to gift the property in favour of a Gurdwara. The appellant being one of the two nephews, filed a suit challenging the deed of gift and praying for recovery of possession after death of the testator's wife. The appellant contended that as per the will of the testator, his wife took only a life estate and the properties were to vest in the appellant and his brother. On the terms of the will, she had no right to gift the property to the Gurdwara and she was bound by the terms of the bequest. The trial court dismissed the suit; but the appellate court reversed the same. But in the second appeal, the High Court reversed the decision of the lower appellate court and dismissed the suit. Allowing the appeal, the apex court held that while first making an attempt to reconcile all the clauses of the will and give effect to all of them, it is found that the apparent absolute estate given to his wife by the testator is sought to be cut down by the stipulations that the property must go to his nephews after the death of the wife, that the wife cannot testamentarily dispose of the property in favour of anyone else and the further interdict in the note that the wife during her lifetime would not be entitled to mortgage or sell the properties. Thus on reconciling the various clauses in the will and the destination for the properties that the testator had in mind, it is clear that the apparent absolute estate in favour of I has to be cut down to a life estate so as to accommodate the estate conferred on the nephews. What the court has to attempt is a harmonious construction so as to give effect to all the terms of the will if it is in any manner possible. While attempting such a construction, the rules are settled. Unlike in the case of a transfer in praesenti wherein the first clause of the conveyance would prevail over anything that may be found to be repugnant to it later, in the case of a will, every effort must be made to harmonise the various clauses and if that is not possible, it will be the last clause that will prevail over the former and giving way to the intention expressed therein."

In a case where a Hindu female was in possession of the property as on the date of the coming into force of the Act, the same being bequeathed to her by her father under a will, Court in Bhura and others v. Kashi Ram (1994) 2 SCC 111), after finding on a construction of the will that it only conferred a restricted right in the property in her, held that Section 14(2) of the Act was attracted and it was not a case in which by virtue of the operation of Section 14(1) of the Act, her right would get enlarged into an absolute estate. This again could only be on the basis that she had no pre-existing right in the property.

In Dindyal and another v. Rajaram (1971 (1) SCR 298) Supreme Court again noticed that, "...before any property can be said to be "possessed" by a Hindu woman as provided in Section 14(1) of the Hindu Succession Act, two things are necessary (a) she must have a right to the possession of that property and (b) she must have been in possession of that property either actually or constructively."

Sharad Subramanyan vs Soumi Mazumdar & Ors (2006 (6) SCJ 293) Section 14 of the Act. In V. Tulasamma and Ors. v. Sesha Reddy (Dead) by L.Rs. AIR 1977 SC 1944, (hereinafter "Tulasamma") after a complete survey of the Shastric Hindu Law and the changes brought therein by Section 14 of the Act, this Court culled out the principles arising thereunder in the following words:
"(1) that the provisions of Section 14 of the 1956 Act must be liberally construed in order to advance the object of the Act which is to enlarge the limited interest possessed by a Hindu widow which was in consonance with the changing temper of the times;
(2) it is manifestly clear that sub-section (2) of Section 14 does not refer to any transfer which merely recognises a pre-existing right without creating or conferring a new title on the widow. This was clearly held by this Court in Badri Pershad's case ((1969) 2 SCC 586).
(3) that the Act of 1956 has made revolutionary and far- reaching changes in the Hindu society and every attempt should be made to carry out the spirit of the Act which has undoubtedly supplied a long felt need and tried to do away with the invidious distinction between a Hindu male and female in matters of intestate succession;
(4) that sub-section (2) of Section 14 is merely a proviso to sub- section (1) of Section 14 and has to be interpreted as a proviso and not in a manner so as to destroy the effect of the main provision."

Analysing the scope and extent of sub-section (2) of Section 14 of the Act, which this Court treated as a proviso to sub-section (1), this Court took the view that as a proviso it should be interpreted in such a way so as not to substantially erode sub-section (1) of Section 14 and the Explanation thereto. It was pointed out that sub-section (2) had carved out a completely separate field and before it could apply, the following three conditions must be satisfied:
"(i) that the property must have been acquired by way of gift, will, instrument, decree, order of the Court or by an award; (ii) that any of these documents executed in favour of a Hindu female must prescribe a restricted estate in such property; and (iii) that the instrument must create or confer a new right, title or interest on the Hindu female and not merely recognise or give effect to a pre-existing right which the female Hindu already possessed."

"In Gummalapura Taggina Matada Kotturuswami V. Setra Veeravva and others (1959) Supp.1 SCR 968) The opening words in "property possessed by a female Hindu" obviously mean that to come within the purview of the section the property must be in possession of the female concerned at the date of the commencement of the Act. They clearly contemplate the female's possession when the Act came into force. That possession might have been either actual or constructive or in any form recognized by law, but unless the female Hindu, whose limited estate in the disputed property is claimed to have been transformed into absolute estate under this particular section, was at least in such possession, taking the word "possession" in its widest connotation, when the Act came into force, the section would not apply."

In Eramma v. Verrupanna and others (1966 (2) SCR 626), this Court emphasized that the property possessed by a female Hindu as contemplated in the Section is clearly the property to which she has acquired some kind of title whether before or after the commencement of the Act and negatived a claim under Section 14(1) of the Act in view of the fact that the female Hindu possessed the property on the date of the Act by way of a trespass after she had validly gifted away the property. The need for possession with a semblance of right as on the date of the coming into force of the Hindu Succession Act was thus emphasized.

The same is the position in **Raghubar Singh v. Gulab Singh (AIR 1998 S.C., 2401)** wherein the testamentary succession was before the Act. The widow had obtained possession under a Will. A suit was filed challenging the Will. The suit was compromised. The compromise sought to restrict the right of the widow. This Court held that since the widow was in possession of the property on the date of the Act under the will as of right and since the compromise decree created no new or independent right in her, Section 14(2) of the Act had no application and Section 14(1) governed the case, her right to maintenance being a pre-existing right.

In **Mst. Karmi v. Amru and others (AIR 1971 S.C., 745),** the owner of the property executed a will in respect of a self- acquired property. The testamentary succession opened in favour of the wife in the year 1938. But it restricted her right. Thus, though she was in possession of the property on the date of the Act, this Court held that the life estate given to her under the will cannot become an absolute estate under the provisions of the Act.

In a case where a Hindu female was in possession of the property as on the date of the coming into force of the Act, the same being bequeathed to her by her father under a will, this Court in **Bhura and others v. Kashi Ram (1994) 2 SCC 111),** after finding on a construction of the will that it only conferred a restricted right in the property in her, held that Section 14(2) of the Act was attracted and it was not a case in which by virtue of the operation of Section 14(1) of the Act, her right would get enlarged into an absolute estate. This again could only be on the basis that she had no pre-existing right in the property.

PROPERTY –PURCHASED FOR CONSIDERATION- MAINTENANCE CHARGE

Ram Kali vs. Choudhri Ajit Shankar (1997) 9 SCC 613., after referring to Tulusamma case the court has arrived at following conclusions

(1) That the Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by pure Shastric Hindu Law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a right maynot be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognising such a right does not confer any new title but merely endorses or confirms the pre- existing rights.

(2) Section 14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in favour of the 1956 Act and promote the socio-economic ends sought to be achieved by this long needed legislation.

(3) Sub-section (2) of Section 14 is in the nature of a proviso and has a field of its own without interferring with the operation of Section 14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by Section 14(1) or in a way so as to become totally inconsistent with the main provision.

(4) Sob-section (2) of Section 14 applies to instruments, decrees, awards, gifts, etc. which create independent and new titles in favour of the females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise pre-existing rights. In such cases a restricted estate in favour of a female is legally permissible and Section 14(1) will not operate in the sphere. where, however, an instrument merely declares or recognises a pre- existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of Section 14(1) and the restrictions placed, if any, under the document would have to be ignore. thus where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of sub-section 14(2) and would be govered by Section 14(1) despite any restrictions placed on the powers of the transferee.

(5) the use of express terms like "property acquired by a female Hindu at a partition", "or in lieu of maintenance", "or arrears of maintenance", etc. in the Explanation to section 14(1) clearly makes sub-section

(2) inapplicable to these categories which have been expressly excepted from the operation of sub-section (2).
(6) The words "possessed by " used by the Legislature in Section 14(1) are of the widest possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same. Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property would be deemed to be possessed by her and by force of Section 14(1) she would get absolute interest in the property. It is equally well- settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the section does not contemplate the possession of any rank trespasser without any right or title.
(7) Tha the words "restricted estate" used in Section 14(2) are wider than limited interest as indicated in Section 14(1) and they include not only limited interest, but also any other Kind of limitation that may be placed on transferee."

Charge created by court against property purchased for consideration for maintenance of wife and child of the vendor — Liberty reserved to transferee to canvass before executing court that properties which are still possessed of by husband-vendor should be first sold and only if the amount is not realised, then the properties in their hands should be put to sale. **Thimmamma & Others v Cowramma @ Hutchamma & Others, 1990(3) Kar. LJ. 281B.**

Section 25 of the Hindu Adoptions and Maintenance Act incorporates a well-known rule of Hindu law that the rate of maintenance fixed even if it is fixed by a decree is not immutable and is capable of variation or alteration if circumstances justify such variation. A person who has a right to claim maintenance from the profits of immoveable property over which a charge has been created in an earlier suit can enforce that right against the transferee of the property even if he is a transferee for consideration if he has notice of the right of maintenance. The right to receive maintenance about which Section 39 of the Transfer of Property Act speaks is not only a right to receive maintenance in the first instance but also a right to receive enhanced maintenance which may be claimed if there is material change of circumstances. Hence, the right to enhanced maintenance could be enforced against a transferee who has notice of that right. It is not necessary to enforce that right to prove that the transferee had notice of any intention on the part of any one to defeat that right. So long as the transferee has notice of the claim, although the transferor could have been made liable also for the claim, the transferee cannot escape his liability to pay enhanced maintenance. —**Vedavathi Williams v Rama Bai, and Others, AIR 1964 Mys. 265.**

Where under a settlement the house was given to the wife by the husband for her residence during her lifetime, a subsequent transferee is not entitled to possession of the house during the wife's lifetime. The word 'maintenance' in Section 39 of tine Transfer of Property Act is not restricted to food and clothing but includes residence within its meaning. **Adiveppa v Smt. Janakmamma, AIR 1975 Kant. 198 ,**

Once it is found that the sale by the husband was a transaction which was entered into after coming to know that the wife was going to present the suit for maintenance, and the transfer was not a bona fide transfer without notice, the wife is entitled to the benefit of Section 39 of the Transfer of Property Act and entitled to a charge on the alienated properties. That the husband has other properties is no ground to refuse the statutory benefit under Section 39. **Siddegowda v Lakkamma and Others, AIR 1981 Kant. 24**

MORTGAGE DEED REGISTERED LATER THAN THE SALE DEED

Sale deed dated 21-7-1949 registered earlier while mortgage dated 9-7-1949 registered later — Effect of and priority of transactions. Section 40 speaks of benefit of an obligation arising out of a contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon. It is now well-settled that a contract for sale does not create an interest in land, but creates a personal obligation of a fiduciary character which can be enforced by a suit for specific performance not only against the vendor but also against a volunteer and a purchaser for consideration with notice. The defendants had acquired a persona! right to enforce specific performance of a contract for sale, but when on July 31, 1949, defendants were party to a sale deed and purchased the property what was merely a personal obligation under the agreement for sale became an acquisition of interest in the property. Mortgage is mode of transfer by which an interest in property is created. An interest in property then would not remain simplicitor an obligation or benefit of an obligation arising out a contract and thus stands excluded from falling within the protection of the second para of Section 40 of the Transfer of Property Act. Applying Section 47 of the Registration Act, it is held that the instrument creating the equitable mortgage took effect from the date of its execution though registered later and it had to have priority. — **K.R. Varadaraja lyengar and Others v T. Lakshminarayana Setty, AIR 1985 Kant. 245. ILR 1985 KAR 1268**

S. 40 of the T.P.Act. "Where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon, such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation nor against such property in his hands."

EXPRESSIONS OR THE LANGUAGE EMPLOYED IN THE DEED

Section 40 of the Transfer of Property Act embodies certain of the principles of the English law of equity relating to restrictive covenants to ownership of immoveable property. The right mentioned in the first para of that section is not conferred by the section itself. The section merely regulates or governs the exercise of such a right if it exists otherwise. As the right relates to two immoveable properties, the enjoyment of the one which is restrained for the more beneficial enjoyment of the other, the natural inference is that the source of the right must be an agreement or covenant between the owners of these two properties. The result of the amendment of the section in 1929 is that whereas as between the immediate parties to a transfer, covenants both affirmative as well as restrictive may be enforced/ the only covenants which can be enforced against transferees from the original transferor-covenantor are negative or restrictive covenants and not positive of affirmative covenants. Though the right mentioned in the first paragraph of Section 40 has a direct relation with the right of ownership of immoveable property, it is not either a right comprised within the larger right of ownership or a legal incident thereof. It is an additional benefit acquired by him by virtue of a covenant between himself and the owner of the other property whose enjoyment he seeks to restrain. Hence, it is not capable of being transferred independently of the ownership of the property. It can be exercised only by a person who is for the time being the owner of the property or has by virtue of a transfer or otherwise either the entire right of ownership or a right comprised in it of such character that one could say that the right under the covenant is directly or appropriately related to it. Before a person other than a covenantor can enforce the covenant, the covenantee must have transferred to him both the property as well as the covenant. The English law ideas of equitable assignment or reciprocal obligations arising in equity have no application in Indian Law under Section 40.The transferor must expressly transfer the covenant along with the property or the circumstances of the transaction of sale and the expressions or the language employed in the deed of sale must be such as to enable the Court to read not a more intention on the part of the seller to transfer the covenant but the actual effectuation of that intention. — **Motilal Bool v Corporation of City of Bangalore, 1962 Mys. L.J. Supp. 148 : ILR 1961 Mys. 675.**

PROTECTION TO TRANSFEREE

Condition precedent for claiming — Transferor in possession, and entry in land revenue records showing his possession as ownership — Where transferee has not made enquiries into title of transferor and has merely acted upon such entry in land revenue record, which is not evidence of title, he cannot be said to have taken reasonable care or acted in good faith to claim protection of provision against dispossession by real owner of property. Simply because the names of defendants 2 to 4 were found for the suit lands, the 1st defendant could not have ventured to purchase the suit lands from them, without ascertaining or knowing whether or not they were the real owners or not. . . . When, as required under proviso to Section 41 of the Transfer of Property Act, no care, much less reasonable care was taken by 1st defendant to ascertain as to whether or not defendants 2 to 4 were the title holders and that he acted in good faith, he cannot have protection under Section 41 of the Transfer of Property Act. Simply because there was mutation with entries made in favour of defendants 2 to 4 for the suit lands, that does not help 1st defendant so as to answer the question of law in his favour. **— Trial court observation upheld:-** 'There is also material on record to show that defendant 1 has not taken reasonable care to ascertain that defendants 2 to 4 were real owners of the suit properties and they had power to make transfer. Under such circumstances it cannot be said that he has acted in good faith D.W. 1 admits in the cross-examination that he knows defendants 2 to 4 since his childhood and plaintiff was married to defendant No. 2 long back. He also knows that plaintiff was daughter of Rayappa Dalvai and Parwatewwa. In para 4 of cross - examination he states that he has seen the entries in the R. of Rights before purchasing the suit land. Such enquiry cannot be called as bonafide enquiry for the purpose of Section 41. In para 6 of the cross-examination D.W. 1 states that he has not asked other defendants how they got the suit land and how they got their names entried in the R. of R. in the concluding sentence he admits that he has not enquired about prior ownership. He has not published any notice in the news paper. This material is sufficient to show that right of defendant No. 1 cannot be protected under Section 41 of the T.P. Act" **1st Appellate court observation upheld:-** " .... There is absolutely no evidence on record to show that the appellant - defendant -1 had taken proper steps to ascertain as to who is the owner of the land purchased by him. No public notice was issued before registration of the sale-deeds. No enquiry was made with anv person including the plaintiff regarding the real ownership of the property. It is therefore merely based on disputed mutation entries, defendants Nos. 2 to 4 could not have pretended and forced the ostensible owners to alienate the property, which they did not know. It is, therefore, the appellant-defendant No. 1 cannot seek protection of benefit of Section 41 of Transfer of Property Act, to non-suit the plaintiff in entirety". **Mallappa Adiveppa Hadapad v Smt. Rudrawa and Others, ILR 2003 KAR 1774.**

PROTECTION TO TRANSFEREE

Section 41 of the Act is based on the principle of equity that one, who allows another to hold himself out as the owner of an estate and a third party purchased for value from the apparent owner in the belief that he is the real owner, the man, who so allows the other to hold himself out, shall not be permitted to recovery upon his secret title, unless he can over throw that purchaser by showing either that he had direct notice or something which amounts to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an enquiry, which if prosecuted would have lead to a discovery of it. It is equally well settled, and the section is quite clear, that the real owner must have by his consent express or implied held out the ostensible owner as the owner of the property. If either by words or by conduct, he induced

others to treat such a person as the real owner and to do that from which they might have abstained, he cannot_question the legality of the Act to the prejudice of those who acted in good faith. Mere possession of a manager cannot be treated as ostensible ownership with the consent of the real owner. In every case, where a transferee for valuable consideration seeks protection under Section 41 of the Act, he must show that it was the real owner, who permitted or created the apparent ownership of the transferor either by express words or consent or by acts or conduct, which imply consent. Conservely it must be held that if the real owner was not responsible for permitting or creating the apparent ownership, the protection under Section 41 will not be available to a transferee from such person because such a person cannot be said to be an ostensible owner as his claim to ownership does not arise from the consent of the real owner. In substance, before one can be considered to be an ostensible owner, it must be shown that it was with the consent express or implied of the true owner that was enabled to represent himself as the owner of the property to a bona fide purchaser for value without notice. If it is found that the so called ostensible owner by any fraudulent means created documents without the knowledge of the real owner and represented himself as the owner of the property, Section 41 of the Act will not protect the interest of a transferee from such a person and it must be held that the ostensible ownership of the property is not created by an act of the real owner or with his consent express or implied. Indeed such a person cannot claim himself to be an ostensible owner. On Facts Held: In the instant case, defendant No. 2 did not deny the original title of the plaintiff. According to him, some time in the year 1947-48 she conferred title on him by Hiba-bil-ewaz. That story has been disbelieved by the Courts-below concurrently. It must, therefore, be held that the story of Hiba-bil-ewaz was a creation of defendant No. 2 himself and this was not done with the consent express or implied of the plaintiff. The next document upon which reliance was placed is Ex.D. 1 said to be an application written by the plaintiff to the Revenue authorities transferring her occupancy rights in favour of defendant No. 2. The trial court found that, that documents had been created by defendant No. 2 himself, who having enjoyed the faith and trust of the plaintiff obtained her signatures on blank papers and used them for the purpose of making out an application to the Revenue authorities for the transfer of occupancy rights in his favour. The appellate court has not upset this findings, but has proceeded on the basis that even the Patta so granted to the defendant No. 2 was not a document of title. It will thus, appear that if these two transactions are excluded, there is nothing else that the plaintiff did which can amount to an express or implied consent on her behalf enabling the defendant No. 2 to hold himself out as an owner of the property. As observed earlier, if a person creates false documents in his own favour without the knowledge of the real owner, that cannot by any stretch of logic be construed as having been done with the express -or implied consent of the real owner. In the instant case, it appears that defendant No. 2 throughout represented to the plaintiff, his mother-in-law, that he was acting on her behalf and in her interest. The story of Hiba-bil-ewaz and transfer of occupancy rights in his favour was built up by defendant No. 2 without even the knowledge of the plaintiff. In these circumstances, no fault with the finding of the appellate court that defendant No. 2 cannot be described as an ostensible owner so as to give protection of Section 41 to defendant No. 1. This was really a case, where defendant No. 2 attempted to set up his own title without the consent express or implied of the plaintiff. He was therefore pretending to be the real owner, and was not acting as an ostensible owner. Therefore, we concur with the finding of the appellate court that in the facts and circumstances of this case, it cannot be said that defendant No. 2 was an ostensible owner. Assuming that defendant No. 2 may be treated as an ostensible owner, the question as to whether defendant No. 1 exercised due care and caution and acted in good faith before making the purchase so as to entitle him to the protection of Section 41 of the Transfer of Property Act, is a pure question of fact. The Courts-below have concurrently held that defendant No. 1 did not make reasonable enquiries and if he had done so, he would have found out that defendant No, 2 was not the owner of the property.and was merely a manager of the plaintiff being her son-in-law. In my view, the finding is justified having regard to the fact that circumstances existed, which should have put defendant No. 2 on guard. The document of title shown to him by defendant No. 2 was in favour of his mother-in-law. No doubt the defendant No. 2 claimed that he had acquired title by virtue of Hiba-bil-ewaz, but there was no document to prove that there was no transfer of title by such Hiba-bil-ewaz. Defendant No. 1 claims to have made enquiries from defendant No. 2. That could hardly serve any purpose, because defendant No. 2 was obviously interested in convincing defendant No. 1 that he had title to the property. The agreement to sell was executed even before the defendant No. 1 had obtained certified copy of Ex.D. 1 from which one may reasonably infer that in the matter of purchase of the suit lands, the first defendant was not influenced by Ex.D.. 1 or in any event, he did not consider it necessary to make enquiries by reference to the revenue records before entering into an agreement to sell. He did not make any enquiry to find out on whose behalf rent was being paid after the said Hiba-bil-ewaz. Moreover, if the defendant No. 2 had acquired title by a gift what was the need to file Ex.D. 1 years later. In such a situation, when circumstances existed necessitating serious enquiry, and there was no documet of title in favour of defendant No. 2 as he claimed to nave derived title orally fron, . i plaintiff, a prudent person would have certainly made enquiries from the plainta herself. It is an admitted fact that for about 24 years defendant No. 2 was known b the family of defendant No. 1. It is therefore reasonable to assume that he must have known that the person in whose favour the document of title was, was no oth- -than the mother-in-law of defendant No.2. Such enquiry was not made. - It is equally well settled, and the section is quite clear, that the real owner must have by us consent express or implied held out the ostensible owner as the owner of the properly. If either by words or by conduct, he induced others to treat such a person as the real owner and to do that from which they might have abstained, he cannot question the legality of the Act to the prejudice of those who acted in good faith. Mere possession of a Manager cannot be treated as ostensible ownership with the consent of the real owner. In every case, where a transferee for valuable consideration seeks protection u/S. 41 of the Transferof Property Act, he must show that it was the real owner, who permitted or created the apparent ownership of the transferor either by express words or consent or by acts or conduct, which imply consent. Conversely, it must be held that if the real owner was not responsible for permitting or creating the apparent ownership, the protection u/S. 41 will not be available to a transferee from such person because such a person cannot be said to be an ostensible owner as his claim to ownership does not arise from the

consent of the real owner. In substance, before one can be considered to be an ostensible owner, it must be shown that it was with the consent express or implied of the true owner that he was enabled to represent himself as the owner of the property to a bona fide purchaser for value without notice. If it is found that the so-called ostensible owner by any fraudulent means created documents without the knowledge of the real owner and represented himself as the owner of the property. S. 41 of the Transfer of Property Act will not protect the interest of a transferee from such a person and it must be held that the ostensible ownership of the property is not created by an act of the real owner or with his consent express or implied. Indeed such a person cannot claim himself to he an ostensible owner. S. 41, in my view, incorporates a rule akin to the rule of estoppel whereby the real owner, who by reason of his conduct or express or implied consent was responsible for the creation of an ostensible ownership cannot be permitted to set up his real ownership to defeat the rights of a bona fide purchaser aeting in good-faith and who despite reasonable enquiries could not discover such real ownership. It is, therefore, the conduct of the real owner which gives rise to an enquiry in favour of a bona fide purchaser acting in good faith. S. 41 is a statutory recognition of this equitable rule. - **Seshumull M. Shah v Sayed Abdul Rashid & Others, ILR 1991 Kar. 2857, AIR 1991 Kant 273, 1991 (1) KarLJ 320**

TRANSFER ON BEHALF OF MINOR — SUBSEQUENT ACQUISITION OF TITLE BY MINOR AFTER MAJORITY — EFFECT OF — RIGHT TO ALIENEE TO ENFORCE HIS RIGHT

The plaintiff sued the defendants for possession of the suit property (the suit garden land) on the strength of a sale deed dated 1-11-1939 executed by defendants 1 and 2 for themselves and defendant 1 as Manager of a joint family and guardian of his then minor son defendant 3. On the date of the sale in favour of the plaintiff the land had been sold in execution at the instance of defendant 4, a Co-operative Society and purchased by defendant 4 itself on 18-4-1939 at a sale which was confirmed on 20-7-1939. The plaintiff had paid the amounts due to defendant 4 in accordance with terms of the sale in his favour. Defendant 3 pleaded that he had purchased the property from defendant 4 a Co-operative Society out of his own self-acquisitions under a sale deed dated 16-10-1944. Held, that the case was clearly one where Section 43 of the Transfer of Property Act would in effect if not in terms apply and defendant 3 was estopped from resisting the plaintiff's claim. Even where the representation of subsisting title is made on behalf of an infant by his guardian or next friend or other person legally competent to bind him by such representation on his behalf, such infant is liable to be estopped thereby. The right to obtain relief under Section 43 is based, not on the diligence of the transferee, but on the principle that the transferor who has made an erroneous or fraudulent representation should not be allowed to get away with it and should be compelled to make good the bargain which it has become possible for him later on to do, subject of course to any subsequent lawful rights. – “I think this is a clear case where Section 43, T.P. Act would in effect if not in terms apply. That section provides that where a person fraudulently or erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists, and that nothing in that section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option. The section is based on the general rule of equity that where a transferor purports to convey a particular property and has not the title under which he professes to convey, the transferee must be satisfied out of any title which the transferor then has or afterwards acquires in the said property. It may be regarded as only an extension of the law of specific performance of contracts. When there is a contract for sale, the law compels the vendor to perform the contract specifically by conveying to the vendee the property sold and to execute a sale deed.”- ".....It is a species of relief which the courts are on the constant watch of giving either against the vendor himself or any person claiming as heir or volunteer under him, whether, the contract for the sale remains wholly unexecuted, or is defectively executed and whether the vendor Had good title to the premises at the time of the sale, or whether such title accrued to him afterwards: See Gour's Law of Transfer, Vol. I page 503." **B.V. Sundariah v B. R. Ramasastry, AIR 1955 Mys 8**

AGREEMENT OF SALE — COMPROMISE DECREE FOR SPECIFIC PERFORMANCE OF — SUBSEQUENT ACCRUAL OF RIGHT TO JUDGMENT-DEBTOR CANNOT BE PERMITTED TO RESILE FROM COMPROMISE DECREE.

In this case the judgment-debtor has voluntarily undertaken in Execution Appeal while entering into a compromise to execute the sale deed. He cannot be permitted to resile from the same on one pretext or the other. On 18-8-1992 the judgment- debtor, who was previously the owner of the land in 1958 became the absolute owner of the land under the provisions of the Karnataka Land Reforms Act. If he has become the absolute owner of the land with a right to alienate the land, the doctrine of feeding the land by estoppel has come into play and the judgment-debtor cannot be permitted to resile from the compromise decree. . . . There must be a fusion of justice and equity. In this case there can be no doubt that the judgment-debtor was the absolute owner of the land when he entered into a compromise on 31-8-1976. The compromise decree was firuiJ and binding on the parties. The judgment-debtor subsequently became the absolute owner under the provisions of the Karnataka Land Reforms Act 1961 on 18-8-1992 after the embargo period of 15 years and continues to be the owner of land at the time of the present execution proceedings. —

31. A plain reading of Section 61 makes it abundantly clear that the occupant shall become the absolute owner after the period of 15 years.

32. In Shah Mathuradas Maganlal and Company v Nagappa Shankarappa Malaga and Others, the Supreme Court held that the lease determines and merges in the reversion. If the lessor purchases the lessee's interest, the lease is extinguished as tbe same cannot be at the same time both landlord and tenant.

33. In Babi D'Souza v Syndicate Bank, the Court held, once occupancy rights are conferred on the tenant as a result of an enquiry under Section 48-A of the Karnataka Land Reforms Act and once a certificate under

Section 55 is issued, the land ceases to be vested in the State Government and the tenant becomes full owner thereof.
34. In Lakshmana Gowda v State of Karnataka and Others, the Court held, the doctrine of feeding the grant by estoppel embodied in Section 43 of T.P. Act would apply and the title he subsequently acquired on such grant of the land, would enure to the benefit of his alienee who would get a good title to such land after such regrant to his alienor.
35. In Fernando v Gunatilake, the Court held, where a vendor sells without title, a title subsequently acquired by him accrues to the purchaser and prevails over that of a decree under a transfer made by the vendor after the sale. The rules apply not only if there has been delivery of possession to the purchaser but also if a duly executed deed has been delivered to him and registered.
36. In Rajapalse v Fernando, the Court held, where a grantor has purported to grant an interest in land which he did not then possess but afterwards acquires, the benefit of his subsequent acquisition goes automatically to his grantee.
37. In Shobhrajmal v Smt. Kamla Devi, the Court held, a lease of immoveable property determines in case the interests of the lessee and the lessor become vested at the same time in one person in the same right.
38. In R.P.A. Valliammal v R. Palanichami Nadar and Others, the Court held, Execution of Decree-the opportunity to object to executability of the decree could be taken only once and repeated applications appear to be unwarranted.
39. In Vasantkumar Radhakisan Vora v Board of Trustees of the Port of Bombay, the Court held, the principle of promissory estoppel is that where one party has by his word or conduct made to the other a clear and unequivocal promise of representation which is intended to create legal relationship to arise in future knowing or intending that it would be acted upon by other property to who the promise or representation is made and it is in fact so acted upon by the other party, the promise or representation (herein the compromise petition agreeing to execute the sale deed) would be binding on the party making it and he would not be entitled to go back upon it.
40. All these judgments cited above in my opinion clearly advances the proposition that there must be a fusion of justice and equity. In this case there can be no doubt that the judgment-debtor was the absolute owner of the land when he entered into a compromise on 31-8-1976. The compromise decree was final and binding on the parties. The judgment-debtor subsequently became the absolute owner under the provisions of the Karnataka Land Reforms Act, 1961 on 18-8-1992 after the embargo period of 15 years and continues to be the owner of land at the time of the present execution proceedings. - **Narayana Swamy v Smt. Muniyamma (Dead) by LRs and Others, ILR 1999 KAR 1608**

WHERE POSSESSION IS NOT TRACEABLE TO AGREEMENT OF SALE:-

1. The appellant has preferred this writ appeal being aggrieved by the rejection of his writ petition by the learned Single Judge on 6-12-1999 '(Bhavera Kenchappa v. B. Ragkavendrachar Ors.). The appellant herein filed the writ petition challenging the order of eviction passed by the Tahsildar, Honnali Taluk dated 17-5-1996. As per the averments of the writ petition, respondents 1 to 3 were the village officers in whose favour 72-09 acres of land situated at Chatnahalli Village of Honnali Taluk were regranted by the Assistant Commissioner on 10-3-1969. As per the orders of regrant, Sy. Nos. 69 and 140 of Chatnahalli Village were also included. The appellant herein claiming to be a tenant under respondents 1 to 3, in respect of Sy. No. 69 measuring 1-04 acres and Sy. No. 140 measuring 4-00 acres is in possession of the same. Subsequently, under an agreement of sale dated 5-9-1969 the appellant agreed to purchase the above said land from the respondents. In other words, appellant was a tenant till 5-9-1969 and thereafter he came to be an agreement-holder in respect of these two parcels of land. Though the agreement has been entered into, no sale deed was obtained by the appellant from respondents 1 to 3, but he continued to be in possession of the land. After the introduction of Karnataka Land Reforms Act, appellant herein filed an application before the Land Tribunal, Honnali and the application of the appellant was rejected by the Tribunal as per the order dated 18-7-1977 holding that the lands claimed by the appellant were not re-granted in favour of respondents 1 to 3 and the said lands were still considered as inam lands. On that short ground, the application came to be rejected. Again, the Land Tribunal by its order dated 26-8-1977 granted the occupancy right in favour of the appellant in respect of 1-04 acres of land in Sy. No. 69 and 4 acres of land in Sy. No. 140 and the petitioner continued to be in possession pursuant to the orders of the Land Tribunal. The detailed order passed on 26-8-1977 is not on record. The circumstances in which the Tribunal passed the second order one month later are not clear from the order sheet filed by 1st respondent. Though the notice was issued to respondents 1 to 3 herein by the Land Tribunal, they did not contest the case arid therefore the Tribunal considering the evidence of the petitioner granted occupancy right on 26-8-1977. On an application filed by the respondents 1 to 3 herein, proceedings were initiated before the Tahsildar, Honnali Taluk for eviction of the appellant in respect of Sy. Nos. 69 and 140 of Chatna-halli in case No. T.T.C.R. 10/92-93. The said proceedings were initiated by the respondents pursuant to the provisions of Section 5(6) of the Karnataka Village Offices Abolition Act, 1961 (hereinafter refer to as 'the Act'). After holding a detailed enquiry, Tahsildar on 17-5- 1996 passed an order of eviction while holding that the respondents therein have a right to recover the sale price through Court.
2. Being aggrieved by the order of eviction passed by the Tahsildar, Honnali, the appellant filed an appeal before the District Judge, Shi-moga in M.A. Nos. 31 and 47 of 1996. The District Judge, after hearing the parties held that the appeal filed by the appellant was not maintainable in view of Sub-section (2) of Section 3 of the Act and directed the parties to present the appeal before the appropriate authority. Subsequently, writ petition was filed by the appellant herein challenging the order of eviction passed by the Tahsildar, Honnali in Writ Petition No. 22970 of 1998 on the ground that when the Land Tribunal had confirmed the occupancy rights in his favour and the said order had not been challenged by respondents 1 to 3, Tahsildar could not have passed an order of eviction by invoking Sub-section (6) of Section 5 of the Act. According to the appellant, he continues to be in possession of the property as a tenant under the respondent and therefore

the order of eviction passed holding that the appellant is in possession of the property under the part performance of the sale agreement was one without jurisdiction. It is also pleaded by him that the Tahsildar had no jurisdiction to pass an order of eviction, as long as the order of the Tribunal is in force and that the proceedings have been initiated by misrepresenting the facts before the Tahsildar and that such application has been filed by the respondents 1 to 3 15 years after the order granting occupancy certificate by the Tribunal in his favour and 23 years after the order of regrant made in favour of the respondents. In other words, it is contended by the appellant that within a reasonable time, respondents did not initiate proceedings before the Tahsildar. The petition of the appellant was opposed by respondents 1 to 3. According to them, appellant is in possession of the property by virtue of Section 53-A of the Transfer of Property Act and therefore the order of Tahsildar cannot be challenged by the appellant claiming support under the orders of the Tribunal dated 26-8-1977. They also contended that the orders of the Tribunal dated 26-8-1977 has to be ignored by the Court in view of rejection of the application of the appellant by the Tribunal on 18-7-1977. It is contended by the respondents that when once the Tribunal had rejected the application of the petitioner on 18-7-1977, Tribunal will not get jurisdiction to grant occupancy right again on 26-8-1977 in respect of the same land between the same parties. They also contended that the orders of the Tribunal dated 26-8-1977 need not be challenged by them as the same was passed without jurisdiction.

3. After hearing the parties, learned Single Judge dismissed the petition by holding that the appellant herein had not approached the High Court while invoking Article 226 of the Constitution of India with clean hands. According to the learned Single Judge, petitioner has suppressed the order passed by the Land Tribunal rejecting the application of the appellant on 18-7-1977. Mainly on the ground of suppression of facts, writ petition of the petitioner came to be rejected. Being aggrieved by the said order, present appeal is filed by the appellant.

HELD:- 1) While making an application, respondents have not stated before the Tahsildar about the order passed by the Tribunal granting occupancy rights in favour of the appellant. When the respondents are parties before the Tribunal and the occupancy rights have been conferred on the appellant, even if the orders of the Tribunal are void or one without jurisdiction, the respondents should have challenged the same before the appropriate authorities, which they have failed to do so.

2) The possession of the appellant is traceable to lease and even after the agreement he continued to be in possession thereof. The possession has not been obtained by the appellant by virtue of or under the agreement of sale. The possession which the appellant had was anterior to the agreement of sale and the mere execution of agreement of sale does not alter the character of possession. The moment the agreement has been executed, it cannot be said that the possession under the lease had lost its identity. It is relevant to mention that in the agreement of sale, there was no recital that the appellant was put in possession under the said agreement. In fact, the prior possession of the appellant as per lease has been recognised. Under these circumstances, Sub-section (6) of Section 5 could not have been invoked by the Tahsildar.

3) It is to be noted that the application filed by the appellant for grant of occupancy rights was rejected on 18-7-1977 not on merits, but on the ground that the land was not regranted. There was an obvious factual error because admittedly regrant had taken place much earlier to the date of disposal of the application. When once the Tribunal became aware of the fact, this mistake was rectified and a fresh order was passed on 26-8-1977 granting occupancy rights in favour of the appellant.

Bhavera Kenchappa v B. Raghavendrachar and Others, 2002(1) Kar. LJ. 4.

HINDU LAW — JOINT FAMILY PROPERTY — ALIENATION BY MANAGER

Manager entitled to make alienation for family necessity or for benefit of estate — Sale by manager is voidable and not void — Alienee entitled to possession unless sale is avoided by appropriate action by other coparcener — Remedy of other coparcener aggrieved by alienation is to sue for partition and separate possession — Alienee in possession is entitled to injunction to restrain other coparcener from interfering with his possession. The manager of a Joint Hindu Family is entitled to alienate the joint family property for joint family necessity or for the benefit of the estate, in certain circumstances. Whether the manager is the father or not, will not make any difference. If such an alienation is made by the manager of the Joint Hindu Family of joint family property, the sale would bind not only his share in the property but the share of the other coparceners as well. No doubt, the other coparceners may be entitled to file a suit for partition and recover their share if the alienation was not for family necessity or for the benefit of the estate. The burden in such cases will also lie on the alienee to prove family necessity or the benefit to the estate to uphold the alienation by the manager. But that right of a coparcener does not affect competency of the manager to alienate the joint family property. When once such alienation is made, the alienee is entitled to be in possession of the property and right of any other coparcener is to sue for partition and recover possession of his share in the joint family properties. The sale being only voidable unless it is avoided by an action, the alienee is entitled to continue in possession. The position may be different if one coparcener alienates his share alone, but once the alienation is made by the manager of the property, it will be effective until it is properly avoided by the non-aiienating coparcener by filing a suit for partition. In this case, the brother of the defendant was the joint family manager. He has executed a sale deed of the whole property in favour of the plaintiff. Both the Courts below have found that plaintiff is in possession which cannot be reversed in revision under Section 115 of the Code of Civil Procedure. The remedy of the defendant is to file a suit and to recover his share. Without pursuing his remedies in that suit, he is not entitled to interfere with the possession of the plaintiff who is in possession of the plaint schedule property under a sale deed executed by the joint family manager. In that view of the matter, the Courts below were right in granting a temporary injunction in favour of the plaintiff. — **Muniyappa v Ramaiah, AIR 1996 Kant 321, ILR 1996 KAR 1883**

WHERE DEFENDANT ERRONEOUSLY OCCUPIED THE PLOT ALLOTTED TO THE PLAINTIFF, BUILT A HOUSE AND EFFECTED IMPROVEMENTS

From the facts established, it is seen that both the plaintiff and the defendant had applied to the Government for assignment to each of them a house site in Talapady village in Mangalore Taluk. Government assigned S. No. 343/2 to the defendant and S. No. 343/6 to the plaintiff. Defendant erroneously occupied the plot assigned to the plaintiff and built a house therein. He also effected other improvements in the site in question. In April 1955, the plaintiff filed the present suit for possession on the basis of his title. The surrounding circumstances in this case, as well as the oral evidence adduced by the defendant show that he had entered into the suit site innocently and effected improvements therein under the bona fide belief that that site had been assigned to him.

The question for decision is whether under law he is entitled to any compensation under these circumstances. Compensation is not claimed by him under any customary law. Therefore, all that I have to see is whether he is entitled to compensation under Section 51 of the Transfer of Property Act. Before he can be held to be entitled to any compensation under Section 51, he has to establish two important ingredients. First of all, he must show that He is a transferee of the suit site and secondly he must establish that he had effected improvements in the suit site believing in good faith, that he is absolutely entitled thereto. From the circumstances above set out, there can be no doubt that the defendant was under a wrong impression that the suit site had been allotted to him, and it is under that impression he had effected improvements therein.

In the order of assignment served on the defendant, it is clearly mentioned that S. No. 343/2 had been assigned to him. Hence it is clear that he was highly negligent. Section 3(22) of the General Clauses Act says that "a thing shall be deemed to be done in 'good faith' where it is in fact done honestly, whether it is done negligently or not." Therefore it has to be held that the defendant had effected improvements in the suit site believing in good faith that he was absolutely entitled to that site.

He must prove that he is the transferee of the suit site. The suit site was at no time assigned to him. What was assigned to him is S. No. 343/2. Therefore he cannot be held to be a transferee under Section 51 of the T. P. Act.

In the result, this appeal is allowed in part. The plaintiff will not only have a decree for possession; he will also have a decree for mesne profits at the rate of Re. 0-50nP. per year from the date of the suit till the property is delivered to the plaintiff. Though no compensation is allowed to defendant in appeal the lower court order as to compensation for plastering on condition is left un-disturbed. **Ijjabba Beary v Ijjinabha alias Ijjabha Beary, AIR 1964 Mys. 24: ILR1963 Mys. 301.**

BONA FIDE PURCHASER WITHOUT NOTICE OF THE MORTGAGE AND HAD EFFECTED IMPROVEMENTS.

Date for ascertainment — Proof of improvements. Plaintiff was a purchaser of the suit property and sued for redemption of an existing mortgage. Appellant (D3) had previously purchased the property from the mortgagee and he was found to be a bona fide purchaser without notice of the mortgage and had effected improvements. The preliminary decree gave plaintiff the option to pay the appellant the cost of improvements or to sell the property to appellant and plaintiff elected to pay the cost of improvements. - Held, Section 51 of the Transfer of Property Act was applicable to determine the equities between the parties and the decree in the form in which it was passed could have been passed. The Court should assess the valuation of the improvements at a date as near as possible to the date of actual eviction rather than the date of election by the plaintiff. The claimant could produce his books of account to show expenses on improvement to arrive at the saleable value of the property. In the absence of such evidence the Court could rely on the oral evidence of a Commissioner who was qualified as a valuer. The principle is, what is the worth of the improvement in the property as a vendible subject. **J. Narayana Rao vs V.G. Basavarayappa And Ors., AIR 1956 SC 727**

THE GRANTED LANDS ALWAYS BELONG TO THE GOVERNMENT AND THE GRANTEE WAS NOT ENTITLED TO ALIENATE THE LAND DURING THE PROHIBITED PERIOD AND THE GOVERNMENT HAD A RIGHT TO RESUME THE SAME.

Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978, Sections 4 and 5 — Improvements to property — Made by transferee with defective title — Transferee, when he is evicted, has right to be compensated for improvements made by him, only if he had made . improvements in good faith that he is absolute owner of property and his eviction is by person having better title — When granted land is transferred in breach of condition of grant, transferee is not entitled to benefit under Section 51 of Transfer of Property Act, as transfer is not in good faith — His eviction under Section 5 of Act of 1978 is not by person with better title, but by Government acting under statutory provisions — Provisions of Section 51 of Transfer of Property Act — Not attracted. Thus Section 51 of the Transfer of Property Act is attracted where the immovable property is transferred and improvements are made by the transferee in good faith that the transferee is absolutely entitled to the property. It is a far cry to suggest that the transferee has made the improvements in good faith or the transfer was secured bonci fide. The transferee was fully conscious that the transferee is in possession of the land under a grant issued by the Government and the terms and conditions of the grant specifically prohibits the transferor from alienating the land for a duration of 15 years from the date of grant. It is impossible even to suggest that the transferee, who secured the transfer within the period of prohibition, can claim that the transferee acted bona fide and in good faith made improvements on the land. The benefit of Section 51 is available only to a certain category of

transferees. The section prescribes that when the transferee who made improvements in good faith is subsequently evicted by any person having a better title, then only the transferee has a right to require the person causing the eviction to value the improvements and pay the same. The crucial words arc 'transferee is subsequently evicted by any person having a better title'. The transferee is evicted by the Assistant Commissioner in exercise of statutory power under Section 5 of the Act and not because the Assistant Commissioner has a better title than that of the transferee. The eviction takes place because the transfer is null and void being in contravention of the terms of the grant made in favour of a member of Scheduled Caste or Scheduled Tribe. The granted lands always belong to the Government and the grantee was not entitled to alienate the land during the prohibited period and the Government had a right to resume the same. The right which flows to the transferee under Section 51 of the Transfer of Property Act is available only when the transferee is evicted by a person having better title and in our judgment, such a contingency does not arise when the transferee is evicted under Section 5 of the Act because the transfer is declared as null and void under Section 4 of the Act. — **Harischandra Hegde v State of Kamataka and Others, ILR 1996 KAR 1077 (DB).**

RIVAL PURCHASERS — BONA FIDE PURCHASE WITHOUT NOTICE — PROOF — OPTION TO PAY VALUE OF IMPROVEMENTS — WHO CAN EXERCISE.

As found by the Courts below, the plain-riff appellant is the prior purchaser of the suit property and thus he had acquired a valid little to the suit property. The sale in Favour of the predecessor-in-title of the respondent under Exhibit IV being of a later date, the same cannot affect the validity of the sale in favour of the plaintiff under Exhibit A dated 8-6-1938. Both the Courts below have come to the conclusion that the respondent is a bona fide purchaser for value without notice of the sale in favour of the plaintiff. The appellant contends that this conclusion, is on the face of the records, unsustainable and the same has been arrived at by ignoring important pieces of evidence. In the course of the arguments, the learned Counsel fur the respondent contended that the sale deed Exhibit A is invalid as the same was registered in a wrong registration office. This contention does not appear to have been urged in the Courts below. The evidence on record is not sufficient to come to the conclusion that no portion of the property included in Exhibit A was within the registration District of the Bangalore Taluk Sub-Registrar at the time of the registration. Hence this new plea cannot be decided on the basis of the material on record. In the result, the judgments and the decrees of the Courts below are set aside. …….. It is open to the respondent to remove the building put up by him without injuriously affecting the property. In the circumstances of this case, the parties will bear their own costs in ail the Courts. Section 51 of the Transfer of Property Act leaves the option to the person having better title either to pay the value of the improvements or to sell his interest to the subsequent purchaser. The choice is that of the evictor. The Court cannot direct the evictor to sell the property to the transferee who is evicted. As between two purchasers of the same property, it is for the subsequent purchaser to prove that he was a bona fide purchaser for value without notice of the alienation in favour of the prior purchaser. — **Kasipathi v E. Subba Rao, AIR 1961 Mys. 62.**

ILLUSTRATIONS

A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void.

A gives Rs. 500 to B on condition that he shall marry A's daughter C. At the date of the transfer C was dead. The transfer is void.

A transfers Rs. 500 to B on condition that she shall murder C. The transfer is void.

A transfers Rs. 500 to his niece C, if she will desert her husband. The transfer is void.

A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition.

A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. B Marries without the consent of C, D, E, but obtains their consent after the marriage. B has not fulfilled the condition.

A transfers Rs. 500 to B on condition that he shall execute a certain lease within three months after A's death, and, if he should neglect to do so, to C. B dies in A's lifetime. The disposition in favour of C takes effect.

A transfers property to his wife; but, in case she should die in his lifetime, transfer to B that which he had transferred to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favour of B does not take effect.

A transfers Rs. 500 to B, to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies as minor or marries without C's consent, the Rs. 500 shall go to D. B marries when only 17 years of age, without C's consent. The transfer to D takes effect.

A transfers a farm to B for her life, and, if she does not desert her husband to C. B is entitled to the farm during her life as if no condition had been inserted.

A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm.

A transfers a farm to B, provided that, if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

The farm of Sultanpur is the property of C and worth Rs. 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Rs. 1,000 to C C elects to retain the farm. He forfeits the gift of Rs. 1,000. In the same case, A dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to B.

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

A sells to B, C and D a house situated in a village and leased to E at an annual rent of Rs. 30 and delivery of one fat sheep, B having provided half the purchase money and C and D one-quarter each. E, having notice of this, must pay Rs. 15 to B, Rs. 7.50 to C and Rs. 7.50 to D and must deliver the sheep according to the joint directions of B, C and D. , In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation. E had agreed as a term of his lease to perform this work for A, B, C and D severally required to perform the ten days' work due on account of the house of each. is not bound to do more than ten days' work in all, according to such directions as B, C and D may join in giving.

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable to sell a field, part of such property, to B. B satisfies himself by reasonable enquiry that the income of the property is insufficient of A's maintenance, and that the sale of the field is necessary, and acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make a use of it determined to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

A, a Hindu who has separated from his father B, sells to C three fields, X, V and Z representing that A is authorised to transfer the same. Of these fields 2 does not belong to A, it having been retained by B on the partition; but on B's dying A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver 2 to him.

A contracts to sell Sultanpur to B. While the contract is still in force he sells Sultanpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.

A, owing a moiety, and B and C, each a quarter share, of mauza Sultanpur, exchange an eighth share of that mauza for a quarter share of mauza. There being no agreement to the contrary, A is entitled to an eighth share in Lalpura, and B and C each to a sixteenth share in the mauza.

A, being entitled to a life-interest in mauza Atrali and B and C to the reversion, sell the mauza for Rs. 1,000. A's life-interest is ascertained to be worth Rs. 600, the reversion Rs. 400. A is entitled to receive Rs. 600 out of the purchase-money. B and C to receive Rs. 400.

A, the owner of an eight-anna share, and 6 and C, each the owner of a four-anna share, in mauza Sultanpur, transfer a two-anna share in the mauza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of A, and half-an-anna share from each of the shares of B and C.

STAMP ACT - CASE LAW

INSTRUMENT DULY STAMPED

To be 'duly stamped' an instrument should comply with three requirements: (i) the stamp must be of the proper amount; (ii) should bear the proper description of stamp; (iii) the stamp must have been affixed or used according to law for the time being in force. It is evident from sub-section (2) of Section 33 that for determining whether an instrument bears the proper stamp and thus complies with the requirement of being 'duly stamped', the stamp duty payable on the instrument must be determined only with reference to the terms of the instrument and not evidence dehors or beyond the instrument. Section 33 does not contemplate an enquiry, with reference to material other than the instrument itself, to reach a conclusion as to whether such instrument is duly stamped or not. If a property of the market value of Rs. 25,000/-, is conveyed under a sale deed, mentioning the sale consideration as Rs. 10,000/- and the stamp duty at the specified rate is paid on Rs. 10,000/- then it is duly stamped for purposes of the Act, even though there may be undervaluation regarding market value. This is so, because, to find out whether there is undervaluation, an enquiry beyond the terms and contents of an instrument, is required, to determine the market value. Undervaluation cannot be assumed merely with reference to the terms or contents of an instrument but can be determined only with reference to external evidence relating to market value. Section 33 does not contemplate or permit any such enquiry into the market value of the property which is the subject-matter of the instrument, nor determination whether there is any undervaluation. Thus, a deed of conveyance bearing the necessary stamp

duty at the specified rate on the consideration or value mentioned therein, cannot be considered as 'not duly stamped' and therefore cannot be impounded under Section 33. The Sub-Registrar can send an instrument to the Deputy Commissioner under Section 37(2) for determination of a proper duty under Section 39, only if it is impounded under Section 33, as not being duly stamped. He cannot send an instrument to the Deputy Commissioner under Section 37(2), if he is merely of the opinion that it is undervalued. The Deputy Commissioner while exercising his power under Section 39 of the Act, in regard to an impounded instrument, cannot embark upon an enquiry into the market value of the property; he can only decide whether the instrument is duly stamped or not; and if he finds that it is duly stamped, he shall certify thereon that it is duly stamped; and if it is not duly stamped, he shall require payment of proper duty or the amount required to make up the. same together with a penalty as specified therein. The resultant position is that, there can be no determination of 'proper duty' not levy of penalty under Section 39, in respect of documents which are not impounded or which cannot be impounded. Hence no penalty can be levied under Section 39, in regard to an instrument which is undervalued. It should however be noted that in regard to instruments which are not duly stamped, but which are not impounded, but registered, the proper duty can be collected by initiation of proceedings under Section 46-A of the Act. Thus the determination whether a document is not duly stamped and therefore should be impounded relates to a pre-registration stage. On the other hand, the enquiry as to whether the document is undervalued or not and the determination of market value and proper duty on such market value, is a post-registration enquiry, which has nothing to do with the registration or validity of the instrument. Thus, if a document which is not duly stamped, is presented for registration, the Registering Officer will not register the document but impound it, and send it to Deputy Commissioner under Section 37(2) so that the Deputy Commissioner can require payment of proper duty and penalty under Section 39. On the other hand, if the document is undervalued, the Registering Officer shall register the document and refer the instrument to the Deputy Commissioner for determination of market value and payment of proper duty under Section 45-A and the Deputy Commissioner has to determine the market value and the proper duty payable thereon after giving the parties, a reasonable opportunity of being heard. Before 1-4-1991, in areas where Section 45-A was not brought into force, there could be no action under Section 45-A, even if the consideration/price/value mentioned in Instruments of Conveyance, Exchange or Gift was less than the market value. In such case, action could be taken only under Sections 28 and 61 of the Act. The combined effect of Section 28(1) and (2) and Section 61 and Rule 15-A was that if there was any undervaluation, the person executing the document could be prosecuted and punished under Section 61. Once Section 45-A was made applicable, of course, the deficit stamp duty could also be collected. But under no circumstances, penalty could be levied under Section 39, in regard to undervalued instruments. - Coming to the case on hand, the land sold is situated in Yadur Village in Chikodi Taluk and Section 45A became applicable in the said area only from 1.4.1991. On the date of execution and registration of the sale (26.8.1985) Section 45A was inapplicable and what was applicable was Section 28 and Rule 15A. Hence, if the Registering Authority on verification found that there was undervaluation, he could only prosecute the executant under Section 61 and could not impound the document under Section 33 or initiate any action under Section 39. Hence, the impugned order directing recovery of stamp duty on the basis of market value and penalty equivalent to ten times the duty, under Section 39 is without authority of law and contrary to the provisions of the Act. **Huleppa Balappa Karoshi v Sub-registrar, Chikodi, ILR 1995 KAR 3589**

RENT PREMIUM OR BOND OR SECURITY DEPOSIT

This is a reference under S. 54(l) of the Karnataka Stamp Act, 1957 (Act No. 34 of 1957) (hereinafter referred to as the Act) by the Chief Controlling Revenue Authority. The reference relates to the stamp duty payable on the three lease deeds which have been impounded by the Sub-Registrar, Koppa, when they were presented for registration……. Referred questions:- Whether the "Security Deposit" is 'premium' or 'fine' as per S. 105 of the Transfer of Property Act and whether it is liable to duty under Art. 30(c) of the Schedule to the Karnataka Stamp Act, 1957, If not whether it is a 'Bond' as defined in S. 2(l)(a) of the Karnataka Stamp Act, 1957 and whether liable to stamp duty under Art. 12 of the Schedule to the Karnataka Stamp. Act, 1957, If the document does riot fall under any of the categories aforesaid, then what is the correct nature of the deed and what stamp duty is payabe thereon", ……. Under Clause-4, the lessee is to deposit a sum of Rs. 1,25,000/- on or before May 31, 1980 with the lessor by way of security deposit. This is insisted upon by the lessor in order to ensure proper maintenance of the demised coffee estate during the lease period. The lessor has reserved his right to appropriate from the said deposit, such sum of money which he may have to incur in case of any loss caused by the mismanagement of the estate by the lessee. …….. Security deposit is not the same thing as premium or fine, as explained under S. 105 of the T. P., Act, or any money advanced in addition to the rent reserved. ……. Article 47 as follows :
"47. Security bond or mortgage-deed, executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof, or execution by a surety to secure the due performance of a contract."
"34. Mortgage deed not being an agreement relating to Deposit of title deeds, pawn or pledge (No. 6), Bottomry Bond (No. 13) Mortgage of a crop (No. 35), Respondential Bond (No. 46), or Security Bond (No. 47)."

We are, therefore, of the opinion that the instrument (with reference to Cl.4) is to be construed as a security bond failing under Art. 47 of the Schedule and the stamp duty payable as per the Schedule to the Article.

Definition of 'bond' and under Article 12 - Meaning of 'bond' - Schedule - Article 30{c) - 'Security deposit' whether premium or fine under Section 105 of Transfer of Property Act or money advanced in addition to the rent reserved. Security deposit is not the same thing as premium or fine as explained under Section 105 of the

Transfer of Property Act, or any money advanced in addition to the rent reserved. Article 12 expressly excludes the other kinds of bonds referred to in the Note appended to the said Article, which are chargeable to duty, under the specific articles mentioned. What follows from the above is that the category of bonds mentioned in the Note, are not exigible to duty as 'bond' in the generic sense as defined in Section 2(l)(a) under Article 12. 'Bond' is a generic term. A bond is an instrument in writing by which a person binds himself or commits legally to pay a certain sum of money to another on certain conditions. Generally accepted definition of bond is that it is a certificate of evidence of a debt, more fully described in Section 2(l)(a). The security deposit does not answer the description of premium or a fine and the same reason also hoJds good that it is not a bond in the generic sense. Thus, the document is not exigible to stamp duty either as premium or as bond in the generic sense. **Chief Controlling Revenue Authority v M. V. Chandrashekar and Others, ILR 1984 Kar. 1003 (FB): AIR 1985 Kant. 61 (FB).**

In V. SRINIVASAN v. THE SUB REGISTRAR, HIRIYUR AIR 1985 Karnataka 56, Court has discussed in detail about the scope of Article 30(c) of The Stamp Act. Para 13 reads: "The provision contained in Section 105 of the Transfer of Property Act read in the light of the decisions of the Supreme Court, cited above, brings out the distinction between a price paid for a transfer of right to enjoy the property and the rent to be paid periodically to the lessor. When the interest of the lessor is parted with for a price, the price paid is the premium or salami. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. There may be circumstances where the parties may camouflage the real nature of the transfer by using clever phraseology. In some cases the so called premium is in fact advance rent and in others rent is deferred price. It is not the form but the substance of a transaction that matters. The nomenclature used may not be decisive or conclusive. But it helps the Court having regard to the other circumstances to ascertain the intention of the parties." Para 14 reads: "Adverting lastly to the term 'money advanced in addition to rent observed', it is to be understood ejusdem generis the other two expressions explained above, viz., 'fine' and 'premium'. The words or for money advanced were newly added in the Central Act. The object of the addition of the words or for money advanced is apparently to rope in transactions which are a combination of a lease and mortgage and which are embodied in the form of a lease providing for payment of an advance. The lease may provide either for the return of the advance or adjustment of it in the rents payable towards the end of the period of lease. In either case, the real intention can only be that conveyance duty shall be paid on the amount of such advance. The advances obtained on leases are generally analogous to advances obtained on usufructuary mortagages and the documents which partake of the character both of a mortgage and a lease are quite common. Thus, where under a lease deed executed in consideration of the advance made by the lessee to discharge subsisting encumbrances, the lessee was empowered to withhold from the stipulated monthly rent a sum of money and appropriate the same in liquidation of the sum advanced by him, the document is chargeable with stamp duty under Section 30(c) of the Schedule to the Act."

BOND OR MORTGAGE

If a document consists of only an obligation to repay the money, then it may be considered as a bond. But when the document, in addition to the undertaking to repay the money personally, also gives a right to the creditor to recover the money by sale of a specific immoveable property, it will not come within the ambit of 'bond' as defined by the Act. ……. Section 58(b) of TP ACT reads as - "Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage - money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee."……. The document in question is admittedly not written on a proper stamp paper and it is not registered. A mortgage requires compulsory registration. Any document, which requires, compulsory registration, if it is not registered, is inadmissible in evidence. If it is inadmissible in evidence, the suit based on such an inadmissible document, will not be maintainable or competent at all. The period of limitation for a mortagage may be twelve years. But if the mortgage itself is inadmissible on account of non-registration, the suit, though filed within time, wilt have to be thrown out. **Nagabhusappa vs Laxminarayana , ILR 1985 Kar. 1742.**

TRUST DEED TO TRANSFER SOCIETY PROPERTY

Chief Controlling Revenue Authority, Government Of Karnataka vs Dr. H. Narasimhaiah ILR 1991 KAR 1041 A document described as the "deed of trust" executed by the president of the National Education Society of Karnataka (registered), Basavangudi, Bangalore, was presented before the Deputy Commissioner for Stamps under section 31 of the Karnataka Stamp Act, 1957 (for short "the Act"), for adjudication as to the proper stamp duty payable on the said instrument. The Deputy commissioner entertained a doubt as to the proper duty leviable on the said document. So, acting under section 53(2) of the Act, he drew up a statement of the case and refereed it, with his opinion thereon, for the decision of the Chief Controlling Revenue Authority. …….. According to the opinion of the Deputy Commissioner of state, the entire ownership of the properties in the society is transferred to the trust. There is a disposition of property as well as transfer. As such, the documents satisfied the definition of settlement as per section 2(1)(q)1(ii) of the Karnataka Stamp, Act, 1957, as there is a non-testamentary disposition in writing of movable and immovable properties for any religious or charitable purpose. Hence, the duty leviable shall be in accordance with article 48 of the Schedule to the Karnataka Stamp Act, 1957, as a settlement. …….. Further, according to section 14 of the Karnataka Societies Registration Act, 1960, the property, movable and immovable, belonging to the

society, shall, if not vested in the trustees, shall vest with the governing body. Secondly, there is no provision in the Act to change the character of the society to a trust. The only provision is section 21 which provides for amalgamation of societies. As there is no provision to convert a society into a trust, the transaction in effect amounts to a transfer of the property thereby attracting higher stamp duty as a settlement. The term 'declaration of trust' as provided in article 54 of the Act is not defined but recourse can be had to the Indian Trusts Act where the term 'trust' has been defined as a confidence reposed in a person regarding a property. As such, a declaration of trust involves vesting of property out of confidence reposed in him. Here, in this case, there is already a society owning properties which transfers the property to a trust or transforms itself into a trust." ……. In our considered opinion, the documents fall within the meaning of "settlement" as defined under section 2(1)(q)(iii) of the Act and as such they are liable to duty under article 48 of the Schedule to the Act.

MORTGAGE

Where petitioner executed a mortgage in 1956 and on Aug. 28, 1958 obtained further accommodation from the creditor and executed a memorandum on Sep. 1, 1958 reciting that the title deeds already with the creditor should be treated as deposit for the equitable mortgage in respect of the further advance and further recited the rate of interest and other conditions, Held: the memorandum was not an instrument of mortgage, but only an agreement relating to deposit of title deeds. **Shivacharanlal v State of Mysore, (1963)1 Mys. L.J. 107.**

DUTY OF COURT IN MARKING DOCUMENTS AND VERIFYING STAMP DUTY PAYMENT

K. Amarnath vs Smt. Puttamma ILR 1999 KAR 4634, R.V. Raveendran, J.

When a document is admitted in evidence, it is marked in the manner prescribed in Order 13, Rule 4 of the CPC. When a document is rejected as inadmissible in evidence, an endorsement has to be made as prescribed under Order 13, Rule 6 of the CPC. When a document is not admitted, but is assigned a number only for identification purposes, then an endorsement to that effect should be made on the document. ……. When a document is produced and sought to be exhibited, the Court should decide whether it is admissible or not immediately, so that the parties will know whether such document could be relied on or not. If a document is not admitted, by refusing to mark it, the party may take steps to let in other relevant and permissible evidence to prove the document. On the other hand, if the document is marked in evidence, the parties may not choose to let in further evidence on that aspect. When the question of marking of the document is left open, the parties will have to proceed with the evidence with considerable uncertainty. Therefore, Courts should consider and decide the question of admissibility of a document sought to be exhibited, before proceeding further with the evidence. If the Court has any doubt, it may hear arguments on the question. …… A duty is cast upon every Judge to examine every document that is sought to be marked in evidence. The nomenclature of the document is not decisive. The question of admissibility (with reference to Section 34 of Karnataka Stamp Act, or Section 35 of Indian Stamp Act and Section 49 of Registration Act) will have to be decided by reading the document and deciding its nature and classification. The tendency to mark documents without inspection and verification should be eschewed. Even while recording ex parte evidence or while recording evidence in the absence of the Counsel for the other side, the Court should be vigilant and examine and ascertain the nature of the document proposed to be marked and ensure that it is a document which is admissible. The Court should not depend on objections of the other Counsel before considering whether the document is admissible in evidence or not. Section 33 of the Stamp Act casts a duty on the Court to examine the document to find out whether it is duly stamped or not, irrespective of the fact whether an objection to its marking is raised or not. It should be borne in mind that once a document is admitted in evidence, it cannot be called in question thereafter on the ground that it was not duly stamped. Once the Court admits a document even wrongly, such admission becomes final and cannot be reopened. Hence, the need for dilligence not only on the part of the opposite Counsel, but also on the part of the Court having regard to the statutory obligation under Section 33 of Karnataka Stamp Act. …… A combined reading of Sections 33, 34, 35, 37 and 41 of the Karnataka Stamp Act requires the following procedure to be adopted by a Court while considering the question of admissibility of a document with reference to the Stamp Act: (a) when a document comes up before the Court, it has to examine and determine whether it is properly stamped. When the other side objects to it, the Court should consider such objection and hear both sides; (b) after hearing, if the Court comes to the conclusion that the document has been duly stamped, it shall proceed to admit the document into evidence; (c) on the other hand, if the Court comes to the conclusion that the document is not stamped or insufficiently stamped, it shall pass an order holding that the document is not duly stamped and determine the Stamp duty/deficit stamp duty and penalty to be paid and fix a date to enable the party who produces the document to pay the Stamp duty/deficit Stamp duty plus penalty; (d) if the party pays the duty and penalty the Court shall certify that proper amount of duty and penalty has been levied and record the name and address of the person paying the said duty and penalty and then admit the document in evidence as provided under Section 41(2); and the Court shall send an authenticated copy of the instrument to the District Registrar together with a Certificate and the amount collected as duty and penalty, as provided under Section 37(1); (e) if the party does not pay the duty and penalty, the Court will have to pass an order impounding the document and send the instrument in original, to the District Registrar for being dealt with in accordance with law as per Section 37(2) of the Karnataka Stamp Act. …….. The deference between Section 34 of the Karnataka Stamp Act and Section 49 of the Registration Act should also be borne in mind. Section 34 says "no instrument chargeable with duty shall be admitted in evidence for any purpose, or shall be acted upon, registered or authenticated by. . . unless such instrument is duly stamped". Subject to the provision enabling the Court to collect the deficit Stamp duty, the bar under Section 34 is absolute and an instrument which is not duly stamped cannot be admitted at all in evidence for any purpose. On the other hand, Section 49 of the Registration Act which deals with the effect of non-registration of

documents provides that if a document which is required to be registered under law is not registered, then such document shall not affect any immovable property comprised therein, nor can it confer any power to adopt, nor can it be received as evidence of any transaction affecting such property or conferring such power. But the proviso to Section 49 provides that an unregistered instrument may be received as evidence of a contract in a suit for specific performance or as evidence of part performance of a contract for the purpose of Section 53-A of Transfer of Property Act or as evidence of any collateral transaction not required to be effected by registered instrument.

MORTGAGE / LEASE/ USUFRUCTUARY MORTGAGE

A 'Bhogyada Kararu' is an agreement relating to usufructuary mortgage. A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The characteristics of an usufructuary mortgage are the following.-
(a) Possession of the mortgaged property is delivered/agreed to be delivered to the mortgagee;
(b) The mortgagee is to retain possession until repayment of the mortgage amount and to receive and appropriate the rents and profits in lieu of interest or of principal or of both;
(c) The mortgagor does not incur any personal liability to repay the money; and there being no personal liability to pay, there is no forfeiture and, therefore, the remedies by way of foreclosure or sale are not open to the mortgagee.
On the other hand, a lease is a transfer of a right to enjoy a property and is not a transfer of an interest in a property and the usufruct of the property belongs to the tenant till the determination of the lease. The difference between a usufructuary mortgage and a lease came up for consideration before the Supreme Court in Ramdhan Puri v Bankey Bihari Saran and Others. The Supreme Court held that the intention of the parties must be looked into and that once there is a debt with security of the property for its redemption, then the arrangement is a mortgage. The Supreme Court further held that where the relationship between parties was described as creditor and debtor and the debtor gave his property as security for the amount advanced, the document was a mortgage. In other words, if the money paid is a loan advanced and the transfer of possession is for the purpose of security for the repayment of such loan, the transaction would be a usufructuary mortgage.

Leases, on the other hand, can be of different types. The consideration for the lease can be (a) a premium i.e., a price; (b) a rent, either in cash or in kind; (c) money advanced, that is, a deposit or advance; (d) a combination of a, b and c or any two of them.

Merely because an amount is advanced and possession is delivered, a transaction will not become a mortgage. As stated above, mortgage contemplates the taking of a loan and delivering possession to secure payment of the loan, the relationship being that of a creditor and debtor. On the other hand, in a lease for money advanced or deposit made, there is no relationship of debtor and creditor between the landlord and tenant. In such a transaction, the tenant who desires to take the premises on lease, agrees to make a Deposit, instead of making a monthly payment as rent, with the understanding that the landlord will continue to hold the said advance or deposit so long as the tenant continues in possession and he should refund the same when the tenant vacates the leased premises. It may be noticed that in such a transaction, the property is not given up security for the amount advanced. While the primary transaction in a mortgage is advancing of a loan and securing the advance by an immovable property, in a lease against deposit, the primary intention is to make available the premises to the tenant and receive the consideration therefor by way of interest free advance.

Having identified and decided on the nature of the document, the next question that arises for consideration is whether it was properly stamped. If it is a usufructuary mortgage, it is subject to Stamp duty at a rate equivalent to that of a conveyance on the mortgage amount under Article 34(a) of the Schedule to the Karnataka Stamp Act. On the other hand, if the document is a deed of lease, or even an agreement to lease, Stamp duty will be payable under Article 30. For the purpose of Stamp duty, it makes no difference whether the deed is a deed of lease or agreement to lease. Both require the same Stamp duty. There is a prevalent wrong impression that lease deeds and lease agreements for a period of less than one year (normally executed for eleven months) do nut require registration and can be stamped as a mere agreement. Once the terms of a lease are reduced to writing, the instrument requires to be stamped as per Article 30 and requires registration under Section 107 of the Transfer of Property Act.

The following illustrations will demonstrate the difference: (a) If the instrument (be it a deed of lease or agreement of lease) confirms, grants or creates a lease, either from any past date or from that date or from a future date, it will be an instrument requiring Stamp duty under Article 30 and requiring registration. Thus, an instrument executed on 1-1-1999 stating that the lease is for a term of 5 years from 1-12-1998 or from 1-1-1999 or from 1-2-1999 is a present demise; (b) If the instrument records an agreement to grant a lease in future subject to a contingency or contingencies, then it is a mere agreement which does not require Stamp duty under Article 30 of the Stamp Act, or registration. An instrument which records an agreement to construct a building and then grant a lease by executing a separate deed will be a mere agreement which can be stamped under the residuary clause of Article 5 and may not require registration.

Supreme Court in the case of Bipin Shantilal Panchal v. State of Guj 2001 Cri LJ 1254 : (AIR 2001 SC 1158) wherein it has been held that, where admissibility of document is objected then the Court should tentatively mark the document as an exhibit and can determine the objections at the last stage in the final judgment. But, while holding so, the Apex Court carved an exception regarding admissibility of a document where objection is based on deficient stamp duty, then the Court has to decide the objection before proceeding further.

In this regard, reliance is placed upon the judgment of the Supreme Court reported in **AIR 1966 SC 1631** for the proposition that no act of Court shall harm a litigant and it is the bounden duty of Court to see that if a person is harmed by a mistake of the Court, he should be restored to the position he would have occupied.

MORTGAGE

Essential ingredients of a mortgage deed - There can be no transfer of interest in immoveable property if principal money secured is more than one hundred rupees, unless the mortgage is effected by a registered instrument signed by the Mortgager and attested by at least two witnesses. If documents not registered, it cannot be said the documents have transferred any interest in immoveable property. In such cases liability for levy of duty and penalty, as a mortgage deed arises. — **Vasudev Pandurang v Basappa Hanumanthappa, ILR 1985 Kar. 547.**

MORTGAGE & HIRE-PURCHASE

Hire purchase agreement by agriculturists for tractor and implements - Stamp. If under a document there is a transfer of specified property or creation of right over or in respect of property, it should be stamped as a mortgage deed. Where under a hire purchase agreement for tractor and other implements executed by loanees in favour of the Tahsildar, a right is created over specified immovable properties of loanees, the agreement is liable to be stamped as a mortgage under Art. 34(b) of the Act and Art. 47 is not applicable. **Chief Controlling Revenue Authority v D.S. James, AIR 1973 Mys. 105**

MORTGAGE

Karnataka Agricultural Credit Operations and Miscellaneous Provisions Act, 1974 — Form No. 3, Declaration — Offering security of certain immovable property for borrowing of money or financial assistance — Whether the declaration is a simple mortgage for purposes of the Act — Whether the Revenue authorities were justified in concluding that the deficit stamp duty is to be paid? A reading of the provision makes it clear that any instrument which for the purpose of securing money advanced by way of loan or to be advanced by way of loan or one person transfers or creates in favour of another person a right over a specific property is called a mortgage. In the present case a reading of the declaration would make it clear that the party concerned would offer certain property by way of security for the payment of amount of financial assistance and the description of the property is also set forth in the schedule thereto. Therefore it is clearly a case of mortgage, because there is borrowing of money and offer of security of certain immovable property in terms of Section 2(l)(n) of the Act ..... When that declaration is required to be registered and the declaration itself creates interest in respect of the property by way of charge or security in the property in question, it should certainly be held **to be a mortgage. Pasalu Thimmappa and Others v Karnataka Appellate' Tribunal, Bangalore and Others, ILR 1994 KAR 1367.**

CONVEYANCE- RELEASE

M.A. Venkatachalapathi vs State Of Mysore And Ors AIR 1966 Mys 323 When a co-owner sells his undivided interest in a common property to another co-owner, there is necessarily a release of the interest of the transferor co-owner But this only means that every transaction of sale between two co-owners, is a transaction of release also just as every transaction of partition between two co-owners is, as explained in Nanjunda Setty's case 1963(2) Mys LJ 75: (AIR 1964 Mys 124 (FB), also a transaction of mutual release. …….. Every sale may not involve a release. A sale between two persons who had no prior common interest in a property sold, will not involve a release, a generally speaking, a release like a partition, pre-supposes the existence of common interest of the parties to the transaction (Vide Nanjunda Setty's case, 1963(2) Mys LJ 75: (AIR 1964 Mys 124)(FB). But if, the seller and the purchaser have a prior common interest in the property, there a necessarily a release by the seller of his interest in the property. …….. Similarly every release may not result in a conveyance or sale. A release may relate to a settlement of a doubtful claim. A release may be of a right which is not capable of being transferred in law, like the right to maintenance, or the mere right to sue. A release may be of a debt by the creditor, in which case the debt is not transferred from the creditor to the debtor. A doubt or multiple release accompanied by the acquisition of the full right by such co-owner in the portion of the property allotted to him, may amount to a partition between the co-owner. But where release is by a co-owner of his share in the common property which is legally capable of being transferred, in favour of another co-owner, for a consideration of a sum of money coming outside the common property the transaction amounts to a sale of the undivided share.

Nanjunda Setty v. State of Mysore 1963(2) Mys LJ 75(AIR 1964 Mys 124):-- ".....Where the release results in the releaser getting exclusive right to a portion of the common property, what happens in reality is a division of the common property. If, on the other hand, the releaser gets as consideration for the release

cash or other property which does not form part of the common property, such a release does not results in any division of the common property, such a release does not result in any division of the common property into exclusive shares. Such would be the case where the releases pays from out of his separate funds the consideration for the release....."

Chinnathayi v. Kulasekara Pandiya Naicker, [1952] SCR 241 Supreme Court was considering how the general words of a release should be construed. Their Lordships laid down that the general words of a release should be understood as referring to a state of things which were in the contemplation of the parties at the time of the deed and not to a state of things brought about by subsequent events and not in the contemplation of the parties at the time of the deed.

CONVEYANCE OR RELEASE

Where a document recited that there was an agreement to sell on payment of consideration, but that a sale deed was not executed because of the loss of stamp paper purchased for the purpose and that the executant had lost his title to the property by prescription and as the second party who had acquired title by adverse possession wanted a reference deed for collateral purposes, therefore the deed was executed under which the executant relinquished his right, title and interest in favour of the other party, held, the document amounted to conveyance or sale as defined in S. 2(d) of the Act and chargeable to stamp duty under Art. 20 of the Sch. Though the word sale or purchase had not been used in the document, the word 'hereby relinquished' whatever right, title or interest the executant possessed indicated that by the document, the rights possessed by the executant were being transferred in favour of the other party. **State by Sub-registrar v M.L. Manjunatha Shetty, AIR 1972 Mys. 263 (FB) :**

COPARCENARY - COURT SALE

Panduranga Mallya v U. Vamana Mallya ILR 1988 KAR 1747. : Sale of coparcenary property between various co-sharers by court - Held, it does not amount to a sale and sale certificate issued under Or. 21, RI. 94 CPC would not be an instrument of sale and question of paying non-judicial stamp paper does not arise **-** In the case of a partition what is done is that the shares in the properties are adjusted between the parties. While so adjusting the shares of the parties in the proper ties, one person may be allowed to retain the entire property for himself subject to the payment of owelty to other sharers in respect of their share in the property. Therefore, partition amongst the Hindu Co-sharers does not amount to a transfer of property or any interest in the property, though it might result in the wiping out of the shares of other sharers in the property. **- It has been held in DASAPPA SETTY v. KALI DASAPPA SETTY, 1968(1) Mys. L.J. 200** that a partition is not a transfer at all and that a sale certificate issued under Order 21, Rule 94 C.P.C. was not an instrument of sale and the stamp duty need not be paid thereon under Section 164 of the Panchayat Act. **– In ASHOK KSHYA v. SUDHA VASISHT, AIR 1987 SC 841**, that if in the course of an arbitration a co-sharer gets the entire property on payment of certain amount to the other co-sharers, it does not amount to a sale at all. The award did not create any right in any immovable property,. nor did it effect partition in any immovable property. It was, therefore, not compulsory to register the award. The award merely indicated the entitlement of the respondent in the property and the cessor of their interest in the property on receipt of money. Their right and inter- est was to cease only on the payment of the amount and not otherwise, not even by the operation of the document itself. The award only declared that the right of the appel- lant to get the immovable property was dependent upon the payment of the amount by him. A right to the property was not created by the award itself, a right to certain property was declared. A right to get the property was declared on the payment of the money. The award did not create any right to the property, extinguish any right to the property, which was not there. It quantified in terms of money the value of that right and declared the method of working out those rights.

PARTNERSHIP AND PROPERTIES

Deed of declaration of partnership property - Stamp duty chargeable. Ten persons purchased certain coffee estates for Rs. 22,75,000. A registered sale deed was executed in their favour as co-owners. Subsequently the ten persons executed a partnership deed referring to the purchase of the estates by them. Later by the draft deed in question, styled as deed of declaration of mutation of nomenclature, they declared that the estates are the properties of the partnership firm which they had formed and that their relationship in respect of the said estates was not as co-owners but as partners. Held: that the document did not purport to convey the estates to the partnership firm. The document merely recorded the intention of the partners to treat the properties purchased as partnership assets. The change of legal relationship from one of co-owners to partners in respect of immovable properties was not brought about by the instrument but by operation of law, by virtue of the fact that the partners agreed to treat the said properties as partnership properties. Hence the document was neither a 'deed of conveyance' as defined in S. 2(1)(d), nor a 'deed of partnership' falling under Art. 40 of the Sch. to the Act, but was a 'memorandum of agreement' chargeable to stamp duty of under Art. 5(d) of the Sch. to the Act. ..... For the purpose of bringing separate property of the partners into a common stock of the firm, it is not necessary to have recourse to any written document. As soon as the partners intend that their separate properties should become the partnership properties and they are treated as such, then by virtue of the provisions of the Partnership Act, the properties become the properties of the firm. This result follows by operation of law**. Rebelio v Chief Controlling Revenue Authority, AIR 1971 Mys. 318 (FB).**

VILLAGE MAP NOT INSTRUMENT

Map issued by local authority — Production in evidence, of certified copy of — Such map, held, is not instrument attracting payment of stamp duty, as it does not create, transfer, limit, extend, extinguish or record any right or liability — Same produced in evidence for purpose identifying suit property cannot be rejected on ground that it is not duly stamped. Held: Where a document creates some right or liability between the parties transferring certain rights, then it comes within the meaning of definition of an "instrument" and is chargeable to stamp duty. It is in respect of those documents if proper stamp duties are not paid, such documents have to be impounded and the duty and penalty has to be charged, if it is to be admitted in evidence. . . In the present case, what is required to be produced is the certified copy of the map, only for the purpose of identifying the properties described in an "instrument". Therefore, the certified copy of the map does not come within the meaning of Section 2(l)(j) and (k) of the Act so as to direct to pay the duty and penalty. The Karnataka Stamp Act does not provide for paying the duty and penalty in respect of sketches, maps, etc. If the transaction takes between two or three persons under the instrument and is not charged properly, in respect of such instrument the Court can direct the party to pay the duty and penalty as the case may be. But, mere production of the certified copy of the map does not come within the meaning of definition of an "instrument". — **Channamma and Others v Shantkumar, ILR 2004(2) Kar. 1052.**

KAIDB LAND

Companies Act, 1956, Section 21 — Transfer of Property Act, 1882, Section 105 — Karnataka Industrial Areas Development Act, 1966, Section 14(d) — Industrial plot allotted to company — Lease cum-sale deed executed in respect of — Company subsequently changing its name and presenting supplementary agreement for registration in order to substitute its old name by its new name in original lease-cum-sale deed, retaining terms and conditions of lease-cum sale unaltered — Company under its new name continuing to be same as it was under its old name except for change of its business of manufacturing readymade garments to software development — By reason of mere change of user of demised property from carrying on one business to another, fresh transaction does not take place — Stamp duty on consideration fixed under original agreement Cannot again be demanded in respect of such supplementary agreement which does not effect transfer or create any new right or liability in respect of demised premises. Held: The appellant was permitted by the third respondent herein to establish a software park. The execution of supplementary agreement became necessary consequent upon the change in the name of the company. By reason of such supplementary agreement although it was permitted to establish a software park but by reason thereof no fresh transaction was entered into. .... The said lease was governed by Section 105 of the Transfer of Property Act, 1882. By reason of the supplementary agreement, a restrictive covenant has been amended in terms whereof the appellant herein was permitted to carry on the business of a Technology Park instead of manufacture of readymade garments/leather garments. Only because the name of the company was changed, the same would not mean that a fresh transaction took place. Having regard to the change in the name of the company, the appellant's name was sought to be substituted in the original agreement. The period of the lease, the quantum of the premium paid and other terms and conditions remained unaltered except the restriction contained in clause 2(q) of the said deed, was removed. By reason of mere change of user from carrying on one business to another, it is true; a fresh transaction does not take place. The terms and conditions of the lease can be changed by mutual consent. Unless the essential ingredients thereof as contained in Section 105 of the Transfer of Property Act are not altered, it cannot be said that the parties to the contract entered into a fresh transaction. The third respondent merely reserved unto itself a right of re-entry on expiry of the said period of eleven years. It could in terms of the covenant of the lease also extend the period of tenancy or terminate the same. Unless the lease itself came to an end, the third respondent did not have any right to re-convey the property. By reason of mere change in the name of the company "Prasad Garments Private Limited" the erstwhile lessee also cannot be held to have transferred its leasehold interest in favour of the appellant herein..... Execution of an instrument which would attract payment of stamp duty in terms of Article -5(d) of the Act must involve transfer of the property or otherwise a right or liability may inter alia be created, transferred etc., as envisaged in Section 3 thereof. Once it is held that the supplementary agreement is neither a deed of lease nor a deed of sale within the meaning of Section 105 or Section 54 of the Transfer of Property Act, as the case may be, Article 5(d) of the Schedule to the Act will have no application. If Article 5(d) has no application, indisputably the residuary clause contained in Article 5(f)(i) would have. The appellant admittedly paid the stamp duty in terms thereof.... It is now well-settled that for the purpose of levy of stamp duty, the real and true meaning of the instrument must be ascertained. .... Having regard to the fact that the entity of the appellant cannot be said to be totally different from Prasad Garments Private Limited and as by reason of the supplementary agreement, no fresh transaction has been entered into, the impugned judgment cannot be sustained, which is set aside accordingly. — **Prasad Technology Park Private Limited, Bangalore v Sub-Registrar, Krishnarajapuram, Bangalore and Others, AIR 2006 SC 604.**

SETTLEMENT DEED-ATTESTATION

Transfer of Property Act, 1882, Section 123 — Indian Evidence Act, 1872, Sections 68 and 72 — Deed of settlement — Proof of execution of — Since law does not require attestation of such document though it is attested, it may be proved by admission or otherwise, as though no attesting witnesses existed — Examination of at least one of attesting witnesses, held, is not obligatory. Held: The settlement deed is not a document required by law to be attested. Section 72 of the Indian Evidence Act prescribes that an attested document not required by law to be attested may be proved as if it was unattested. The settlement deed though not required by law to be attested, has been attested by attestors. But then under Section 72 of the Indian Evidence Act, it is not obligatory on the part of the person propounding the document to examine the

attesting witness. The testimony of the attesting witness is not the only evidence by which a settlement deed can be established. It can be done by other kinds of evidence. — **Mrs. Devaki and Another v Mrs. Lingamma, ILR 2002 KAR 2125**

SETTLEMENT OR GIFT

Though under both property is given without consideration, however where gift under registered deed is for providing for dependent, document is deed of settlement and not deed of gift — Since document is intended to have immediate operation, it confers title to property immediately on beneficiary. Held: The word 'settlement' as defined under Section 2(24) of the Indian Stamp Act and Section 2(l)(q) of the Karnataka Stamp Act is a non-testamentary disposition, in writing, of movable or immovable properties made in consideration of marriage, for the purpose of distributing property of the settlor among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him or for any religious or charitable purpose and includes an agreement in writing to make such a disposition and where any such disposition has not been made in writing, any instrument recording, whether by way of declaration of trust or otherwise, the terms of any such disposition. When the document is executed for any of the purposes mentioned in the above sections of the Indian Stamp Act or the Karnataka Stamp Act, then it could be called a 'settlement deed'. There is a clear distinction between the deed of settlement and a deed of gift and both the documents are recognised as the mode of conveyance of the property. A plain reading of the document-Exhibit P. 1 in question makes it clear that what the deceased did under the settlement deed-Exhibit P. 1 was to distribute his properties referred to in that deed to his wife and daughter for the purpose of providing for them who were dependent on him and were als'o the members of his family. Thus, the document in question squarely falls within the term clause (b) of sub-section (24) of Section 2 of the Indian Stamp Act which sub-section defines the term 'settlement' under the Indian Stamp Act and the same is the definition of the word 'settlement' under the Karnataka Stamp Act also. A perusal of the document shows that the purpose of the same was to distribute or to settle the property of the deceased to his wife and daughter who were dependent on him. **Mrs. Devaki and Another v Mrs. Lingamma, ILR 2002 KAR 2125**

REFUND OF STAMP DUTY PAID

Refund of stamp duty and registration fee paid — Claim for — Sale deed registered in year 1996, relating to purchase of land claimed to be for construction of cinema house — Claim for refund preferred in 1998 on basis of State Government orders dated 3-6-1994 and 10-12-1997 exempting sale deed from levy of stamp duty and registration fee if land purchased under sale deed is used for constructing cinema house thereon — Claim, held, not admissible, in absence of statutory provision enabling-refund of stamp duty and registration fee. — The sale deeds had been registered by the petitioner in the year 1996. At that time the Government Order and the Official Memorandum under which they are claiming exemption of stamp duty and registration fee, were very much in force. In spite of that the petitioners have not availed of the same benefit. They have not mentioned in the sale deeds that they had purchased the properties for the purpose of constructing cinema theatres. The exemption now claimed by the petitioners ought to have been claimed before purchasing the stamp paper and paying the registration fee. Having completed the registration by paying the requisite stamp duty and registration fee prescribed under the Act, it is not open for the petitioners to seek refund of the same. Under the Act, if the stamp purchased is not used within a specified period, the purchaser can claim refund in accordance with the procedure contemplated. There is no provision for claiming refund of the stamp duty in respect of the used stamp paper or registration fee. Instead of availing the benefit of exemption at the right time, the claim for refund is put forth after a lapse of two and half years after completion of registration of the deeds. The attempt of petitioners is nothing but allowing the train arrived at the station and thereafter seeking to travel in the missed train. **Raja Rajagopal and Another v State of Karnataka and Others, 2000(2) Kar. L.J. 181.**

PART PERFORMANCE

The Supreme Court also considered Section 53A of the Transfer of Property Act in the case of Shrimant Shamrao Suryavanshi v. Pralhad Bhairoba Suryavanshi I.L.R. 2003 Karnataka 503 and held that a person obtaining possession of the property in part performance of an agreement of sale can defend his possession in a suit for recovery of possession filed by the transferor or by subsequent transferee of the property claiming under him. In the course of the said decision, the Apex Court also referred to the conditions to be satisfied before a transferee can seek to defend his possession under Section 53A of the Act. The said conditions are:
(1) there must be a contract to transfer for consideration of any immovable property;
(2) the contract must be in writing, signed by the transferor, or by someone on his behalf,
(3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
(4) the transferee must in part-performance of the contract take possession of the property, or of any part thereof,
(5) the transferee must have done some act in furtherance of the contract; and
(6) the transferee must have performed or be willing to perform his part of the contract.
If the conditions enumerated above are complied with, the law of limitation does not come in the way of a defendant taking plea under Section 53A of the Act to protect his possession of the suit property even though a suit for specific performance of a contract is barred by limitation.

UNREGISTERED DEED - STAMP AND PENALTY.

By an unregistered document which is found to be an usufructuary mortgage deed, no legally valid transfer of any interest in the property in question can be said to have been made, and when there is no such legally valid transfer, the document is not liable to stamp duty and as such no levy of stamp duty and penalty could be ordered. **Gurappa Kalappa v Pattanaik, (1974)2 Kar. L.J. Sh. N. 31.**

INSTRUMENT WHEN TO BE STAMPED.

Stamp duty under the Act is chargeable on an instrument on execution and the instrument should be stamped before or at the time of the execution. Failure to register the instrument after execution is an irrelevant matter for the purpose of determining the question whether the document is chargeable to duty, under the Act. Similarly, failure to obtain the previous sanction of the Collector under S. 47 of the Hyderabad Tenancy and Agricultural Lands Act, 1950 for the transfer, which invalidates the transfer, has no bearing on the question of the liability of the document to stamp duty under the Act. …….. Section 17 of the Act provides that all instruments chargeable with duty and executed by any person in the State of Mysore shall be stamped before or at the time of the execution. …….. Section 34 provides that no instrument chargeable with duty shall be registered unless such instrument is duly stamped. If the contention of the learned counsel for the petitioner, that where a document which requires registration under the law has not been registered, it is not liable to stamp duty, is accepted as valid, then the registration officer before whom an unstamped document or insufficiently stamped document is presented for registration cannot refuse to register the document on the ground that it is not duly stamped nor can such an officer impound the document under Section 33. The registration officer before whom any document is presented for registration has the statutory duty to consider whether the instrument is duly stamped in accordance with the provisions of the Act in force at the time of its execution. Under the Registration Act. a document can be presented for registration before the appropriate officer within four months from the date of its execution. If the argument of the learned counsel for the petitioner is accepted as valid, if there is any alteration in the rate of duty between the date of execution of a document and its registration, the rate of duty that will govern is the one in force at the time of the registration of the document. The provisions of the Act do not lend any support for such an argument. We are clearly of the opinion that stamp duty under the Act is chargeable on instruments on execution and the instruments should be stamped before or at the time of execu-| tion. The failure to register the instrument after execution is an irrelevant matter for the purpose of determining the question whether the document is chargeable to duty under the Act. Simi-larly, failure to obtain the previous sanction of the Collector for the transfer which invalidates the transfer has no, bearing on the question of the liability of the document to Stamp Duty under the Act. **Anna Rao v Bandeppa, AIR 1971 Mys. 63 (FB).**

REDUCTION OF STAMP DUTY

Notification Issued for — Since concession under notification dated 28-9-1994 is only for land purchased for construction of duly approved new cinema theatre, denial of concession for purchase of land with cinema theatre already existing thereon, is valid. Held: The notification dated 28-9- 1994 provides for exemption and concession only for the lands purchased for construction of the duly approved new cinema theatre and the said Government Order is not applicable to the lands with existing cinema theatre. In the present case the sale deed dated 13-2-1997 discloses the existence of Vinayaka cinema theatre as and therefore at the time of the execution of sale deed the cinema theatre was already in existence. Therefore, the order passed by the District Registrar and Deputy Commissioner of Stamps, Tumkur District is justifiable one and it is in accordance with law and it cannot be interfered with by this Tribunal in this appeal. — **K.B. Nagendra and Another v The Deputy Commissioner for Stamps and Registration, Tumkur District, Tumkur and Another, ILR 2005 KAR 2105.**

SOCIETY PROPERTY TRANSFERRED TO TRUST

Document described as Deed or Trust by President of National Education Society - Whether the document is a deed of trust or settlement deed - Terms of deed - Society becomes a trust - Property gets transferred and there is complete change in the status - No provision in Societies Registration Act to change character of society to trust - Transaction in effect amounts to transfer of property and is chargeable to stamp duty as settlement. Held: Undisputedly the property belonged to the society registered under the Society Registration Act and these properties are sought to be transferred and vested in the newly created Trust. The society existed as separate legal entity, and the Instrument in question seeks to convert the society into a trust and transfer and vest all the properties in the trust. There is no provision in the Societies Registration Act to convert the properties of a society into a Trust Property. Under these circumstances, looking to the very terms of the Instrument in question, the document falls within the meaning of settlement as defined under Section 2(l)(q)(iii) of the Act and as such it is liable to duty under Article 48 of the Schedule to the Act. - **The Chief Controlling Revenue Authority, Govt. of Karnataka v Dr. H. Narasimhaiah, ILR 1991 Kar. 1041**

GIFT DEED AND EXEMPTION IN STAMP DUTY

Gift deed — Stamp duty chargeable to — Gift to mother — Since family in relation to donor for purpose of stamp duty does not include mother, concessional rate applicable where donee is member of family of donor, is not attracted — Stamp duty is chargeable on basis of market value of property transferred as gift — Non-inclusion of mother in definition of "family", held, is not discriminatory. Held: The ground of challenge is that the explanation of 'family' in Article 28(b) is violative of Article 14 on account of non-inclusion of father and

mother. It is possible that in certain circumstances, logically mother, father and dependant brothers/sisters may be included in the definition of 'family'. But, it is also possible in a different set of circumstances, mother and father or siblings may not be considered as members of the family. When a person is married and has children, normally the spouse and children are alone considered as family, for several purposes. There is nothing unreasonable about it. Further, the question is not whether it is reasonable to include the parents, but whether their non-inclusion is unreasonable and arbitrary so as to render the explanation open to challenge on the ground of violation of Article 14. It is not possible to hold that when mother is not included in the definition, the definition of 'family' in the explanation becomes incomplete and violates Article 14 or that the explanation defining 'family' should be so interpreted as to include the mother. Equally baseless is the contention that because a gift from mother to son falls under Article 28(b), a gift from son to mother should also necessarily fall under Article 28(b). .... Article 28(b) will have to be read with the explanation, in a plain and normal manner. Only if the deed falls squarely under Article 28(b), the concessional rate of stamp duty can be availed. If not, the deed will be governed by Article 28(a). — **M.S. Narendra and Another vs State of Karnataka and Another, ILR 2001 KAR 4239.**

BENEFIT OF REDUCED STAMP DUTY CANNOT BE RESTRICTED TO STAMP DUTY PAYABLE UNDER SECTION 3 OF ACT, AND HAS TO BE EXTENDED TO ADDITIONAL STAMP DUTY PAYABLE UNDER SECTION 3-B OF ACT

Notification dated 16-6-1999 reducing "total stamp duty payable under Act" on instruments of conveyance of immovable property purchased from Messrs Information Technology Park Limited, Bangalore, upto fifty per cent — Where reduction of stamp duty granted under notification is reduction in total stamp duty payable under Act in respect of such instruments, benefit of reduced stamp duty cannot be restricted to stamp duty payable under Section 3 of Act, and has to be extended to additional stamp duty payable under Section 3-B of Act — Notice demanding full payment of additional stamp duty, held, is not sustainable and is liable to be quashed. Held: The notification expressly speaks of the total stamp duty payable under the Act and with reference to the category of transactions referred to in the notification itself. When there is no dispute that the sale deeds in respect of which the demands have now been raised, are the types of transactions which are covered under the notification, the only other question is as to whether a distinction can be made with regard to the concession vis-a-vis levy of stamp duty and levy of additional stamp duty. The notification does not expressly mention either of stamp duty leviable under Section 3 or additional stamp duty leviable under Section 3-B of the Act. On the other hand, what all it says is that the total stamp duty payable in respect of the transactions the concession of 50% is extended. As the words used is "total stamp duty payable", obviously it should include the additional stamp duty levied and collected under Section 3-B of the Act. If that were not to be the case, then there was no occasion to use the words "total stamp duty payable". ... It cannot be said that extending of the notification dated 16-6-1999 to be applicable to levy of duty as well as additional stamp duty is in the nature of a liberal interpretation of the notification or amounts to enlarging the application of the notification. No such exercise is either necessary or indulged in, when the wordings of the notification itself is looked into. The notification itself achieves the core object of granting exemption upto 50% on even additional stamp duty payable and to the class of transactions referred therein. . . . The three transactions being clearly covered by the notification dated 16-6-1999 being of the nature of transactions referred to therein and also granting exemption upto 50% of the total stamp duty payable in respect of the transaction, the stand of the petitioner claiming exemption from levy of stamp duty even in respect of payment of additional stamp duty under Section 3-B of the Act is perfectly justified and in consonance with the notification. The demand raised calling upon the petitioners to pay the difference of duty over and above what it had paid, is not sustainable in law and accordingly these demand notices are liable to be quashed- — **Tata Consultancy Services, Mumbai v State of Kamataka and Another, ILR 2004 KAR 674 Justice D.V.Shylendrakumar.**

MODE OF CANCELLATION OF COURT FEE STAMP PAPERS

No particular mode is prescribed either under any statute or any rules framed under statute — Provision requiring cancellation would be duly complied with if evidence of cancellation is such that same sheet cannot be applied to any other instrument — Rejection of plaint on technical ground that party or his Counsel has not affixed his signature on each and every sheet, is legally untenable, when each and every sheet is cancelled by typing thereon cause title of suit. Held: The suit of the plaintiff is to recover a huge amount of Rs. 13,39,34,033.80 and he has also paid the requisite Court fee of Rs. 8,77,0007-. The preliminary objection of the Trial Court is that all the stamp papers have not been defaced by the plaintiff or by his Counsel by putting his signature. . . . When such Court fee stamp papers are produced, the purpose of defacing is to ensure that it is not used in any other case. In the present case neither the plaintiff nor the plaintiff's Counsels have signed the stamp papers, but it is clear that the cause title of the parties have been duly typed. Therefore, it satisfies the requirement of Section 13 of the Karnataka Stamp Act, 1957. . . . Even otherwise, on filing of the papers with the Court along with the stamp papers, the Court office puts the seal of the Court on all the stamp papers and will punch the stamps. Thereby, it also results in defacing of the stamp papers... . There is no other provision in the Civil Rules of Practice or under the High Court Rules describing the manner as to in what way the stamp papers have to be defaced. Therefore, if the requirement of Section 13 of the Karnataka Stamp Act is complied, it suffices the matter. Accordingly, the Trial Court is directed to register the case and proceed in accordance with law. — **Shetty's Construction Company Private Limited, Hubli v Krishna Bhagya Jala Nigam Limited, Bangalore and Others, ILR 2004 Kar. 1467** :

POWER TO LEVY STAMP DUTY ON DOCUMENTS REGISTERED OUTSIDE THE STATE.

The main contention urged in this case is that the treatment meted out to the Central Government employees in not putting them on par with the State Government employees in regard to payment of Stamp duty on the mortgage deeds to be executed in favour of the respective Governments on housing loans is opposed to

principles of natural justice apart from offending the provisions of Article 14 of the Constitution of India .....The economic legislations should be viewed by the Courts with greater latitude and they cannot be struck down as invalid on the ground of crudities and inequities. In the instant case, the impugned notification came to be made keeping in view the financial position of the persons who are unequal in many respects. Therefore, the impugned notification having been based on reasonable classification, cannot be interfered with .... Section 19 of the Act entitles the State of Kaniataka to demand proper stamp duty from persons who have registered .their documents outside the State but the same are subsequently enforced within the State of Kaniataka and therefore the procedure initiated under Section 46-A of the Act, by the respondents is in consonance with the said provisions of the Act. - **Erappa and Others v State of Karnataka and Others, : ILR 1991 Kar. 3102.**

PRODUCTION OF DOCUMENTS — DUTY OF COURT TO EXAMINE DOCUMENT

Duty of Court to examine document independently whether it is duly stamped or not, irrespective of whether objection against marking is raised or not — Once Court admits document in evidence even wrongly, such admission becomes final and cannot be called in question thereafter on ground that document was not duly stamped. Held: A duty is cast upon every Judge to examine every document that is sought to be marked in evidence. The nomenclature of the document is not decisive. The question of admissibility (with reference to Section 34 of Karnataka Stamp Act, or Section 35 of Indian Stamp Act and Section 49 of Registration Act) will have to be decided by reading the document and deciding its nature and classification. The tendency to mark documents without inspection and verification should be eschewed. Even while recording ex parte evidence or while recording evidence in the absence of the Counsel for the other side, the Court should be vigilant and examine and ascertain the nature of the document proposed to be marked and ensure that it is a document which is admissible. The Court should not depend on objections of the other Counsel before considering whether the document is admissible in evidence or not. Section 33 of the Stamp Act casts a duty on the Court to examine the document to find out whether it is duly stamped or not/ irrespective of the fact whether an objection to its marking is raised or not. It should be borne in mind that once a document is admitted in evidence, it cannot be called in question thereafter on the ground that it was not duly stamped. Once the Court admits a document even wrongly, such admission becomes final and cannot be reopened. Hence, the need for diligence not only on the part of the opposite Counsel, but also on the part of the Court having regard to the statutory obligation under Section 33 of Karnataka Stamp Act. Procedure to be followed while considering admissibility of — If Court comes to conclusion that document is insufficiently stamped, Court should determine deficit Stamp duty and penalty payable and direct party to pay same and admit document after payment is made — If payment is not made, Court has to impound document and send same to District Registrar for having dealt with in accordance with law as per Section 37(2) of Karnataka Stamp Act.

A combined reading of Sections 33, 34, 35, 36, 37 and 41 of the Karnataka Stamp Act requires the following procedure to be adopted by a Court while considering the question of admissibility of a document with reference to the Stamp Act; (a) When a document comes up before the Court, it has to examine and determine whether it is properly stamped. When the other side objects to it, the Court should consider such objection and hear both sides; (b) After hearing, if the Court comes to the conclusion that the document has been duly stamped, it shall proceed to admit the document into evidence; (c) on the other hand, if the Court comes to the conclusion that the document is not stamped or insufficiently stamped, it shall pass an order holding that the document is not duly stamped and determine the Stamp duty/deficit stamp duty and penalty to be paid and fix a date to enable the party who produces the document to pay the Stamp duty/deficit Stamp duty plus penalty; (d) If the party pays the duty and penalty the Court shall certify that proper amount of duty and penalty has been levied and record the name and address of the person paying the said duty and penalty and then admit the documr a in evidence as provided under Section 41(2); and the Court shall send an authenticated copy of the instrument to the District Registrar together with a Certificate and the amount collected as duty and penalty, as provided under Section 37(l)(e). If the party does not pay the duty and penalty, the Court will have to pass an order impounding the document and send the instrument in original, to the District Registrar for being dealt with in accordance with law as per Section 37(2) of the Karnataka Stamp Act.

Document insufficiently stamped and document requiring registration but not registered — Provisions of both Acts bar such documents being received in evidence — Regarding insufficiently stamped document, bar is absolute, subject to provision enabling Court to collect deficit Stamp duty and penalty — Regarding unregistered document bar is not so absolute, as unregistered instrument may be received as evidence of contract in suit for specific performance or as evidence of part performance of contract of sale of immovable property or as evidence of collateral transaction not required to be effected by registered instrument. Held: The difference between Section 34 of the Karnataka Stamp Act and Section 49 of the Registration Act should also be borne in mind. Section 34 says "no instrument chargeable with duty shall be admitted in evidence for any purpose, or shall be acted upon, registered or authenticated by. . . unless such instrument is duly stamped". Subject to the provision enabling the Court to collect the deficit Stamp duty, the bar under Section 34 is absolute and an instrument which is not duly stamped cannot be admitted at all in evidence for any purpose. On the other hand, Section 49 of the Registration Act which deals with the effect of non-registration of documents provides that if a document which is required to be registered under law is not registered, then such document shall not affect any immovable property comprised therein, nor can it confer any power to adopt, nor can it be received as evidence of any transaction affecting such property or conferring such power. But the proviso to Section 49 provides that an unregistered instrument may be received as evidence of a contract in a suit for specific performance or as evidence of part performance of a contract for the purpose of Section 53-A of Transfer of Property Act or as evidence of any collateral transaction not required to be effected' by registered instrument. For example, if a sale deed is executed on a white paper and is not

stamped, it can neither be admitted in evidence nor be used for any purpose. But if a sale deed is executed on requisite stamp paper but is not registered and the executant refuses to admit registration, then the purchaser has a right to file a suit for specific performance, and rely on the sale deed, even though it was not registered, as evidence of the contract for sale. Thus, though both Section 34 of the Stamp Act (corresponding to Section 35 of the Indian Stamp Act) and Section 49 of the Registration Act, both bar the document being received as evidence, the bar is absolute under Stamp Act (unless deficit duty and penalty is paid) and the bar is not absolute under Registration Act.— **K. Amarnath v Smt. Puttamma, 2000(4) Kar. L.J. 55.**

INSUFFICIENTLY STAMPED DOCUMENTS PRODUCED -PROCEDURE.
The petitioners filed claim petitions contending that they had acquired title to the property attached by means of sale deeds executed by defendant in their favour. The sale deeds were insufficiently stamped and petitioners applied praying that the documents be sent to the Deputy Commissioner under S. 37(2) of Stamp Act. The Munsiff dismissed the applications on the ground that when they are tendered in evidence, he will decide the question of insufficiency of stamp. In revision. Held, the Munsiff rightly dismissed the applications to send the documents to the Deputy Commissioner under S. 37(2). When a document comes before the Court for the purpose of being used in evidence, the first jurisdiction of determining the duty and penalty is that of the Court. It is only when that stage is crossed and the document is not tendered in evidence, then and then only does S. 37(2) come into play. **Lakshminarayanachar v Narayan, (1969)2 Mys. L.J. 299.**

SUB-REGISTRAR TO WHOM DEED IS PRESENTED FOR REGISTRATION, HAS NO POWER TO IMPOUND DEED FOR INSUFFICIENCY OF STAMP AND REFER MATTER TO DEPUTY COMMISSIONER FOR DETERMINING OF STAMP DUTY PAYABLE
If Sub-Registrar finds that stamp duty paid is insufficient, he can refuse to register deed till deficiency in stamp duty is made good, and it is also open to party to appeal against Sub-Registrar's order demanding payment of additional stamp duty — Impounding of document and reference made before registration of deed are without jurisdiction and, so also order passed by Deputy Commissioner on reference, Held: Unless the document is registered under the provisions of the Indian Registration Act, 1908, the Registering Authority, the Sub-Registrar has no authority to make reference of the document to Deputy Commissioner, who is notified by the Government in exercise of its power under Section 45-A of the Act, for the purpose of exercise of his power under this provision of the Act. Since the document was not registered, he had no jurisdiction to determine the sufficiency or otherwise of the stamp duty payable on the document to be registered before the Sub-Registrar under the provisions of the Act 1957 and the relevant rules. For the reasons stated supra, the Sub-Registrar should not have refused to register the document when it was presented for registration. As contemplated under the provisions of Section 35 of the Registration Act of 1908 when the Sub-Registrar has refused to register the document presented before him, he has to follow the procedure as provided under Section 71 of the Act, 1908 the order of reference of the unregistered document made by the Sub-Registrar to the Deputy Commissioner amounts to refusal to register the document for which the Sub-Registrar was statutorily obligated to assign his reasons for his refusal to register the document. Upon such order the petitioner has got a statutory remedy under Section 72 of the Act, 1908. Therefore, the action of Sub-Registrar in not registering the document and referring the document to the Deputy Commissioner for examining as to whether the stamp duty paid on the document is sufficient or not is bad in law. Therefore, the order passed by the Deputy Commissioner on the reference is not in conformity with either the provisions of the Karnataka Stamp Act or Indian Registration Act. Therefore, the impugned order passed by him is wholly unsustainable in law. . . . The plain reading of sub-sections (2) and (3) of Section 45-A of the Act, 1957, it makes very clear that the Sub-Registrar has got power to make reference of the conveyance deed after registration of the document under Section 45-A of the Act, 1957. Therefore, the Deputy Commissioner of the area who has been notified for the purpose of the provisions of the Karnataka Stamp Act, 1957 has to examine the document with regard to the value of the property which is the subject-matter of 'Conveyance' Deed, after registration of the document by the Registering Authority under the provisions of the Indian Registration Act, then only the second respondent can exercise his power under Section 45-A(2) and (3) of the Act of 1957. — **Dr. Usha Mohan Das v The Divisional Commissioner, Bangalore Division, Bangalore- and Others, 2001(3) Kar. LJ.463.**

LEASE DEED – STAMP DUTY INSUFFICIENCY
Document styled, as lease not properly stamped produced during the course of eviction petition by the petitioner - Whether Trial Court was right in holding it as inadmissible evidence. Held: Proviso (a) to Section 34 of the Karnataka Stamp Act, however, provides for a procedure to pay the stamp duty and the prescribed penalty, if a party requires the document to be admitted in evidence. That procedure is still available to the petitioner - **Hanumanumul Baid v Ananthapadmanabha, ILR 1992 Kar. 1133.**

INSTRUMENT NOT DULY STAMPED — NOT ADMISSIBLE IN EVIDENCE, NOT EVEN FOR COLLATERAL PURPOSES.
Section 34 of the Act mandates, no document shall be admitted in evidence for any purpose, unless it is duly stamped. Section puts a complete embargo and bar against admissibility of such a document which is not stamped, or which is not duly stamped, and it cannot be made use of for any purpose. — **Doddabasappa v Gurubasappa (Deceased) by LRs. and Others AIR 2001 Kant 149**

Javar Chand v. Pukhraj Surana; A.I.R. 1961 S.C. 1655. Undoubtedly, if a person having by law authority to receive evidence and the civil court is one such person before whom any instrument chargeable with duty is produced and it is found that such instrument is not duly stamped, the same has to be impounded. The duty

and penalty has to be recovered according to law. Section 35, however, prohibits its admission in evidence till such duty and penalty is paid. The plaintiff has neither paid the duty nor the penalty till today. Therefore, stricto sensu the instrument is not admissible in evidence. ……."Where a question as to the admissibility of a document is raised on the ground that it has not been stamped or has not been properly stamped, the party challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the Court. The Court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case. Once a document has been marked as an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, Section 36 comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to the Trial Court itself or to a Court of Appeal or Revision to go behind that order. Such an order is not one of those judicial orders which are liable to be reviewed or revised by the same Court or a court of superior jurisdiction."

Supreme Court in the case of Ram Rattan v Bajrang Lal AIR 1978 SC 1393:
"6. When the document was tendered in evidence by the plaintiff while in witness-box, objection having been raised by the defendants that the document was inadmissible in evidence as it was not duly stamped and for want of registration, it was obligatory upon the learned Trial Judge to apply his mind to the objection raised and to decide the objection in accordance with law. Tendency sometimes is to postpone the decision to avoid interruption in the process of recording evidence and, therefore, a very convenient device is resorted to, of making the document in evidence subject to objection. This, however, would not mean that the objection as to admissibility on the ground that the instrument is not duly stamped is judicially decided; it is merely postponed. In such a situation at a later stage before the suit is finally disposed of, it would none the less be obligatory upon the Court to decide the objection. If after applying mind to the rival contentions the Trial Court admits a document in evidence, Section 36 of the Stamp Act would come into play and such admission cannot be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. The Court, and of necessity it would be Trial Court before which the objection is taken about admissibility of document on the ground that it is not duly stamped, has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case and where a document has been inadvertently admitted without the Court applying its mind as to the question of admissibility, the instrument could not be said to have been admitted in evidence with a view to attracting Section 36 (See Javer Chand v Pukhraj Surana). The endorsement made by the learned Trial Judge that "objection, allowed subject to objection", clearly indicates that when the objection was raised it was not judicially determined and the document was merely tentatively marked and in such a situation Section 36 would not be attracted".

In HINDUSTAN STEEL LTD. vs. DILIP CONSTRUCTION CO., AIR 1969 SC 1238, it has been held as follows:-
"The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments. It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponents. The stringent provisions of the Act are conceived in the interest of the revenue. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument."

COURT SHOULD APPLY ITS MIND TO THE QUESTION OF ADMISSIBILITY EVEN IF THERE IS NO OBJECTION
Nothing on record to show that Court applied its mind to the question of admissibility nor the act of making endorsement has been made — Hence question of admissibility of document of evidence kept open to be decided by Trial Court at the time of final decision. Held: There is nothing on record to show that the Court has applied its mind to the prior act of examining whether the document Ex. P-l is admissible in evidence. The second act namely marking the endorsement under Order 13, Rule 4(1), C.P.C. also has not been made admittedly. It is no doubt true that the defendants did not raise any objections at the time of marking the document in question as Ex. P-l. But I do not think it absolves the responsibility placed on the Court in examining the document for admissibility. The facts of the case disclose that according to the plaintiff himself Ex. P-l represented an agreement of sale, a completed contract whereas the defendants have contended that the document indicates only a proposal and is not a completed contract. It is neither necessary nor proper for this Court to express any opinion on this aspect as it may prejudice the case of either party before the Trial Court. But what is important to note is that the admissibility of the document Ex. P-l which is not stamped was a serious question to be considered by the Trial Court at the time of marking the document. There is nothing on record to show that the Trial Court had applied its mind consciously to the question whether the document was admissible or not. By no stretch of imagination could it be said in this case that the document has been admitted in evidence. The proper order that could be passed is to keep open the question of the admissibility of the document Ex. P-l leaving it to be decided by the Trial Court at the time of the final decision of the suit. - **Narasamma and Another v Arjun M. Menda and Others, ILR 1996 KAR 136**

MURUGHARAJENDRA CO. v. CHIEF CONTROLLING REVENUE AUTHORITY and Ors., 1974(1) KLJ 177 (FB) is again under a different context. Title deeds had already been deposited with the mortgagee towards an earlier loan. A further loan was obtained by the mortgagor on the security of the same title deeds deposited earlier with the creditor. It was held by the Full Bench, that the mere acknowledgment by both the parties that the same title deeds would be held as security for the additional sum does not require to be stamped under the Karnataka Stamp Act, because, under the circumstances of the said case, the subsequent

letter was not intended by the mortgagees to be the sole repository of the terms of the equitable mortgage and it was only a letter containing an acknowledgment of an already concluded equitable mortgage; this second letter was not an instrument by which any right or liability was created in respect of an immovable property.

In MALKAJAPPA v. C. AYAMMA and ANR., 1964(1) Mys.L.J. 299 a document purporting to be a mortgage was produced in evidence; but it was not duly stamped, Narayana Pai, J. (as he then was) held that, a document which was not registered is not chargeable to stamp duty as a mortgage; to be a mortgage, (other than deposit of title deeds), registration is compulsory. It was held: "If one is to be guided only by the language of the document, it may perhaps be possible to say that some security was intended to be given under the document. But, for the purpose of the Stamp Act, a mortgage deed should be a document under which one person transfers or creates to or in favour of another person a right over in respect of specified property for the purpose of securing money advance, or to be advanced by way of loan, or an existing or future debt, or the performance of an agreement. The essence of the definition is that the document should effect a transfer."

PALU-PATTI KARAR UN REGISTERED TO SHOW SEVERANCE OF STATUS

Production of earlier Palu-patti Karar, not duly stamped and registered, only to prove as to when joint status stood severed - Held, Palu-patti Karar admissible in evidence; Order of Trial Court directing payment of duty and penalty on the document set aside. In this Court what has been contended is that once the Court came to the conclusion, it was admissible in evidence for collateral purpose of only proving the severance of status and not evidence of the partition, the Court was not correct in asking the plaintiff to pay duty and penalty as if the document was not required to be stamped. Undoubtedly, under the Karnataka Stamp Act an instrument of partition is required to be duly stamped according to the provisions contained there, i.e., on the market value of the largest of the shares. But, that has already been done in the deed of partition executed in the year 1968 and duly registered in respect of the same properties pursuant to what was agreed in the instrument in question. Therefore, the learned Munsiff committed an error in coming to the conclusion that there can be two partition deeds in respect of the same properties by holding the instrument in question to be also a deed of partition. If parties have paid duty on the instrument of partition of 1968, that will be the document which will be effective being a registered document and the earlier palu-patti has no other value except as evidence of severance of Joint status, that is, the point of time to be reckoned for purpose of severance of status - **Narayan Rao, M.S. v M.S. Shivarama, 1988(2) Kar. L.J. 330.**

PALU-PATTI KARAR

Documents not required to be registered — Document merely reciting properties which were assigned to respective brothers in previously concluded partition of joint Hindu family does not declare any right and hence there is no necessity of registering such document — Such document produced, not as suit document, but only for collateral purpose of evidencing possession of property, is admissible as evidence in suit for perpetual injunction.Document refers to the items of the properties which were given to the brothers. It is only a list of articles given to the respective brothers on 31-3-1976 under the heading 'division regarding family amenities and properties'. ... In this case, the document in question is not a suit document. It is only produced for collateral purposes to show that the respondent is in possession of the property. According to the parties, the partition had taken place in the year 1957. Document came into being only to show the items of the property allotted to the shares of each brother. Therefore, the learned Court below has come to the conclusion that it is nothing but a palupatti or memorandum of partition. .... The same was produced only to show severance of the coparcenary joint family n the same is indicating the list of properties allotted to each brother by virtue of earlier partition effected amongst them. Partition list which are mere records of previously completed partition between the parties can be admitted in evidence even though they are unregistered to prove the facts of partition..... Even if the document is not admissible in evidence because of the bar imposed by the provisions of Sections 17 and 49 of the Registration Act, still the party is not precluded from adducing oral evidence to show that a particular property has fallen to their share. — **K.C. Thimma Reddy v K. Govinda Reddy, 2000(1) Kar. L.J. Sh. N. 36.**

SALE AGREEMENT – POSSESSION DELIVERED- STAMP DEFICIT AND PENALTY

Agreement to sell immovable property — Stamp duty payable on — Where possession of property is delivered pursuant to such agreement, stamp duty payable is same as duty payable in respect of conveyance on market value of property agreed to be sold — If such agreement is insufficiently stamped, same is inadmissible in evidence unless deficit stamp duty is paid along with penalty which is ten times such deficit duty. Held: Article 5(e) of the Karnataka Stamp Act prescribes, that agreement if relating to sale of immovable property, wherein part performance of the contract, possession of the property is delivered or is agreed to be delivered without executing the conveyance, then, the stamp duty payable is the same as conveyance under Article 20 on the market value of the property. The explanation to Article 5(e) to (i) prescribes that where subsequently, conveyance is executed in pursuance of such agreement the stamp duty already paid shall be adjusted towards the total duty leviable on the conveyance. Thus, it is clear that where an agreement of sale under which the possession is delivered, it amounts to conveyance and hence, attracts stamp duty as conveyance on the market value of the property. In the instant case, the agreement entered into between the parties, which is a basic document for claiming the relief of specific performance and for injunction, clearly provides for sale of immovable property and it also recites that the possession has been delivered. Therefore, the document in question clearly falls within the scope of Article 5(e) of the Karnataka Stamp Act and its Explanation (II). If the Legislature thought that it would be appropriate to collect duty at the stage of the agreement itself, if it fulfills certain conditions instead of postponing collection of such duty till the completion of the transaction by execution of a conveyance deed in as much as all substantial conditions of a

conveyance have already been fulfilled, such as an agreement if relating to sale of immovable property, where, in part performance possession of the property is delivered and what remains to be done is a mere formality of paying the balance and of execution of sale deed, it would be necessary to collect duty at a later stage itself though right, title and interest may not have passed as such. Still by reason of the fact that under the terms of the agreement there is an intention of sale and possession of the property has also been delivered, it is certainly open to the State to charge such instruments at a particular rate, which is same as a conveyance on the market value of the property, and that is exactly what has been done in the present case. Therefore, it cannot be said that the impugned order made by the Trial Court suffers from any such illegality or material irregularity so as to call for interference in revision. The document, which is insufficiently stamped, cannot be permitted to be used for collateral purpose in view of Section 34 of the Karnataka Stamp Act which clearly prescribes that no instrument chargeable with duty shall be admitted in evidence for any purpose. In the instant case, the proper stamp duty payable under the Karnataka Stamp Act being not paid and when the document was sought to be used in evidence, the Court below was justified in passing the impugned order which cannot be found fault with. — **Jayalakshmi Reddy v Thippanna and Others, ILR 2002 KAR 5163**

DETERMINATION OF STAMP DUTY AND PENALTY PAYABLE

Unstamped instrument — Production of in evidence — Determination of stamp duty and penalty payable — Trial Court can determine same, and there is no need to make reference to Registrar of Stamps for determination of same. Held: There is no provision in Karnataka Stamp Act, 1957, which envisages a reference to the Registrar of Stamps for determining the duty payable on any instrument. The scheme of Section 34 of the Karnataka Stamp Act, 1957, also does not envisage any such reference being made before the document could be marked. The amount of duty payable on the sale deed (in the absence of any material to show that the property had been undervalued), is relatable to the consideration that was paid and received by the parties to the transaction. The penalty amount leviable on the instrument also didn't require or call for any enquiry which could possibly call for a reference to the Registrar. The Court below was therefore justified in holding that the duty payable on the instrument as also the penalty had to be calculated by the Court and not by the Registrar. — **Mahadeva v The Commissioner, Mysore City Corporation and Others, ILR 2003 KAR 1653**

DETERMINATION OF STAMP DUTY AND PENALTY PAYABLE

Jurisdiction of Court — When a document chargeable to duty and produced before Court for purpose of being used in evidence is either not stamped at all or insufficiently stamped — Court to determine duty and penalty and impose it after impounding — Security deposit in lease — Duty payable comes under Section 30(c) of the Act covered by fine, premium or money advanced. Held: When a document comes before the Court for the purpose of being used in evidence, the first jurisdiction of determining the duty and penalty is that of the Court. Section 34 of Karnataka Stamp Act prohibits the reception in evidence of documents which are insufficiently stamped. But a proviso is added thereto according to which the same is chargeable and the person having authority to receive evidence may impose such duty together with the penalty as specified therein. The exercise of jurisdiction under the proviso to Section 34 arises when a document is actually tendered in evidence but it might have been produced much earlier by one or other of the parties to the litigation. When a document chargeable to duty and produced into Court in connection with a proceeding before it is found by that Court to be either not stamped at all or insufficiently stamped it is bound to impound it. Idea of impounding it is to enforce collection of duty or deficient duty together with penalty. When a document comes before the Court for the purpose of being used in evidence, the first jurisdiction of determining the duty and penalty is that of the Court. It is only when that stage has crossed and the document is not tendered in evidence that it ceases to be a document impounded by the Court. In cases where party has produced certain document and expressly makes his intention clear that he would not rely upon that document in support of his causes pleaded, then that would amount to his not producing for purposes of placing reliance on that document by way of legal evidence then the question of Court exercising its powers under Section 34 of the Karnataka Stamp Act would not arise and the Court has nothing more to do with it as a Court but as impounding authority has to send the same to the Deputy Commissioner under sub-section (2) of Section 37, since Stamp Act is a fiscal legislation and its object is to collect revenue. The only question that requires consideration is whether the security deposit of Rs. 7,500/-comes under ambit of Section 30(c) of the Karnataka Stamp Act for purposes of payment of additional stamp duty than the one that is already paid on the document. Whether payment of a sum of Rs. 7,500/- mentioned in Clause (4) of Part 11 as security deposit represents nature of premium or money advanced in addition to rent reserved for purposes of payment of stamp duty as a conveyance under Section 30(c) of the Karnataka Stamp Act. Premium is defined in Section 105 of Transfer of Property Act, 1882 as the price paid or promised for a lease. It is to be noted that both Clauses (b) and (c) of Article 30 use the words fine, premium or money advanced. The duty that is payable on the document in question comes squarely under the ambit of Article 30(c) of the Karnataka Stamp Act, 1957. - **Leelamma Samuel v T.M. Francis, ILR 1994 KAR 3143.**

STAMP OBJECTION

Document insufficiently stamped admitted in evidence — Such document cannot be rejected in evidence when law provides for recovery of deficit stamp duty with penalty and same has in fact been recovered — Stamp Act is a fiscal measure enacted to secure revenue for State and not enacted to arm litigant with weapon of technicality to meet case of his opponent — Court is not required to consider admissibility of document in evidence from stand point of stamp law — Once Court, rightly or wrongly, admits document in evidence, admission cannot be called in question at any stage of suit or proceeding on ground that document is insufficiently stamped. Held.—Instruments cannot be rejected on the ground that they are inadmissible on

the ground of being not properly stamped when the requisite duty and penalty is recoverable and recovered. .... .In the instant case, the Karnataka Stamp Act, or any enactment providing for recovery of stamp duty on specified instruments, is a fiscal enactment intended to secure to the State specified stamp duty. Sections 34 and 35 of the Karnataka Stamp Act is intended to effectuate the intention of the legislature by barring the admission of document unless the requisite stamp duty is paid along with the stipulated penalty. When once a document is admitted in evidence rightly or wrongly, Section 35 of the Karnataka Stamp Act bars any objection to the admissibility of the document at a later stage in the same proceedings or otherwise. The only exception is Section 58 of the Karnataka Stamp Act. In the instant case Section 58 of the Karnataka Stamp Act is inapplicable. When once a document has been admitted, rightly or wrongly, in evidence, it is not open to a party in any other proceedings to contest the admissibility of the document on the ground that the document is not properly stamped in accordance with law. Sections 34 and 35 come into operation when for the first time a document is tendered in evidence and not on subsequent occasions when it is already tendered as evidence. In the instant case, the document was admittedly marked in the litigation between the same parties and the same is now sought to be tendered as evidence in this case. The question of admissibility of the document on account of being improperly stamped cannot now be raised by the defence in the suit. .... .The Trial Judge committed a jurisdictional error in rejecting the document in question. — **Sakamma v Pavadi Gowda and Others, ILR 1998 KAR 3842.**

STAMP OBJECTION

Document admitted in evidence — Determination of question as to sufficiency of stamp duty paid thereon — Court postponing determination of question at later stage while admitting document in evidence, it amounts to admission of document subject to objection — It is obligatory to decide question before disposing of suit finally — Immunity from objection contemplated in Section 35, is not attracted to documents admitted subject to objection. Held: In the present case, the Court below has postponed the determination of question of stamp duty. At the time when the document was produced and filed at the stage of evidence objection was raised, but the Court below postponed it for decision later on. So, it had not decided the question of admissibility of the document for want of stamp duty. At that stage, it had only been taken on record for the purpose of avoiding delay, subject to determination of the question, later on. May it be an irregularity, may it be for purpose of avoiding any delay in course of recording of evidence and interruption. There may be some irregularity, but it did not bar the jurisdiction of the Court to determine that question. A document which has been taken on record subject to objections, clearly indicates that the question of admissibility is to be later on decided, and the same has not been decided at the stage when it was filed, section makes it obligatory to decide that question. .... The taking of document subject to objections clearly indicated in the present case Court has not applied its mind, and has not determined the question of admissibility of document to attract Section 35 of the Karnataka Stamp Act. — **Doddabasappa v Gurubasappa (Deceased) by LRs. and Others, AIR 2001 KAR 149**

STAMP OBJECTION

Document tendered in evidence — Admissibility questioned by party opposite on ground that document was not duly stamped — Court, in order to ensure uninterrupted recording of evidence, marking it as exhibit pending adjudication of objection — Such marking of document tentatively, held, is not conclusive of its admissibility and does not give it immunity from being questioned — Order subsequently passed by Trial Court holding that document was not duly stamped and directing party tendering same to pay deficit stamp duty with penalty — Order, held, does not call for interference in revision.Held: In the present case mere marking of a document as exhibit is not conclusive for the purpose of giving it any immunity from questioning under Section 35 of the Act, because, admittedly the document was not admitted after judicial application of mind and the marking was only for the sake of convenience and the issue of admissibility was postponed to facilitate uninterrupted recording of evidence. . . In this view of the matter, direction of the Trial Court to the plaintiffs to pay deficit duty with penalty as provided under clause (a) of the proviso to Section 34 of the Act cannot be said to be suffering from any error requiring interference by this Court. — **Riyaz Khan and Others v Modi Mohammed Ismail and Others, ILR 2002 KAR 3369.**

STAMP OBJECTION

Unregistered and unstamped sale deed — Production of, in evidence — Objection to — Direction issued by Court, while judicially determining objection, to party relying upon such instrument to pay stamp duty and penalty before admitting it in evidence to prove nature of his possession of property — Provisions of Stamp Act make no exception in favour of document sought to be admitted in evidence even for proving collateral transaction, and prescribe condition subject to which such document can be admitted in evidence — Order of Trial Court, held, needs no interference. Held: Even when a document is inadmissible for want of registration, the same is admissible to show the character of the possession of the person in whose favour it is executed. There is therefore no gainsaid that ihe unregistered sale deed relied upon by the petitioner could for the limited purpose of proving the nature of his possession be let into evidence notwithstanding the fact that the deed was compulsorily registrable under Section 17, but had not been so registered. . . . That a document is being admitted for a collateral purpose does not however necessarily mean that it can be let in for that purpose even when it is not duly stamped. Section 34 of the Karnataka Stamp Act, 1957, inter alia provides that no instrument which is chargeable to duty shall be admissible in evidence for any purpose or shall be acted upon, registered or authenticated by any person or by any public officer unless such instrument is duly stamped. The expression 'for any purpose' used in Section 34 of the Karnataka Stamp Act/1957, is wide enough to include use of any document for a collateral purpose or transaction. ... It cannot be accepted that just because an unregistered document can be admitted in evidence for proving a collateral transaction, any

such use would entitle the document to be marked as an exhibit de hors the provisions of Section 34 of the Karnataka Stamp Act, 1957. The provisions of Section 49 of the Act remain limited to the consequences of no n-registration of compulsorily registrable documents. The said provision does not deal with or stipulate the consequence that follow if an instrument sought to be proved is not duly stamped. That part is provided for separately by provisions of Section 34 of the Karnataka Stamp Act, 1957, which does not make any exception in favour of documents sought to be admitted in evidence for proving a collateral transaction. So long as an instrument is chargeable with duty, the provisions of Section 34 would render it inadmissible in evidence for any purpose unless the same is duly stamped. . . . The proviso to Section 34 prescribes the conditions subject to which a document which is not duly stamped can be admitted in evidence. It inter alia provides for payment of the duty with which the same is chargeable or in the case of an instrument insufficiently stamped, the amount which is required to make up such duty together with the prescribed penalty. There is no conflict between what is permitted by the proviso to Section 49 of the Registration Act on the one hand and Section 34 of the Karnataka Stamp Act, 1957, on the other. The demand of duty and penalty in terms of the proviso to Section 34 before the document could be marked in token of its having been admitted in evidence did not therefore suffer from any error of law to warrant interference. Whenever an objection regarding the admissibility of an instrument on the ground of its being unstamped or insufficiently stamped is raised, the Court is required to determine the objection before proceeding any further, unlike other cases where an objection to the admissibility of a document on any other ground may be examined at a later stage and the document tentatively marked to avoid delay in recording of the evidence. — **Mahadeva v The Commissioner, Mysore City Corporation and Others, ILR 2003 KAR 1653**

STAMP OBJECTION

Sections 34 to 37 - Held, have no relevance to enquiry under Section 45A of Act - Scope explained. Section 34 of the Act has no relevance to the action taken in the present case under Section 45A. That section comes into operation when a person produces a registered document which even, according to the nature of transaction and the valuation of the property as discernible from the document itself is insufficiently stamped. According to the provision, if a document which is insufficiently stamped is produced before a Court, Tribunal or Authority, it would be in-admissible evidence but could be admitted in evidence, if the party concerned pays the penalty at the rate provided in the proviso. Similarly Section 37 provides as to how instruments impounded should be dealt with. That also has no relevance for this case. **Pushpa, M. v State of Karnalaka, 1987(1) Kar. L.J. 77.**

UNSTAMPED AGREEMENT TO SELL

Suit for specific performance filed on basis of — Such instrument required to be stamped under law but not stamped is not admissible in evidence for any purpose, unless stamp duty and penalty are paid — Expression "any purpose" includes issue of interlocutory order of injunction to restrain other party from alienating suit property during pendency of suit.Held: Section 34 of the Karnataka Stamp Act, 1957, inter alia provides that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority lo receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped. Proviso to Section 34 makes such documents admissible in evidence upon payment of penalty. The expression "for any purpose" appearing in the section is wide enough to include within its amplitude use of the document for the purposes of issue or refusal of injunctions prayed for in a suit for specific performance or similar other reliefs. The document in question has admittedly been produced by the plaintiffs-appellants before the Court below. It has come to the notice of the said Court that the document in question is not duly stamped. The Court would therefore be entitled to impound the same in exercise of its power under Section 33 of the Act. Neither Section 33 nor Section 34 of the Act makes an exception to the general rule or make unstamped or under-stamped documents admissible for the purposes of issuing interlocutory orders. . . In that view, therefore, the Court below was justified in insisting upon the payment of the stamp duty and the penalty on the agreement to sell before it could issue an injunction in favour of the appellants on that basis. Instead of doing so, the Court below appears to have taken an indulgent view by which it has issued an injunction but made its continuance subject to the payment of the stamp duty and penalty on the same by the appellants. The error committed by the Court below is thus for the benefit of the appellants. The Court may well have been justified in ignoring the document so long as it was not properly stamped and the penalty on the same not paid. — **KB. Jayaram and Another v Navineethamma and Others, AIR 2003 Kant 241.**

COURT SHOULD APPLY ITS MIND ABOUT ADMISSIBILITY OF DOCUMENT

Proper procedure to be followed by Courts enumerated.Held: Marking of a document is a ministerial act whereas, admitting a document in evidence is a judicial act. Before a document is let in evidence, there should be a judicial determination of question whether it can be admitted in evidence or not. In other words, the Court admitting a document must have applied its mind consciously to the question whether the document was admissible or not. ..... Even if in the affidavit filed by way of examination-in-chief, the defendant is referring to the document on which he relies on and has given an exhibit number to the said document, the same has to be ignored by the Court and the witness should be called upon to enter the witness-box and if he wants to rely on the said documents, to tender the said documents in evidence, before the Court. .... The proper procedure to be followed by the Courts after the amendment of the Code of Civil Procedure would be as under, (a) When the case is posted for evidence, the examination-in-chief of a witness shall be on affidavit unless ordered otherwise; (b) When the affidavit is sought to be filed on the date the case is posted for evidence, the Court should insist that the witness whose affidavit is sought to be filed enters the witness-box, takes oath and thereafter he/she shall hand over the affidavit containing his/her examination-in-chief to the Court. In other words, the Court should not receive the affidavit containing the examination-in-chief of a

witness by his/her Counsel, thus preventing the possibility of the witness disowing such affidavit; (c) After the affidavit is received through the witness, the Court shall call upon the witness whether he/she has any documentary evidence to tender and if the witness tenders any documentary evidence, the same shall be received by the Court subject to objection raised by the opposite party; (d) If objections are raised, the Court should judicially determine the question whether it can be admitted in evidence or not, then and there if the objection relates to insufficiency of stamp duty; (e) If the Court decides to admit the document, then it shall follow the procedure prescribed under Order 13, Rule 4(1) of the CPC and mark the document. — **Krishna v Sanjeev, ILR 2003 Kar. 3716.**

Bipin Shantilal Panchal v. State of Gujarat and Anr., AIR 2001 SC 1158 : (2001)3 SCC 1 has held as under.--

"12. It is an archaic practice that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the Court does not proceed further without passing order on such objection. But the fall out of the above practice is this: Suppose the Trial Court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the Appellate or Revisional Court, when the same question is recanvassed, could take a different view on the admissibility of that material in such cases the Appellate Court would be deprived of the benefit of that evidence, because that was not put on record by the Trial Court. In such a situation the higher Court may have to send the case back to the Trial Court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or remoulded to give way for better substitutes which would help acceleration of trial proceedings.

13. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the Trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the Court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. However, we make it clear that if the objection relates to deficiency of stamp duty of a document the Court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.

14. The above procedure, if followed, will have two advantages. First is that the time in the Trial Court, during evidence taking stage, would not be wasted on account of raising such objections and the Court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior Court, when the same objection is recanvassed and reconsidered in appeal or revision against the final judgment of the Trial Court, can determine the correctness of the view taken by the Trial Court regarding that objection, without bothering to remit the case to the Trial Court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses,

15. We, therefore, make the above as a procedure to be followed by the Trial Courts whenever an objection is raised regarding the admissibility of any material or any item of oral evidence".

K. Anjaneya Setty vs K.H. Rangiah Setty ILR 2002 KAR 3613 Therefore, having regard to the past experience, the difficulties experienced in following the settled practice and in view of the aforesaid Supreme Court judgment setting out the procedure to be followed, the proper course to be adopted in my view would be this. When an objection is raised for marking of a document, the Court should record the objections and thereafter permit the document to be marked subject to objections. Thereafter, the parties may be allowed to cross-examine the witnesses on the basis of the said document. At the end of the trial while hearing the arguments on the main, arguments regarding admissibility of the document also be heard. If the Court upholds the objections it could exclude the said document and the oral evidence led in respect of the said document from consideration. If the said objection is overruled then the Court would decide the case on merits by taking note of the said document and the oral evidence in respect of the said document on record. In appeal the Appellate Court would again go into the aforesaid questions and pronounce its judgment on merits. If ultimately the document is held to be inadmissible and the oral evidence recorded in respect of the said document has to be excluded, it could be said so much time of the Court in recording the evidence was wasted. When compared to the time taken to hear the arguments regarding objection and the orders passed thereon and in case the matter is taken up in revision the time spent therein, in appeal if that objection is taken and if that objection is overruled and the matter has to be remanded, the time so spent in recording evidence would be negligible and such a procedure could advance the cause of justice. It also cannot be forgotten that the parties to the litigation will be totally innocent about these procedural wrangles and they will never be able to understand why the document is not marked or why the matter is remanded, why without finally deciding the case on merits the case is being tossed from one Court to another. Therefore, though it is settled practice that when any objection is raised regarding marking of a document it has to be heard and decided at that stage itself, a time has come to recast or remould the procedure, as suggested by the Supreme Court which would be a better substitute for the existing one, which would help in acceleration of the trial, except of course regarding objection relating to deficiency of stamp duty.

28. In the instant case defendant wanted to mark the document dated 24-6-1982 which is styled as "Vodambadike Kararu" which is on a Rs. 10.00 stamp paper. The objection was the said document is in the nature of a partition deed, which is not duly stamped nor is it registered as it is a compulsorily registerable document.

29. Per contra, the defendant contended the said document was marked as Ex. D. 1 in O.S. No. 43 of 1986 on the file of the same Court after overruling similar objections raised in the said suit and subsequently the said suit came to be decreed relying on the said document and now the matter is in appeal and therefore it is not open to the plaintiff to object to the marking of the said document as such objection has been considered in the earlier proceedings between the same parties and marked. On consideration of the rival contentions while refusing to admit the said document, the Court below has held as under.-- "Therefore, this document cannot be received as evidence for want of registration. Insofar as the stamp duty is concerned that could be received by imposing duty, penalty, in view of the non-registration this document cannot be marked as evidence before the Court".

While considering the argument that it had been already marked in the earlier suit, the Court has held as under.--

"The defendant wants to mark this document for any collateral purpose i.e., the possession or any other circumstances called for that can be do so in order to establish the possession the defendant might have relied on this document in another suit. The Court for collateral purpose might have received the same. In the instant case when the parties claim right over the document it cannot be possible to receive it as evidence unless it is properly stamped and registered as required under the statute".

Therefore, it is clear the said document is held to be inadmissible as it is compulsorily registerable. However, the Court also takes note of the fact that in the earlier proceedings the said document could have been marked for collateral purposes.

30. Though Section 49 of the Registration Act prohibits receiving as evidence the documents requiring registration under Section 17 which are compulsorily registerable the proviso to the said section provides for receiving such documents in the circumstances narrated therein. Therefore, it is clear there is no total prohibition for receiving unregistered documents in evidence and it is settled law that an unregistered partition deed could be received in evidence to prove any collateral transaction. Therefore, even though an unregistered document is marked that in no way affects the interest of the parties. Mere marking of the document does not take away the right of the opposite party to contend that such a document cannot be relied upon as it is not registered. Similarly, when the law declares for collateral purposes an unregistered document could be looked into it makes clear that such a document could be marked. Under these circumstances, the proper course for the Courts would be to mark such documents, subject to objections, permit the parties to adduce evidence, instead of putting questions to the lawyers at the time of argument to state for what purpose they are relying on the said document. Thereafter consider the respective contentions at the time of final hearing and then decide whether the said document could be looked into for collateral purposes and whether non-registration of the said document has made it inadmissible in evidence. Therefore, the approach of the Court below cannot be sustained.

SUB-REGISTRAR HAS IMPOUNDED THE DOCUMENT

Stamp duty — Reference of document for determination of — Deputy Commissioner to whom impounded document was sent, has to return same to impounding officer after he has dealt with same — Reference was not valid and legal for non-compliance with procedure prescribed. Held: The Sub-Registrar has impounded the document presented for registration under Section 33 of the Act and referred to the 2nd respondent under Section 37(2) of the Act. The 2nd respondent did not follow the procedure prescribed under sub-section (1)of Section 39 of the Act but referred the document for determination under Section 53 of the Act to first respondent. Since the document falls under Article 40- B (b) of the Act for the purpose of payment of stamp duty, it was not at all a matter for the Sub-Registrar to make the reference under Section 37(2) of the Act. Therefore, the reference made was not legal and valid. In fact, reference of the document was wholly unwarranted. — **Y.C. Susheela Devi and Others v State of Karnataka and Others, AIR 2001 Kant 489.**

DEPUTY COMMISSIONER HAS NO JURISDICTION TO REVIEW HIS CERTIFICATION.

Instrument presented for registration, impounded and sent to Deputy Commissioner on opinion that instrument is not duly stamped — Deputy Commissioner, on coming to opinion that instrument is not required to be stamped, returning instrument with his certification to that effect duly endorsed on instrument — Once such certification is made by Deputy Commissioner, same is final subject only to any order that may be made in reference or revision, and Deputy Commissioner has no jurisdiction to review his certification. Held: The certification made under Section 39(l)(a) shall be conclusive or final for the purpose of the Act subject to any orders that may be made under Chapter VI of the Act. In other words, the certification made under Section 39(1)(a) cannot be reviewed under any of the provisions of the Act except under Chapter VI of the Act. In this case, the certification made by the Deputy Commissioner under Section 39(l)(a) was reviewed by himself which is not permissible in law as it does not fall within the ambit of Chapter VI of the Act. The power of the Deputy Commissioner to review or redetermine the issue already decided by him under Section 39(1)(a) of the Act cannot be traced to any of the provisions of Chapter VI of the Act to sustain his order dated 20-6-2001. None of the provisions of Chapter VI of the Act confer power on the Deputy Commissioner to review the certification made by him under Section 39(l)(a) of the Act. Therefore, the impugned order of the Deputy Commissioner dated 20-6-2001 is clearly without authority of law as it cannot be sustained by relying on any of the provisions of Chapter VI of the Act. ..... In view of the above, the order dated 20-6-2001 passed by the Deputy Commissioner and the order of the Karnataka Appellate Tribunal dated 4-7-2002 are liable to be set aside and are accordingly set aside. — **K.B. Nagendra and Another v State of Karnataka and Others, ILR 2005 Kar. 2105.**

MARKET-VALUE

Guidelines issued regarding the general market-value in the area - Validity.There is nothing like a general market value of immovable properties in a city or a locality and the same cannot be pre-determined on any notional or hypothetical considerations and the market value of the particular property has necessarily to be

fixed on a particular date with due regard to the factors enumerated in the statute. The general market value fixed by the Deputy Commissioner which is not authorised by Section 45-A of the Act or the Rules and in derogation of them, unnecessarily restricting the power of the Registering Officers as also his own determination to be made as and when a case arises before him, is without jurisdiction and illegal. When there is under-valuation which necessarily results in under payment of stamp duty, Section 45A empowers the Registrar to make a reference to the Deputy Commissioner, who is empowered to initiate proceedings, determine the proper valuation and recover the difference of stamp duty payable thereon under the Act**. Kulkarni, M.G. and Others v State of Karnataka and Others, ILR1985 Kar. 2152.**

UNDER VALUATION

Instrument of conveyance - Under valuation - Reference, when and how made - Procedure stated - Order of Reference to contain reasons - Order of Reference without setting out reasons invalidates the reference - Explained - The language of Section 45A is very clear. The condition precedent for making a reference is, there must be reasons for the Sub-Registrar to believe that the market value of the property has not been truly set out in the document presented for registration. From this it follows that the reasons must be recorded. However brief it may be, it is the duty of the Sub-Registrar to record reasons for his belief that the true market value has not been set out in the document and thereafter refer the matter to the Deputy Commissioner for adjudicating the real market value of the property under sub-section (2) of Section 45A of the Act. The Sub-Registrar cannot simply record the market value of the property according to him in a sheet and send the documents to the Deputy Commissioner. The documents must be sent as enclosure to the order of reference. It is also open to the Sub-Registrar to make an inquiry as contemplated in Rule 3 ol the Karnataka Stamp (Prevention of Under Valuation of Instruments) Rules, 1977. This Rule also supports the view that an order of reference must contain reasons and the documents should be sent along with the reasons recorded by the Sub-Registrar. As this procedure has not been followed, it should be held that there is no valid reference at all. -"Section 45-A of the Act uses the words 'refer the same to the Deputy Commissioner'. This clearly means that the Sub-Registrar has the power to send the document held by him to the Deputy Commissioner along with the reference made by him. Sub-section (2) of Sec. 45-A of the Act prescribes the procedure to be followed by the Deputy Commissioner on such reference. He is required to give a reasonable opportunity of hearing to the person concerned and has to pass orders regarding the market value of the property. If the Deputy Commissioner finds that the valuation furnished in the documents is correct, he is bound to return the document to the party along with his order. If he finds that the stamp paid is insufficient, he has the power to direct the party concerned to pay the difference and direct that the document be returned to the party after the deficiency is made up. Sub-section (5) of Sec. 45-A also provides for right of appeal to the District Judge". **Sanjay Kumar v The Sub-registrar and Another, 1989(2) Kar. LJ. 7.**

MARKET VALUE - PROVISIONAL ORDER – FINAL ORDER

It is open to party to file objections against provisional order, and it is only after considering objections can final order be passed by Authority — Remedy of appeal is also available to party, if aggrieved by final order — Writ petition against provisional order, held, not maintainable. Held: The order under challenge is only a provisional order and not a final order. The petitioner can therefore file its objections to the provisional order and only after considering the objections, final order.will be passed by the respondent. Petitioner, if aggrieved by the final order, can file an appeal. — Stamp duty payable on deed of sale of — Sale deed executed by Karnataka Industrial Areas Development Board in respect of industrial site allotted on lease-cum-sale basis in 1985, more than decade ago — Stamp duty is payable on market value of industrial site on date of execution of sale deed and not on sale consideration mentioned in sale deed — Concession of paying stamp duty on consideration mentioned in sale deed and not on market value on date of sale, which is available in respect of sale deeds executed by statutory bodies like BDA, KHB, etc., has not been extended to sale deed executed by KIADB — Proceedings initiated to ascertain market value of industrial site on date of sale effected by KIADB, held, is not without jurisdiction. Held: The concession extended to deeds of conveyance executed by BDA, KHB and House Building Co-operative Societies and other Bodies under the proviso to Article 20 of the Schedule to the Act (that is payment of stamp duty only on the consideration mentioned in the deed of sale and not on the market value on the date of sale) has not been extended to sale deeds executed by KIADB; therefore proceedings regarding undervaluation can be initiated in regard to sale deeds executed by KIADB; and the fact that the price mentioned in such deeds of conveyance is the true and correct price paid by the purchaser, has no relevance to the determination of market value on the date of sale, which is the criterion for payment of stamp duty on deed of conveyance. 'Sale price' or 'consideration for the sale' ceased to be the basis for payment of stamp duty in the case of conveyance. In its place, the 'market value' of the property on the date of sale became the basis for calculating the stamp duty payable on conveyance in view of the Amendment to Article 20 by the Karnataka Stamp (Amendment) Act, 1975. Therefore proceedings initiated under Section 45-A of the Act in regard to a sale deed executed by KIADB are not without jurisdiction. —**M/s. Pals Industries Limited, Bangalore v The District Registrar (Detection of Undervaluation of Stamps), Bangalore, 2000(3) Kar. L.J. 48**

APPELLATE POWER

Section 45-A is amended and appellate power of District Judge withdrawn and invested in Divisional Commissioner — After abolition of post of Divisional Commissioner power invested in Deputy Inspector General of Stamps — Orders passed by Deputy Commissioner is appealable only with Deputy Inspector General Stamps — Orders passed by District Judge quashed. Held: Although the provision for appeal against the provisional order is repealed, still the Appellate Authority under the Act will have necessary incidental jurisdiction to entertain the appeal against the interim orders and grant necessary relief. .... The original Section 45-A provides appeal to the District Judge from the order of the Deputy Commissioner. Section 45-A is

amended and the appellate power of the District Judge is withdrawn and came to be invested in the Divisional Commissioner **S. Kumara Bangarappa v The Special Deputy Commissioner of Detection of Undervaluation of 'Stamps-, Bangalore and Another, ILR 2004 Kar. Sh. N. 6 at p. 7.**

SUB-REGISTRAR HAS NO POWER TO IMPOUND DOCUMENT AND POSTPONE REGISTRATION ON GROUND THAT PROPERTY COVERED BY DOCUMENT IS UNDERVALUED.

Registration of document — Power of Sub-Registrar to postpone or keep pending — If stamp duty has been paid on consideration shown in document, Sub-Registrar has no power to impound document and postpone registration on ground that property covered by document is undervalued. Held: Sub- Registrar had no power to impound (or postpone registration of) the document on the ground that property covered by the document was undervalued. If stamp duty had been paid on the consideration shown in the document, the Sub-Registrar had no authority to go beyond the recitals and contents of the document to hold that the document was undervalued or that document was not duly stamped. In other words, Sub-Registrar can neither keep the document pending nor impound it on the ground that valuation shown was incorrect, but could only take action under Sections 28 and 61 of the Karnataka Stamp Act. Even after Section 45-A of the Act came into effect, the registration of the document could not be kept pending on the ground of undervaluation. It therefore follows that the Sub-Registrar could not have kept the sale deeds dated 20-10-1982 and 4-3-1982 pending on the ground that the properties sold thereunder were undervalued. Therefore, the notices dated 30-11-1983 holding that documents were undervalued and demanding deficit stamp duty as a condition precedent for registration, were illegal and without jurisdiction. Therefore, when the said notices dated 30-11-1983 were quashed on the ground that the Sub- Registrar had no authority to keep the registration of the sale deeds pending, the Sub-Registrar had no alternative but to register the documents. — **Veerabhadrappa and Another v Jagadishgouda and Others, ILR 2003 KAR 3042**

RETENTION OF DOCUMENT BY ADJUDICATING AUTHORITY FOR INDEFINITE PERIOD

An indefinite retention of the document without the adjudicating authority taking a decision can be justified in the absence of a specific provision in the Act or the rules empowering the adjudicating authority to retain the document. However it cannot be disputed that for the purpose of adjudication the competent authority will have to look into the original document itself. Nonetheless it does not mean that such document can be retained by the adjudicating authority for an indefinite period. In the circumstances if a reasonable request is made, the document may be returned to the holder of the document upon the party undertaking to produce the same if he is called upon to do so during the adjudicating proceeding. In that view of the matter, when an application is made in this behalf it appears to be just and proper to return the document to the party within a reasonable time, which may ordinarily not exceed six to eight weeks, on such reasonable terms and conditions as the adjudicating authority may consider proper. Similarly when the Sub-Registrar after registering the document has reason to believe that the property is undervalued, he is bound to make a reference to the Deputy Commissioner within such reasonable time. In that view of the matter/ it is open for the Court in the exercise of its discretionary jurisdiction under Article 226 of the Constitution to direct return of the document on terms pending adjudication under Section 45-A of the Act. -**M.K. Kuruvilla v District Registrar, Bangalore and Another, 1994(4) Kar. LJ. 657 (DB).**

DISTRICT REGISTRAR IS QUASI-JUDICIAL AUTHORITY CANNOT DESCRIBE HIMSELF AS COURT.

It is rather surprising, that a quasi-judicial functionary like the District Registrar for Undervaluation of properties should describe himself as a Court, as is indicated in the notice. The authority is one which is required to investigate the instances of undervaluation, determine the proper value of the properties, so that loss of revenue to the State is prevented and proper stamp duty is realized from the persons presenting documents for registration. . . Unless there is an enabling provision or statutory recognition, describing such a functionary as a Court, the authorities cannot describe themselves as Courts. The authority is, at best, a quasi-judicial functionary functioning as an administrative authority and incidentally required to pass orders inclusive of determining or affecting the civil rights of parties. The authorities are required to comply with the principles of natural justice while so functioning, giving a fair opportunity of hearing to the affected and apprise the concerned persons the date of such hearing, look into the representations or submissions made on behalf of the concerned persons and then pass a reasoned order. In the instant case, the impugned orders which are in furtherance of notices dated 16-8-2002 and 28-8-2002 do not indicate as to on which date such hearing had been fixed. The notices had also not fixed any date for the appearance of the parties before the so-called Court. While the orders indicate that a notice dated 28-8-2002 had also been issued which is also not responded by the petitioner, there is no reason as to why the concerned authorities should have issued yet another notice dated 28-8-2002 even before the period of 21 days from the date of issue of the notice dated 16-8-2002 had not expired... It is a matter of utmost regret that a public authority who deals with civil rights of parties, do not function in a transparent and fair manner. This Court cannot help but take note of the fact that the office of Sub-Registrar and Office of the District Registrar for determination of undervaluation are notorious for their nefarious activities and have been subject-matter of adverse scrutiny and comment by vigilant institutions like the Lokayuktha for corruption and bribary charges. . . Procedure which is not transparent, which does not call upon the parties to appear on a particular date, for giving representation or producing documents, a procedure where parties are kept in dark as to what may happen in the future, this Court cannot help, but observe is an arbitrary procedure vitiating the proceeding. Perhaps a fair and transparent procedure is not evolved by the authorities concerned only for extraneous reasons and for pressurizing the helpless citizens who are involved in such litigation... It is but necessary that any notice issued by the 1st respondent should indicate the date of hearing of the case that is fixed for the appearance of parties and the parties should be apprised of that date. . . Under the circumstances, the impugned orders are clearly unsustainable, being not only arbitrary, but also for violating the principles of natural justice. — **Smt.**

B. Razia Rnzak v The District Registrar, Prevention of Undervaluation of the Instruments, Bangalore and Another, ILR 2003 Kar. 3233 : AIR 2003 Kant. 486.

KIADB LANDS

Conveyance of an industrial site by the Karnataka Industrial Area Development Board — Cost of allotment fixed twelve years ago mentioned as consideration — Sale deed registered not returned — Reference made to the Deputy Commissioner for Detection of Undervaluation of Stamps for determination of the market value of the site and the proper duty payable — Whether the Deputy Commissioner for Detection of Undervaluation of Stamps has jurisdiction to initiate proceedings for determination of market value in regard to a deeds of conveyance executed by a statutory authority. Stamp duty is payable on the market value of the property on the date of execution of sale deed and' not on the consideration mentioned in the instrument of conveyance. The concession of payment of stamp duty only on the consideration mentioned in the deed of conveyance instead of on market value is available only in regard to the deeds of conveyance executed by some statutory authorities like BDA, KHB,etc.r specifically mentioned in Article 20 of the Schedule. As the KIADB, though a statutory authority, is not so mentioned in the Article, the concession is not available in regard to deeds of conveyance executed by this authority. Even though the price mentioned in the deed of conveyance executed by the KIADB is true and correct consideration for the conveyance, it will not be the market price as on the date of sale. The Court can take judicial notice of the fact that there was a steady and considerable rise in the prices of real estate and the price fixed in the year 1980, when the site was allotted to the petitioner, could not obviously be the market value in the year 1992 when the sale deed was executed. Second respondent did not act without jurisdiction in making a reference under Section 45-A of the Act, and the notice issued by the Third respondent initiating a proceeding for determination of the market value is valid. - **Safeguard Packaging Systems Private Limited v State of Karnataka and Others, AIR 1995 KANT 336..**

MARKET VALUE – REDITERMINATION

Market value of property for purpose of registration of deed of conveyance — Redetermination of — In case of dispute, authority is statutorily required to hold enquiry and determine market value by reasoned order reflecting authority's application of mind to relevant materials — Market value of vacant sites in any locality as fixed and notified by State Government is for guidance of authority and same cannot be adopted by authority without holding independent enquiry where correctness of market value so fixed is disputed in individual case — Order determining market value, passed without holding enquiry, held, is violative, not only of statutory provisions but also of principles of natural justice, and is unsustainable in law. The District Registrar and the Divisional Commissioner have determined the market value only on the basis of a Government guideline "fixing the value of all vacant sites situate at Rajmahal Vilas Extension, II Stage, Bangalore, where the property in question is situate at Rs. 893/- per sq. ft." without holding any enquiry for correctly arriving at the market value. . . A detailed procedure is prescribed under the Karnataka Stamp Act, 1957 and the rules framed under the Act for determining the proper market value for purposes of payment of proper stamp duty. . . After completing the enquiry as required under Rules 4 and 5, the District Registrar/Deputy Commissioner is obliged in law to pass a reasoned order, reflecting his application of mind to the relevant material as per Rule 7. . . Thus, the Enquiring Authority under Section 45-A(2) of the Act, is statutorily obliged to hold a detail enquiry taking into consideration several factors like the exact location of the site in question prevailing market value, its special advantages etc., and pass a considered order giving reasons and if it fails to do so, the Appellate Authority is obliged to correct the same in exercise of its appellate powers otherwise providing of statutory appeals would become meaningless. The Registrar has not conducted the enquiry as required under Rules 4 and 5 nor his order reflects any application of mind. . . The Appellate Authority also has abdicated its appellate power of examining the correctness of the order under appeal with reference to statutory requirements and the general principles of law. Both the orders of the Appellate Authority and the Registrar are clearly unsustainable and accordingly quashed. — **R. Umaprasad v Deputy Commissioner for Detection of Undervaluation of Stamps, Bangalore and Others, AIR 2004 KAR 287**

DC HAS NO POWER TO REVIEW, RECALL HIS ORDER

Commissioner seeking to review and recall his own order of determination of — Deputy Commissioner, held, has no such power conferred on him by statute — Once Deputy Commissioner holds enquiry and passes order determining market value, in response to reference made by registering officer, he cannot review his order either suo motu or on application made by party affected by order, except for purpose of rectifying mistake apparent from record — Show-cause notice issued by Deputy Commissioner proposing to hold enquiry de novo in order to redetermine market value already determined, under guise of exercising his power of review is without jurisdiction and liable to be quashed. Once Deputy Commissioner determines the proper market value of the property after holding an enquiry, the Act has not made any provision for reviewing or recalling the said order except filing an appeal under Section 45-A(5) of the Act or an application under Section 67-A(2) of the Act. .... There is no inherent power to review. A power to review must be conferred specifically by the statute and when conferred should be limited to the circumstances stated in the "power conferring section" and not beyond. So understood, the power to review his own order should be limited to the two situations referred to in Section 67-A(2) of the Act. But, what the Deputy Commissioner now proposes to do vide his show-cause notice is to conduct a de novo enquiry under the guise of exercising his power of review which is impermissible in law. — **Shantesh Gureddi v State of Karnataka and Another, ILR 2003 KAR 3862**

PARTNERSHIP DISSOLUTION AND PARTITION

The purchasers under the sale deed are the eighteen partners and two minors admitted to the benefits of the firm. The property has been purchased for and on behalf of the firm. The purchase is by the partnership firm

of Gowri Enterprises and not by the said twenty persons in their individual capacity. .... In fact the Dissolution Deed clearly recites that the said property was the property of the firm. Therefore, on dissolution different portions of the property could be allotted to the 18 partners and 2 minors admitted to the partnership. As the property was purchased after the commencement of partnership by twenty persons and treated as the asset of the firm, and as the allotment of different portions of the property is to the very persons who earlier held it as co-owners, the Deed of Dissolution would fall under Article 40-B(b) and not under Article 40-B(a). Article 40-B(a) will not apply as this is not a case where 'X' contributes the property to the firm and at the time of dissolution, the property is allotted to 'Y'. This would be a case of XYZ as co-owners contributing the property to the firm and on dissolution the property being allotted by metes and bounds to X, Y, and Z. Therefore, the case would fall under the residuary part of Article 40-B, that is Article 40-B(b). . . . There is thus no basis to hold that the Dissolution Deed has to be stamped as a partition, even assuming that the property was purchased on 28-3-1992 as co-owners. Partition pre-supposes co-ownership as on the date of the partition. If a property had ceased to be the co-ownership property of the 20 purchasers, but had been treated as the asset of the partnership as on the date of execution of the Deed of Dissolution, the Dissolution Deed cannot be treated as a partition. — **M/s. Gowri Enterprises, Gowribidanur, Kolar District v State of Karnatakn and Others, ILR 1999 KAR 2022.**

STATE POWER O LEVY AND FIX STAMP DUTY

The power to levy stamp duty is available to the State and is a tax. At what rate the tax will have to be levied and in respect of what transaction, is left to the discretion of the legislature. It is unknown in law that merely on the harshness of a particular levy, the provisions of law thereto have been struck down unless it can be shown that such levy discriminates by making classification, which is unreasonable and arbitrary. No such argument is put forth in this case. All that is stated is that a memorandum of agreement of lease-cum-sale could not be equated to a conveyance. When the legislature has the power to levy duty on different types of documents, it is the discretion of the legislature to levy duty at different rates on different types of documents. If in the opinion of the legislature such duty has to be paid on different transactions, that wisdom cannot be questioned by the Courts. Duty on such conveyance shall not exceed rupees ten or the difference of the duty payable on such conveyance and the duty already collected on the security deposit under item (d) of Article 5, whichever is greater. The second proviso to Article 20 makes it clear that if conveyance is executed pursuant to a lease-cum-sale agreement referred to in Article 5{d), the duty on such conveyance shall not exceed Rs. 10/- or the difference of duty payable on such conveyance and the duty already collected on the security deposit under Article 5(d) whichever is greater. Therefore, it is clear that the petitioner will not have to pay stamp duty once over again when the sale deed has to be executed under the terms of the lease-cum-sale agreement. If the petitioner has to pay stamp duty by way of conveyance at one stage or the other, at what stage the duty will have to be collected is also in the discretion of the legislature and if the legislature prescribes, such duty shall be collected at the earliest point of time of the transaction, no exception can be taken thereof. — **G.S. Rajashekar v Bangalore Development Authority, Bangalore and Another, ILR 1995 KAR 3366**

PARTNERSHIP PROPERTY RELEASE OR SALE

Where the effect of the various clauses in an instrument was that in consideration of a certain sum of money, the first party gave up in favour of the second party his share, and the second party became the full owner of the assets and liabilities of the dissolved firm, (except a piece of land) and the liability to pay income-tax and sales tax and the right to obtain refund of such tax: Held, Assuming that the instrument in question could be considered as a release, if it could also be considered as a conveyance, it would be chargeable as a conveyance attracting a higher duty. Under the instrument in question, there was a transfer of property, namely, first party's undivided share to the second party for consideration of a sum of money and thus all the requirements of a sale were satisfied.

Every sale may not involve a release and similarly every release may not result in conveyance or sale. But where the release is by a co-owner of his share in the common property which is legally capable of being transferred in favour of another co-owner, for a consideration of a sum of money coming outside the common property, the transaction amounts to a sale of the undivided share.

The adjectival clause 'which is not otherwise specifically provided for by Schedule' in the definition of 'conveyance' in S. 2(d) of the Mysore Stamp Act does not govern the words 'conveyance on sale' but governs only the words 'every instrument by which property is transferred inter vivas'. It is only when an instrument effects a transfer other than a sale, it requires further examination whether such an instrument is not otherwise specifically provided for by the Schedule before the instrument can be regarded as coming within the definition of the term 'conveyance'. 8 Mys. CCR. 294 not followed.

On the dissolution of the firm, the erstwhile partners will be co-owners of the properties of the firm. Until such property is distributed among the partners according to their rights, each of the partners will have an undivided share or interest in such property.

There is no material distinction between the share of a co-owner in a particular immovable property and a co-owner's rights and interests in the assets of the partnership, for the purpose of determining whether the instrument is a conveyance or a release. The extinguishment of the interest of the releasing co-owner and the enlargement of the interest of the other co-owner can amount to a conveyance of the undivided interest of the former to the latter. The use of any particular words like release, relinquish, assign or transfer in an instrument does not conclusively determine the nature of the instrument. The substance of the transaction has to be looked into. — **M.A. Venkatachalapathi v State of Mysore, AIR 1966 MYS 323**

NEED OF MORE PRACTICAL STAMP DUTY STRUCTURES FOR LEASES

Stamp duty for leases — Need for practical, logical and reasonable structure of — Inconsistencies in existing structure — It is for Government to remove such inconsistencies. R.V. Raveendran, J., Held: To avoid the prevalent confusion and uncertainty in regard to Stamp duty in these matters and to encourage parties to execute proper deeds relating to leases and register them, the Legislature/Government may consider a more practical, logical and reasonable structure of Stamp duty regarding leases and lease agreements. While logic need not be a hallmark of taxing statutes, apparent inconsistencies may be pointed out for rectification in the interests of revenue, to encourage public to enter into lease deeds and pay Stamp duty instead of resorting to oral agreements coupled with delivery of possession. One area where the anomaly is glaring is the prescription of same Stamp duty on the amount paid as premium and advance/deposit. .... In fact the Stamp duty on a sale of a property for Rs. 1,00,0007- and lease of the same property for one year with a refundable advance of Rs. 1,00,0007- is the same. The anomaly of same Stamp duty on premium (non-refundable consideration for the lease) and advance (refundable deposit) requires to be rectified. Be that as it may. **K. Amarnath v Smt. Puttamma, 2000(4) Kar. L.J. 55G.**

CASES ON LEASES OF IMMOVABLE PROPERTY

DIFFERENCE BETWEEN LEASE AND LICENCE

Whether particular agreement creates lease or licence has to be gathered from circumstances of agreement — Party claiming benefit of lease has to prove existence of lease — Annual auctioning of right to run hotel in premises at bus stand belonging to Village Panchayat — Agreement between Panchayat and successful bidder in auction — Agreement creates no lease but only licence. Held: There is a very clear and distinct distinction in law between the concept of tenancy and that of a licence. It is true that in certain cases an arrangement between parties regardless of what it is called or defined has been construed by a Court to be one that confers tenancy rights particularly in cases where the person has been in occupation for a long period of time. Various circumstances attendant in each of such cases must unmistakably indicate that the contract was one of tenancy arid that in order to deprive the occupant of the benefits and protection of the statute, the document was given a different colour. The first essential requirement is that these circumstances must be present but more importantly, it is for the party claiming those benefits to aver very specifically that the agreement was one of tenancy and thereafter to establish this to the satisfaction of the Court. The arrangement emanated from the usual auction of conducting rights for a period of one year and therefore even to set up a plea of tenancy would be extremely far-fetched. The agreement only conferred a licence for a period of twelve months and nothing else and further more, what needs to be taken cognizance of is the fact that the agreement and its execution itself are unchallenged. In these circumstances, the petitioner herself would be virtually estopped from even pleading any status other than that of a licensee. Under these circumstances, the respondents who are the authority in-charge of the premises would be justified in removing anybody including the petitioner, if such persons come in the way of the party to whom the contract has been awarded from functioning there. — **Smt. Prathima S. Bhat v Uppinangadi Grama Panchayath, Uppinangadi, Puttur Taluk, D.K. and Another, 1995(6) Kar. LJ. 136.**

The Forest Department held an auction in respect of various items of forest produce and the auction notice required purchasers to comply with sales tax and stamp law. The auction agreements were for a period of nine to ten months and the purchasers were merely granted the right to cut and carry away the forest produce. Held, the purchasers did not acquire any interest in the soil but merely a right to cut the forest produce and therefore the agreements were in the nature of licences and not leases so as to attract Article 31 (e) of the (Indian) Stamp Act. A study of the definition of 'immovable property' in Section 3{26) of the General Clauses Act, Section 3 of the Transfer of Property Act, Section 2(6) of the Stamp Act and Section 2(7} of the Sale of Goods Act shows that it is the creation of an interest in immovable property or a right to possess it that distinguishes a lease from a licence. No rights over the earnest deposits made by bidders pending auction were created in favour of the State Government and hence the security deposits were not in the nature of mortgages and the purchasers could not be called upon to pay stamp duty under Section 35(c) of the Stamp Act. — **Board of Revenue v A.M. Ansari, AIR 1976 SC1813**

Section 105 — **Easements** Act, 1882, Section 52 — Karnataka Rent Control Act, 1961, Sections 21 and 31 — Lease or licence — Suit for eviction of tenant after termination of tenancy in building exempted from operation of Rent Control Act — Compromise decree under which tenant handed over portion of suit building to landlord and promised to vacate remaining portion before specified date and also agreed to pay "rent" till date of vacating — Agreement under compromise decree, held, did not create fresh lease even though word "rent" is used — Tenant has become licensee — Compromise decree can be executed when licensee has breached his promise to vacate suit building — Fresh order of eviction under Section 21 of Rent Control Act — Not necessary even though exemption from operation of Rent Control Act in respect of suit building has since been removed. Held.—The decree was passed on 21-4-1984 much prior to 1-7-1986. (the date on which Section 31 was struck down). If under the terms of the decree the party has agreed to abide by certain conditions and if by those conditions the petitioner has handed over a portion of the suit premises and retains some other portion of the premises, agreeing to pay damages till vacant possession is delivered, it would be difficult to go behind the decree and hold that the petitioner is still a tenant. If the petitioner is not a tenant pursuant to the compromise decree and pursuant to him handing over the possession of a portion of the suit premises, then, it would not be possible to hold that the petitioner retains the remaining portion of the property only as a tenant. Petitioner will undoubtedly be, under the terms of the compromise only a licensee and not a tenant. ... It is the intention of the parties which is the decisive test, notwithstanding the fact that the word 'rent' being used in the compromise decree. If it can be culled out from the decree passed by a Court of

competent jurisdiction that the intention of the parties was that the tenant willingly acquiesced to be a licensee rather than a tenant then he will undoubtedly be a licensee and nothing more. In these circumstances the landlord was certainly entitled to execute the decree of a Civil Court. ... In the first execution case, the tenant did not question the jurisdiction of the Court but sought time to deliver vacant possession till 7-1-1991. It is only when the tenant did not deliver vacant possession on 7-1-1991 as agreed by him, the landlord was compelled to file the second execution petition. ... It is difficult to impute an intention to create a fresh lease and that pursuant to the compromise decree there was no intention for the parties to enter into a relationship of landlord and tenant. In the facts and circumstances of the case, it has to be necessarily held that the petitioner was only a licensee pursuant to the compromise decree and that such decree is executable. **— C.L Seetharam v J.C. Rudra Sharma, 1997(3) Kar. L.J. 37 (DB).**

GRANTED ONLY BY A PERSON COMPETENT TO CONTRACT

A Lease can be granted only by a person competent to contract and the lessor must have title to the property or authority from the owner of the property. **— Lakshman Gidwani v Thimmamma, 1987(2) Kar. L.J. 426.**

TENANT AT WILL

Even if it is held that a tenant at will has no sure interest or estate, he cannot be evicted without a notice, the duration of which would be depended upon the nature of the lease. In the case of an Agricultural Lease, the notice must expire with the end of the agriculture lease. A tenant at will is none the less a tenant the concept of tenancy at will has reference to duration and interest in the Sand. He is not a tenant at the sweet will and mercy of the landlord. The status and possession of a person who was admittedly a tenant of premises covered by local rent restriction Act till date of commencement of a fresh lease, which turns out to be void for want of registration during and at the expiry of the period purporting to be reserved by such void lease would be that of a tenant. Such a tenant could only be removed by proper legal proceeding and he is not a licence without interest in the premises and could not be forceably evicted by the landlord entering on the premises and locking the same. Such tenant could defend his possession by a suit seeking a declaration and mandatory injunction. **— Biswabani (Private) Limited v Santosh Kurmr, 1979(2) Kar. L.J. Sh. N. 98 (SC).**

Even if it is held that a tenant at will has no sure interest or estate, he cannot be evicted without notice, the duration of which would be dependent upon the nature of the lease. In the case of an agricultural lease, the notice must expiry with the end of the agricultural lease. A tenant at will is nonetheless a tenant. The concept of tenancy at will has reference to duration and interest in the land. He is not a tenant at the sweet will and mercy of the landlord. Hence, possession of the tenant at will, where notice to quit has not been issued, is not on behalf of the landlord and the landlord cannot to be in khas possession within Section 6 of the Bihar Land Reforms Act. The right to take possession is not khas possession. A tenant at will enters possession with the consent of the landlord and till his tenancy is determined, he is in lawful possession and cannot be styled as a trespasser. **— Ramesh Bejoy v Pashupati Rai, 1979(2) Kar. LJ. Sh. N. 97 (SC).**

Where the lease contained a specific condition that the tenant shall give up possession of the house at the will of the landlord without demur and no definite period was fixed in the lease, the tenancy is one at will. Such tenancy can be determined either by demand to give up possession or by operation of law at the death of the lessor. **— Bhimangoud v Golangouda, 1983(1) Kar. LJ. Sh. N. 23.**

A RIGHT TO CARRY ON MINING OPERATION

Section 105 — Every interest in Immoveable property or a benefit arising out of land will be immoveable property for the purpose of Section 105 of T.P. Act. A right to carry on mining operation in land to extract a specified mineral and to remove and appropriate it, is a right to enjoy immoveable property within Section 105 of T.P. Act, more so when it is coupled with a right to be in its exclusive has possession for a specified period, **Shri Shri Takeshwar Sio Thakur Jiu v Hari Dass. 1979(1) Kar. L.J, Sh. N. 71 (SC).**

TENANT DIES THE LEGAL REPRESENTATIVE HAS NO HERITABLE RIGHT TO THE TENANCY

Houses and Rent — Statutory tenant — termination of tenancy — The legal representative has no right to inherit the tenancy. The relationship of landlord and tenant is regulated by the Provisions of the T.P. Act once since relationship, which is Contractual, is terminated under Section 111 of the T.P. Act, the tenant, if he continued in possession of the premises is called statutory tenant, Since tenancy can be terminated only by having recourse to the Rent Control Act. When the Court passes an order of eviction, the tenancy stands terminated. If subsequently, the tenant dies the legal representative has no heritable right to the tenancy — Radheshyam Modi v Jadunath Mahapatra, AIR 1991 Ori. 88.

PERPETUAL LEASE

Whether perpetual or for term — Proof — Onus — Though there is no presumption in law against perpetual lease, unambiguous language is required to infer such lease which has effect of depriving owner of his right to enjoy property for ever — Mere fact that lease is for 99 years at uniform fixed rent, with stipulation for renewal under same terms and conditions at option of lessee and fact that lease is binding on heirs, administrators, executors, successors and legatees of both lessor and lessee and further fact that lessee has made constructions on leased property at his own cost, would not raise presumption that lease is perpetual lease — Onus of proving that lease is perpetual is on lessee — In absence of provision for renewal at option of lessee for indefinite length of time and from generation to generation, lease is to be held term lease only with option for renewal for only once. Held: Though there is no presumption against perpetual lease, clear and unambiguous language is required to infer such a lease. If the language is ambiguous, not clear and admits of some doubt, the Court is required to opt for an interpretation rejecting the plea of a perpetual lease. This is necessary because if the Court leans in favour of a perpetual lease in the absence of the language being clear

and unambiguous, the effect of such interpretation would be to deprive a owner of his right to enjoy the property for ever. There is no presumption in favour of the perpetual lease and the Courts are required to lean against perpetual lease in the absence of stipulations in that behalf being unambiguous or clear. . . . .The lease is for a period of 99 years. Therefore, there cannot be any doubt that when a period of 99 years is fixed in the lease deed, it is a term lease. The renewal, even if done at the option of the lessee, again could be for a term of 99 years only. Whether it be during the original period of lease or even in the renewed period, the option is given to the lessee to surrender at his discretion. There is no provision in the lease deed which says that the renewal of the lease is for an indefinite period. In the absence of a specific provision in the lease deed providing that the renewal is required to be made at the option of the lessee for an indefinite length of time and from generation to generation, it is not possible to come to the conclusion that merely because the lease provides for a renewal of the term fixed in the lease deed under the same terms and conditions, that renewal is for an indefinite period and the lease is a permanent lease. The lease is only for a term of 99 years; and the option can be exercised to renew the lease only once. .... -Since the lease was for construction of a building and for establishing a Pressing and Ginning Factory, the term of the lease is fixed fairly long and a clause for renewal of the lease also is provided. Therefore, the long term provided in the lease with a renewal clause, cannot be understood as meaning that the lease is a permanent lease. Though the power of transfer or assignment of the lease is reserved to the lessee, the said provision specifically states that the transfer or assignment of leasehold interest of the lessee should not in any way affect the other conditions of the lease. The lease deed also provides that in the event the lessee is required to cut any tree growth in the land leased if the said tree growth becoming an obstruction to make use of the leased land for the purpose it was let out, the lessee can cut the trees, but hand over the tree growths to the lessor. This clearly shows that the lessor has reserved substantial interest in the leased premises and he has a right to the tree growths on the leased land in the event of the said tree growths are required to be cut. It is also provided that in the event of lessee vacating the demised land, he is required to deliver wood, stone and tiles used for the construction of the building to the lessor and take only the machineries and zinc sheets. — **Channabasappa Gurappa Belagavi and Others u Laxmidas Bapudas Darbar and Another, 1999(1) Kar. L.J. 216A.**

LEASE AND AGREEMENT TO GRANT LEASE

Payment of advance to owner to make necessary repairs and alterations to buildings — Agreement between parties speaking of present demise in favour of payer of advance — Property to be handed over after repairs and alterations —Mere use of expression "present demise" not decisive for holding it to be lease when demise depended on completion of repairs and alterations in accordance with agreement — Contract is mere executory contract and not lease. Held: The covenants between the parties, it is clear that the possession over the property was to be handed over to the plaintiff after construction of the building with necessary alterations and additions as agreed to between the parties. The said clause also speaks of the present demise in favour of the plaintiff. The question is whether despite use of the words 'present demise', the instrument can be construed as merely executory being in the nature of 'agreement to lease' and not 'lease'. The mere words of present demise as set out in the Document are not decisive for holding it to be a lease because in fact the demise is depended on the completion of the building in accordance with the requirement of the plaintiff which was under construction on the date of the execution of the said document. Therefore, the contract entered into by the parties has to be held as a mere executory contract and not one which has created the demise in praesenti. **— Sheshagiri v Belgaum District Co-operative Bank Limited, Belgaum, 1995(4) Kar. L.J. 403.**

LEASE AND LICENCE

To ascertain the true intent and import of a document, the document should be read as a whole. The proper function of the preamble is to explain certain facts which are necessary to be explained before the enacting part of the statute can be understood. This would equally apply to a deed or a document. The preamble to the suit agreement show that the plaintiff is the owner and the proprietrix of the industry called the "Saravana Industries", that she has been doing business of manufacture and sale of steel furniture, grits, gates, steel windows, industrial works and fabrications pipe and electrical accessories etc., in the said industry and in the last para of the preamble, it is stated that the plaintiff unable to manage the industry more effectively due to her old age and therefore, she is desirous of hiring out the business with the machinery and tools, etc., to the defendant. The mere fact that the word 'factory' is not introduced but only the words 'hiring out the business with the machinery and tools etc.', are used, does not make the transaction any of the less of making over the factory will all the machineries and the tools etc., for carrying on the business subject to the terms and conditions of the agreement that were to follow in the deed. Hiring out the business with the machinery and tools without the entire building including the factory would not carry out the purpose and intention of the parties that the defendant were to carry on the industry which was being carried on by the plaintiff and which she was unable to carry on due to her old age. Reading the suit agreement as a whole, there remain no doubt that it is a lease of the factory along with the tools, machineries, furniture etc., and not merely hiring of the business with the machinery and tools etc. The subject-matter of the suit agreement is not a matter like a shandy place where people are allowed to vend their articles by paying market fee or a cycle stand where a party may keep his bicycle for few hours against payment of certain charges, without having any actual possession of the place or any interest being created in the land on which they transact their business or keep their bicycle. The subject-matter of the transaction between the plaintiff and defendant, in the instant case, is an industrial unit, manufacturing steel article of various kinds and unless the defendant had exclusive possession of the factory premises, the defendant could not carry on the industry of manufacturing various kinds of steel articles he was expected to manufacture. Considering the suit agreement as a whole, there is no doubt that it is a 'lease' and not a 'licence'. — **Smt. Sundara Bai Ammal and Others v K.V. Rajagopai and Others, ILR1985 Kar. 1706.**

LESSEE IS ENTITLED TO A LIMITED INJUNCTION FROM BEING DISPOSSESSED FORCIBLY OTHERWISE THAN IN ACCORDANCE WITH LAW

A lessee after the expiry of termination of the lease does not yield up possession — Whether entitled to injunction against forcible dispossession by the lessor otherwise in accordance with the law — whether lessee has right to continue in possession and injunction can be granted. There can be no forcible dispossession of a person who has juridical possession and the landlord can be restrained from resorting to high handed acts aimed at forcible dispossession, otherwise than in accordance with law. No claim to a right to dispossess by the use of force without recourse to procedure in accordance with law is recognised or countenanced by Courts. Such a right in the respondent cannot be recognised regardless of the question whether or not the appellant itself has any subsisting right to remain in possession. The protection that the Court affords is not of the possession — Which in the circumstances is litiguous possession and cannot be equated with lawful possession — But a protection against forcible dispossession. The basis of relief is a corollary of the principle that even with the best of title there can be no forcible dispossession.The lessee is entitled to a limited injunction from being dispossessed forcibly otherwise than in accordance with law. — **M/s. Patil Exhibitors (Private) Limited v The Corporation of the City of Bangalore, ILR 1985 Kar. 3700 : AIR 1986 Kant 194.**

PURCHASE THE PREMISES FROM THE LANDLORD

When a tenant agrees to purchase the premises from the landlord it was held that the tenant continue to be a tenant. — **Rudrappa by L.Rs. v Danappa Malasiddappa, 1982(1) Kar. L.J. 284.**

VOID LEASE - DEFEND HIS POSSESSION UNDER SECTION 53-A OF T.P. ACT

When there is void lease and consequently the lessee is put in possession of the premises it does not become, a tenant under such void lease. He can only defend his possession under Section 53-A of T.P. Act. — **Technicians Studio (Private) Limited v Lila Ghosh, 1978(1) Kar. L.J. Sh. N. 9 (DB).**

RENEWAL CLAUSE

Whenever a lease contains a renewal clause it confers an immediate right to a further extension as the covenant runs with the land and it is exercisable by the lesse at any time after the commence of the lease. — R. Kempraj v M/s. Burton Son and Company Private Limited, AIR 1970 SC 1872, relied on. When the Wakf Board has accorded sanction for leasing the suit property with a clause for renewal for a further period of 20 years at the option of the lessee, no further sanction was required to be obtained from the Wakf Board for renewing the lease. After the coming into force of the Transfer of Property Act, leases of immoveable property are governed by Chap. V of the Transfer of Property Act. Therefore, any principle opposed to the provisions in Chap. V of the Transfer of Property Act cannot be enforced. — **Vishvarma Hotels Limited v Anjuman-e-lmamia and Others, 1982(2) Kar. L.J. 264.**

A licence in respect of a theatre was renewed on 29-12-1980 in favour of the licensee who was a tenant of the premises. The landlord of the premises challenged the renewal in a petition under Article 226 of the Constitution, alleging that the license was not in a lawful possession of the theatre on the date of the renewal. The lease was for 10 years from 10-7-1970 expiring on 9-7-1980. Under the lease deed option to renew the lease was given to the tenant and the tenant exercised the option by notice, dated 27-2-1980. Even after 9-7-1980 the landlord went on accepting rent. The tenant had made a deposit to be adjusted towards the rent of the last month but the landlord did not so adjust the deposit. HELD, when the tenant exercised the option by notice to the landlord before the expiry of the lease, a fresh lease came into existence. When the deposit was not appropriated by the lessor towards the rents for the last months of the tenancy expiring on 9-7-1980, it showed he had no intention to determine the lease. Further, whereafter the period was over, the lessor went on accepting the rents, it brought into effect a fresh tenancy. A subsequent notice issued in November, 1980 by the landlord determining the tenancy could not set at nought the tenancy which had already come into existence Manjunath V.R. and Another v M.V. Veerendra Kumar and Another, 1981(2) Kar. L.J. 147.

A Lessee entitled to renewal of lease and in possession after the expiry of the original period with the consent of the owner is a lessee for a renewed period and is not merely holding over. —**1964 Mys. LJ. Supp. 112.**

A tenancy for residence renewed by holding over **can only be** a month to month tenancy, though the rent reserved was yearly. **—- Husensaheb Sayadsaheb Attar v Muktabai and Another, 1962 Mys. LJ, 1000.**

In the case of a tenant holding over, the **question** whether the renewal of the **lease** is from year to year or month to month has to be determined with reference to Sections 116 and 106 **T.P.** Act and where the lease is not one for Agricultural or **Manufacturing** purpose, it **must** be deemed to be a **lease** from month to month. — **Bheemappa Hanumanthappa and Another v Nagaraj alias Shivanagappa, 1966(1) Mys. LJ. 664.**

Lease during the period when a tenant is holding over, is renewed from month to month, if the lease is not for Agricultural or Manufacturing purposes. — **1959 Mys. LJ. 165.**

Lessee in occupation of property after the expiry of Lease, is a tenant holding over. A suit for eviction without notice to quit under Section 116 is not maintainable. Such a tenant does not become a tenant at sufferance on expiry of term under unregistered **Lease** Deed executed before filing of suit. — **Satish Chand Makhan and Others v Govardhan Das Byas and Others, AIR 1984 SC 143.**

LEASE OR MORTGAGE – MERGER OF BOTH

Where a document is of a composite character disclosing features of both mortgage and lease, it cannot be taken as a lease. The Court will have to find out the predominant intention of the parties viewed from the essential aspects of the transaction. There is one most essential feature in a mortgage which is absent in a lease (i.e.) that the property transferred is a security for the repayment of a debt whereas in a lease, it is a transfer of a right to enjoy the property. Where this essential feature of a mortgage is missing, the document is not a mortgage, — **Puzikkal Kuttappan v Bhargavi, 1977(1) Kar. L.J. Sh. N. 66 (FB).**

Where there were many features in the document which were more consistent with a lease than a mortgage the transaction is a lease. — **Tayawwa v Gangaiviva and Others, 1966(2) Mys. L.J. 560.**

Usufructory mortgage in favour of lessee already in possession — Stipulation in mortgage deed that possession of mortgagee to be treated as a fresn possession and that until payment of mortgage amounts, mortgagee is entitled to continue in possession — Absence of specific recital as to recovery of possession — Whether lessee had surrendered his lease-hold right was the qviestion that arose for consideration — Held, recitals had the effect of putting an end to relationship of lessor and lessee on creation of new relationship of mortgager and mortgagee — Explained. — **Syed Imdad v R. Ramaswamy, 1989(3) Kar. LJ. 422.**

Possessory mortgage to tenant effect. Where a possessory mortgage was given to appellant who was in possession as a tenant on 21-5-1953 and it was stipulated that the lease was to exist upto 6-11-1953, the mortgagee was given power to sublet, the mortgagor was to do repairs and the possession was to be under the mortgage deed, and the mortgagee undertook to deliver possession of the property on the expiry of ten years. Held, the appellant had surrendered his tenancy from 7-11-1953 and thereafter the possession was only that of mortgagee and there was no question of the tenancy being kept in abeyance and reviving on expiration of the period of mortgage. There cannot be a merger of lease and mortgage in respect of the same property, since neither of them is a higher or lesser interest than the other. **_ Shah Mathuradas Maganlal and Company v Nagappa Shankarappa Malaga, AIR 1976 SC 1565.**

Landlord mortgaged the house to the tenant — Tenant effected improvements — Landlord sold the property to respondent and another — Suit for redemption and possession — Contended by the appellants — Decision in Regular Appeal in favour of respondents — Challenged in RSA. – (1)Whether the leasehold rights of the appellant (mortgagor) got merged in the mortgage? Held.—It is well-settled that there is no question of merger as such of a lease with the mortgagee. In other words, it is not as if lease and mortgage cannot co-exist. This is clear from the decision of the Supreme Court in Gambangi Appalaswamy Naidu and Others v Behara Venkataramanayya Patro and Others, (1984)4 SCC 382 : AIR 1984 SC 1728. (2) Whether the lessee (defendant) impliedly surrendered his lessee's rights for the purpose of taking usufructuary mortgage of the property. Held—The fact that there was no stipulation to pay any interest on the mortgage money; the fact that there was no liability on the part of the defendant to pay rent after the mortgage came into force; the fact that there was no agreement to make any adjustment of payment of rent or interest; the fact that the mortgage period is fixed for about eight years; the fact that, if for some reason, plaintiff was unable to make payment even at the end of eighth year, the defendant was given an opportunity to continue on the land till the amount was paid and other circumstances would unmistakably indicate that the intention of the parties was not to continue the relationship of lessor and lessee as between the mortgagor and mortgagee. In the opinion of this Court, if these circumstances are tested by the guidelines given by the Supreme Court in Gambangi's case, the same would unmistakably point to the conclusion that there was an implied surrender of his tenancy on the part of the defendant immediately .before usufructuary mortgage was executed in his favour. —**Abdulmsoolsab Chamanasab Phaniband v Ruth, 1990(4) Kar. LJ. 382A.**

AFTER CONSENT DECREE – RECEIPT OF RENT DID NOT BRING FRESH LEASE

Where the tenant was given time till the end of 1957 to hand over possession of the property under a consent decree, and he paid the rent in September, October, November and December, 1957 and mesne profits for January, 1958 and the receipt mentioned that what was received was rent, it was Held that the use of the word rent in respect of January, 1958 did not bring about a fresh lease between the parties. — **Habighai Meharalli Bhavnagri v Shivaji Rao D. Jadhav, 1965(2) Mys. L.J. 672.**

STATUTORY TENANT

There is transfer of immovable property in favour of the petitioners. .... The very_instrument is titled as 'Lease Deed' and throughout in the said deed the words 'Lessor' and 'Lessee' are used. The sum of Rs. 6,00,000/- paid by the lessees was for five years and eight months and the same was paid in advance instead of paying monthly rent every month. The recitals in the lease deed is binding upon the 3rd respondent as the execution of the said document is not in dispute. Having agreed so, it is not open now for the 3rd respondent to turn round and say that it was not a lease' but 'licence' and such licence was given to the petitioners to run the theatre for and on behalf of him. If really the petitioners were permitted to run the theatre for and on behalf of the 3rd respondent, there was no occasion for the petitioners to pay such huge amount to the 3rd respondent. On the other hand, the 3rd respondent himself would have paid amount to the petitioners for the services rendered by them and the money realised from the sale of tickets would have been taken by the 3rd respondent. The stand taken by the 3rd respondent in this regard is wholly untenable and such a stand is taken to suit his convenience. The 3rd respondent has admitted that the monthly rental of the premises would be Rs. 8,823.52. ... It is no doubt true that the lease deed is not registered and it is void. Non-registration of lease deed does not take away the relationship of landlord and tenants. Therefore, it is held that the petitioners are statutory tenants under the 3rd respondent and their possession is lawful. . . . Admittedly, the theatre is a non-residential building. The monthly rental of the theatre is Rs. 8,823.52 p.m. for a period of 68 months. Hence, the Karnataka Rent Control Act is not applicable. Therefore, for the eviction of

the petitioners, the 3rd respondent has to file a suit for ejection, after determining lease of the premises. .... The petitioners took possession of the theatre by virtue of the lease deed, pursuant to which possession was delivered to them. Thus, they entered into the possession of the theatre lawfully. After the expiry of lease period, their continuance in possession will not be unlawful until they are evicted by due process of law as they are the statutory tenants under the provisions of the Karnataka Rent Control Act. In this view of the matter, both the impugned endorsement and the order of the Appellate Authority are bad in law and are liable to be quashed. — **R. Sreekanth and Another v The Divisional Commissioner, Bangalore Division, Bangalore and Others, 2003(2) Kar. L.J. 231.**

When a person remains in possession after termination of tenancy, he becomes statutory tenant. Although he can remain in possession he cannot enforce the terms of original tenancy. — **Anand Nivas Private Limited v Anandji Kalyanji's Pedhi and Others, AIR 1965 SC 414.**

There is a distinction between a tenant continuing in possession after the determination of the term with the assent of the land lord and the tenant doing so sans his consent. The former is a tenant at sufference and the later a tenant holding over. Mere acceptance of amounts equivalent to rent by land lord from a tenant in possession after a lease had been determined, either by efflux of time or by notice to quit, and who enjoys statutory immunity from eviction except on well defined grounds as in the Act. If the tenant asserts that the land lord accepted the rent not as Statutory Tenant but only as a legal rent indicating his assent to the tenants continuing in possession it is for the tenant to establish it. Where he fails to establish it cannot be said that there was holding over by him. — **Bhaitxmji Lakhamshi v Himdatlal Jamnadas Dani, AIR 1972 SC 819.**

NOTICE TO QUIT

a) A notice to quit must be interpreted not with a desire to find flaws in it which would render it defective, but it must be construed ut res magis valeat quam pereat. — **Bhagabandas Agarwala v Bhagwandas Kanu and Others, AIR 1977 SC 1120**

b) A person in occupation of property under an unregistered but compulsorily registerable lease does not become a tenant from month to month and a notice terminating the tenancy under Section 106 of the T.P. Act, is not necessary. — **H- Mohammad Khan v H.K. Copal Shetty, 1963(2) Mys. L.J. 494.**

c) A statutory tenant is not entitled to notice as envisaged by Section 106 if the transfer of property before an action in ejectment is commenced against him under any of the enabling provisions of the relevant rent restriction Act. — Firm **Sardarilal Vishwanath v Pritam Singh, 1978(2) Kar. L.J. Sh. N. 25 (SC).**

d) Before maintaining a petition for eviction under Section 21(1) of the Karnataka Rent Control Act, 1961, it is not necessary for the landlord to determine the contractual tenancy by issuing to the tenant a notice under Section 106 of the T.P. Act **Papinayakanahalli Venkanna and Others v Janadri Venkanna Setty, AIR 1981 Kant. 20 (FB)**

e) In order to get a decree or order for eviction against a tenant under any State Rent Control Act, it is not necessary to give a notice under Section 106 of T.P. Act. Determination of a lease in accordance with the Transfer of Property Act is unnecessary and a mere surplusage, because the landlord cannot get eviction of the tenant even after such determination. The tenant continues to be so even thereafter. That being so, making out a case under the Rent Act for eviction of the tenant by itself is sufficient and it is not obligatory to find the proceedings on the basis of the determination of the lease by issue of notice in accordance with Section 106 of T.P. Act **Dhanapal Chettair v Yasoda, 1980(1) Kar. L.J. Sh. N. 90 (SC).**

f) Ground of Eviction need not be set out in the notice. Reasons stated in notice does not estop landlord from pleading and proving another reason. Issue of second notice to quit not necessarily waiver of earlier notice. See Kamataka Rent Control Act, Sections 11, 21(d) and 26. — **Raghavendra v Maratha Co-operative Credit Bank Limited, 1977(1) Kar, L.J. 382.**

g) It must be deemed that there is due service of the notice of termination of a tenancy where the letter is sent by registered post, it being properly addressed, pre-paid and the letter contains the document. The contrary that is required to be proved to take away the presumption is with reference to the four requirements referred to above. It is only to meet the contingency of a person who is to be served with the notice trying to evade it, that the service shall be deemed to have been effected if the four conditions are fulfilled. Section 106 Para 2 does not prescribe that the notice should be sent by registered post; it could also be sent by ordinary post. Where the notice is sent under certificate of posting a presumption arises under Section 114, Evidence Act, that there has been due service. If tender or delivery to the party is known as impracticable, it is open to the landlord to adopt the procedure of affixture. —**Achamma Thomas v E.R. Fairman, 1969(2) Mys. L.J. 179.**

h) Notice by telegram : A notice through counsel by telegram determining the tenancy complies substantially with Section 106- — **Aldelli Gurusidappa v Veerabhadrappa, 1975(1) Kar. L.J. Sh. N. 76.**

i) Notice terminating tenancy should not be interpreted with strictness but should receive a liberal interpretation. If the.notice is sufficient to give impression that the tenancy is terminated at the end of the tenancy month, the notice is valid — **Cherilal K. Wadhva v R. Chandrasekhariah, 1969(2) Mys. LJ. 564.**

j) Person in occupation under an unregistered but compulsorily registerable lease does not become a tenant from month to month and notice terminating tenancy is not necessary. — **V. Ramu v M.V. Venkatappa, 1971(1) Mys. L.J. 443,**

k) Possession after expiry of lease under unregistered deed notice to quit not necessary. — **Doddappa alias Sidramappa Nagappa Yatgiri and Others v Basavanneppa Basappa Chinniwalar, 1978(1) Kar. LJ. 414: AIR 1978 Kant. 140.**

l) So long as there are words in the notice, justifying the view that the notice itself determined the tenancy, the mere fact that there is no termination in so many words will not make it any the less a notice under Section 106. — **Sheshacharya Balacharya Morab v MaUawwa, 1965(1) Mys. LJ. 697.**

m) When a suit for eviction and mesne profits was instituted without giving notice to quit under Section 106 of the Transfer of Property Act against a tenant in occupation of the rented property after expiry of the lease the suit would not be maintainable. Such tenant is a tenant holding over and notice of eviction under Section 106 of the T.P. Act was necessary. It cannot be said that on expiry of the specified period under the unregistered Lease Deed executed before the filing of the suit he became tenant at sufference under Section 111 (a) of the T.P. Act and the suit was maintainable without notice under Section 106 of that Act. — **Satish Chand Makhan v Govardhan Das Eyas, AIR 1984 SC 143**

n) When the defective notice given by the tenant if accepted by the landlord, it will determine the tenancy. — **Calcutta Credit Corporation Limited and Another v Happy Homes (Private) Limited, AIR 1968 SC 471.**

o) When the landlord fails to serve notice under Section 106, it does not mean that such failure estops him from claiming a decree for eviction of tenant. — **Krishanadeo Narayan Aganval v Ram Krishan Rai, AIR 1982 SC 783.**

p) When the notice terminating tenancy does not grant longer time for handing over possession, it does not mean that such failure affects the validity of the termination of the tenancy. — **Arjunsa Shidramasa Mirajkar v Ganapatsa Hanmantsa Bakale and Others, 1964(2) Mys. L.J. 164.**

q) Where the monthly tenancy was according to English calendar a notice to determine possession on or before 30-11-1967 is valid. Eventhough the quit notice asked the tenant to vacate the house on or before 30-11-1967, the tenant was entitled to remain in possession till the midnight of 30-11-1967 and thereafter vacate it and still comply with the notice to quit. The notice was thus perfectly valid and complied with the requirements of Section 106 of the T.P. Act **Peter Paul Coelho and Others v Constance D'Souza and Others, 1979(1) Kar. L.J. 219 : AIR 1980 Kant. 28.**

r) When a lease terminates by efflux of time, notice of termination is not required. See Karnataka Rent Control Act, 1961, Section 31. — **Raghunandan Prasad Garg v Sreeramiah Setty and Others, 1970(2) Mys. L.J. 250.**

s) Where a lease is for a specified term it expires by efflux of time in view of Section 111(a). Therefore service of a notice under Section 106 is not necessary for termination of lease. — **Smt, Shanti Devi v Amal Kumar Banerjee, AIR 1981 SC 1550.**

t) A notice which is defective may still determine the tenancy if it is accepted by the landlord. A notice which complies with the requirements of Section 106 of the Act operates to determine the tenancy, regardless of the fact whether the party is served with the notice or not or whether the party assents thereto or not — **Calcutta Credit Corporation Limited v Happy Homes (Private) Limited, AIR 1968 SC 471.**

u) Once a notice is served terminating the tenancy or showing an intention to quit on the expiry of the period of the notice, the tenancy is terminated, unless with the consent of the other party to whom the notice is given the tenancy is agreed to be treated as subsisting. — **Calcutta Credit Corporation Limited v Happy Homes (Private) Limited, AIR 1968 SC 471.**

v) Landlord giving first notice to quit on grounds of arrears of rent tenant fails to vacate and land lord gives second notice after one year and demands rent for period between 1st and 2nd Notices. In a suit for eviction land lord claims damages for use and occupation for period subsequent to second notice. It was held that the first notice was waived and the land lord had treated the tenancy as subsisting. — **Tayabali Jaferbhai Tankiwala v M/s. Ahsan and Compamj, AIR 1971 SC 102.**

DENIAL OF TITLE

A person cannot be given the benefit of right to continue as a tenant and also contest the title of the landlord at the same time. When the tenant disputes the title of the landlord, irrespective of the technicalities of Section 106 of the T.P. Act, the landlord should be entitled to possession. — **Rachavva and Another v Kariyappa Siddappa and Another, 1981(1) Kar. L.J. 186.**

The experience shows that in many HRC cases, tenants take up a plea of denying the title of landlords and also set up title in themselves. Ultimately, those contentions are found to be baseless. These pleas are taken up in most cases only to prolong the litigation and as by raising such a plea, the tenant is not going to lose anything. On the contrary, he will gain time. The effect of such contentions is that the proceedings get prolonged. Even after the order of eviction is passed, and sometimes even during the pendency of the eviction proceedings, suits are filed by the tenants claiming title in themselves and denying the title of the landlord and even setting up a title in third parties. In order to curb such ungoing to cost him with the order of eviction and also to see that the objects of the Karnataka Rent Control Act are given effect to, it is necessary to make a provision enabling a landlord to make it a ground for eviction in the event the denial of title of the landlord by the tenant is found to be not bona fide even if such a denial is made in the objection to the eviction petition filed under Section 21(1) of the Karnataka Rent Control Act. — **Smt. Govindamma v Murugesh Mudaliar and Others, ILR1990 Kar. 2639 (DB)**

MANUFACTURING PURPOSE AND LEASE PERIOD

To constitute 'manufacture' there must be such transformation in the change out of which a new and different article must emerge having a distrinctive name, character or use. Generally coffee includes coffee powder. When coffee seeds are powdered without adding anything more, the resulting powder cannot be said to be another article with a distinctive name, character or use. The process out of which coffee seeds are converted into powder is not 'manufacture'. Where the tenant had taken the premises for grinding coffee seeds into powder and selling them, he cannot be said to be engaged in the manufacture of coffee powder and notice to quit giving 15 days time is sufficient. — **Meghraj v Seshagiri Rao B., AIR 1977 Kant. 163**

To be understood in popular sense in accordance with meaning in dictionary — Mere running of printing press cannot tantamount to engagement in process of manufacturing. Held: The expression 'manufacturing

purpose' as used in Section 106 has to be understood in a popular sense in accordance with the meaning given in the Dictionaries. Therefore, the said expression cannot be construed keeping in view the special definition set out to those expressions in special statutes like Factories Act. According to the Dictionary meaning, the word 'manufacture' implies a change. But every change is not manufacture. For identifying a given change in an article as manufacturing, there must be a transformation, a new and different article must emerge having distinctive name, character or use. Keeping in view the facts of the present case, mere running of a printing press cannot tantamount to an engagement in any process of manufacturing though the process of printing results in some change on the paper surface over which the printing is done. — Virupakshaiah alias Veeraiah v Shivaputrappa Basappa Golappanavar, 1996(5) Kar. L.J. 53B.

A lease of premises for carrying on business of retreading of tyres is not a lease for a manufacturing purpose, within Section 106 of the Transfer of Property Act. The broad test for determining whether a process is manufacturing process if whether it brings out a complete transformation for the old components so as to produce a commercially different article or commodity. Retreading process does not cause the old tyres to lose its original character. Definitions of manufacture in other enactments such as the Factories Act or the Excise Act should not be blindly applied to the Transfer of Property Act. — **P.C Cheriyan v Darfi Devi, 1979(2) Kar. L.J. Sh. N. 99 (SC).**

When a lease is granted, the test to ascertain whether the lease is granted for manufacturing process, the following points should be noted.—
1. There must be evidence that a certain commodity was manufactured;
2. That the process of production must involve either labour or machinery;
3. That the product which comes into existence after the manufacturing process is complete, should have a different name and should be put to a different use.

where lease was granted for running a flour mill wherein wheat waft transformed by manufacturing process which involved both labour and machinery, into flour it was held that all the three tests were fully satisfied and hence the lease was one for manufacturing process and could be terminated by giving 6 months notice under this Section. — **Idandas v Anant Ramchandra Phadke (dead) by LRs., AIR 1982 SC 127**

Section 106 — The lease deed was silent in regard to the purpose for which the premises was leased. It showed that what had been leased was shop premises. It did not say that what had been leased was a workshop premises. The word "Shop" ordinarily indicated that it was a place for buying and selling goods. The Court below rightly came to the conclusion that the lease was not for a manufacturing purpose, though the Appellant infact might have used the premises for a manufacturing purpose a couple of years after the premises was leased to him. As the lease was not for a manufacturing purpose, the notice of 15 days given in the case was proper and valid in Law. — **Vittal Narayana v Channappa, 1973(2) Mys. LJ. Sh.N.12.**

Where the lease was taken for carrying on bakery and saw mill business, if a lease for manufacturing purpose and the notice of termination require is of 6 months duration. Notwithstanding what is contained in Section 107, the Provisions of Sec. 106 of the Act will apply to a manufacturing lease, whether the lease deed is registered or unregistered, so as to make it a lease from year to year for the purpose of that Section, (i.e) to control duration of the period of the notice. — **Rev Fatner John Augustine Peter Miranda v N. Datha Naik, 1971(2) Mys. LJ. 204**

RELATIONSHIP OF TENANT AND LANDLORD

The H.R.C. Tribunal has given a finding that there is no relationship of landlord and tenant in the earlier proceedings between the same parties. Subsequent thereto the present suit came to be filed and the finding given by the H.R.C. Tribunal has become final and conclusive. Therefore, when on the question of legal-jural relationship between the parties competent Court of law has already given a verdict, despite the said verdict if plaintiff were to repeat and describe the relationship as landlord and tenant it would be only a contention without legal basis and non-description of the defendant's position as that of a trespasser also does not appear to be a fatal one since the suit is based on title and if some other person is in possession the owner of the property can always maintain a suit for possession basing on the title. Hence, under the circumstances suit is maintainable. **M.S. Narayana Rao v S.K. Pundareeka, 2001(3) Kar. LJ. 339A (DB).**

ATTORNMENT TO SUBSEQUENT LANDLORD

The month of tenancy was from 27th of each month and was to expire on 27-7-1974. Respondent purchased the property on 17-4-1967 and the tenant attorned to the purchaser. Held, attornment implies a continuity of tenancy created by the original landlord in favour of the tenant and the month of tenancy does not get altered. Therefore, the notice to quit issued by the purchaser requiring the tenant to quit and deliver possession on the expiry of 16-11-1967 on the basis that the tenancy was from the 17th of each month by virtue of the attornment was not according to law and the purchaser acquired no right to evict the petitioner. As a purchaser with knowledge of the petitioner being in possession as tenant, the respondent was bound by the terms of the lease. — **Karupakale R. Govindiah v C. Veerabhadriah, 1974(2) Kar. LJ. Sh. N. 135.**

Where sale of a tenanted premises recited that vendor has attorned the tenants to the purchaser and the tenant attested the sale deed, it was held it proved attornment of tenancy to the purchaser. **Sohanraj v Kanyalal Daga, 1979(1) Kar. L.J. Sh. N. 45.**

Rights of lessor's transferee to rent — Transfer of property by lessor without notice to lessee creates no privity of estate between lessee and transferee — Attornment of tenancy is legal pre-condition in case of transfer of property, if contract of lease is to be created between lessee and transferee — If lessee, not having

notice of transfer, had paid rent to lessor even after transfer, lessee shall not be liable to pay such rent over again to transferee. Attornment of tenancy is a legal precondition in cases where changes take place with regard to the transfer of ownership. The tenancy is a legal obligation between two parties and if a new person comes into the shoes of the landlord, it is very necessary that notice of this fact be given to the opposite party and that the tenancy be attorned. In the absence of this being done, the right on the part of the new landlord to demand and receive the rent cannot be enforced. . . . The record clearly indicates that the petitioner had no notice of the change of ownership nor was the tenancy attorned. . . . The decree passed against the petitioner is vitiated in so far as it is impermissible to sustain that decree both on facts and in law. — **T. Ratna Pandyan v P. Subramanyam Chetty, 1997(2) Kar. L.J. 365.**

PERMANENT LEASE

A lease of 1914 for erecting a factory and appurtenant buildings stated: it was to be for a term of 20 years certain, on payment of Rs. 350 as annual rent; even though the lessee may not continue to occupy the land, the lessee was granted the right to continue the lease as long as he desired to do so; on his choosing to continue to enjoy the leasehold, the lessee was obliged to pay annually the enhanced rent of Rs. 400 for the next ten years after October 1,1934, and after the expiration of ten years, the rent was further enhanced to Rs. 500 per annum; the lessee was given the option to give up the lease at any time after October 1, 1934 without further liability; the lessor bound himself not to call upon the lessee at any time to give up possession of the leasehold as long as the lessee was prepared to observe the terms of the lease. The lease was heritable and assignable. Held, the lease was intended to create a permanent lease and after the lapse of the first 20 years did not become a tenancy at will or even one for an indefinite term and therefore a lease for the lifetime of the grantee. Where land is let out for building purposes without a fixed period, the presumption is that it was intended to create a permanent tenancy. This presumption was not weakened by the fact that the lessee had stipulated to be entitled to give up possession if and when he decided to do so. It was an advantage specifically reserved to the lessee and did not confer any corresponding benefit on the lessor. That the lease was not intended to be for the life only of the grantee was clear not only from the facts, that it was meant for building purposes, was heritable and assignable and had*not reserved any right to the lessor to terminate the tenancy, but also from the consideration that the lessor would not gamble upon the life of his lessee when he was making sure of the term of at least 20 years. — **Sivayogesivara Cotton Press, Davangere and Others v M. Panchaksharappa and Another, 1961 Mys. L.J. 1043 (SC).**

No permanent lease could be granted either orally or even by means of an unregistered deed. Once it is held that the lease as a permanent lease is invalid, then that lease will have to be treated as a precarious lease. Where a lease is invalid (by reason of absence of a registered instrument as required by Section 107 of the Transfer of Property Act), the fact it is invalid in law is a matter which the lessee must be presumed to know and he is not entitled to compensation for the permanent structure erected by him. He is only entitled to have it removed. — **Rama Devadiga v Ganapami Karantha, 1962 Mys. L.J. 861: ILR 1962 Mys. 250.**

UNLESS THE LEASE IS DETERMINED IN ONE OF THE BODIES UNDER SECTION 11 OF T.P. ACT, THE LANDLORD WOULD NOT BE ENTITLED FOR RECOVERY OF POSSESSION

Section 21 Karnataka Rent Control Act refers to recovery of possession of any premises by the landlord, before the landlord approaches the Rent Control Court under Section 21(1), it is necessary that he should be entitled for recovery of possession. Unless the lease is determined in one of the bodies under Section 11 of T.P. Act, the landlord would not be entitled for recovery of possession, hence an action under Section 21 Rent Control Act cannot be instituted without first determining the lease. — **Church of South India Trust Association v Sampangiraman, 1979(1) Kar. LJ. 85.**

CONTRACTUAL TENANCY – CONTRACT TO CONTRARY

Section 106 of the T.P. Act applies to a contractual tenancy, though governed by Rent Control Act. — **Bhaiya Punjalal Bhagwanddin v Dave Bhagwatprasad Prabhuprasad and Others, 1962 Mys. LJ. 712 (SC).**

When the compromise petition which was incorporated in compromise decree provided that the transferee should collect arrears of rent due, it is a contract to the contrary and hence the transferee is entitled to arrears of rent due before transfer. — **Girdharilal (dead) by L.Rs. v Hukum Singh, AIR 1977 SC 129.**

Second para of Section 110 though refers to a lease for a year or number of years, principles reflected therein will apply even when time limited by lease is a month or a week or a number of months or weeks — Whether the tenancy is for year/s or month/s or week/s, principles contained in para 2 would be subject to an agreement to the contrary — Where the duration of lease was for period from 1-11-1974 to 31-1-1975, tenancy holding over was held to commence from 1-2- 1975 and such tenancy would be from month to month and that it should be terminated at the end of the month of the tenancy — Case-law discussed. — **S.P. Gurjar v Muddanna Shetty, 1990(2) Kar. L.J. 213 : ILR 1990 Kar. 3099.**

RENT ACCEPTANCE – WAIVER OF NOTICE

The lessee was holding certain land of lessor for running a mill since 1905. In 1936, the lessee transferred his rights to a Company. In the lease deed there was not only an express clause under which the lessee was entitled to remove the stocks and materials within 4 months after the termination of the lease but thereafter there was another stipulation that in case the lessee failed to do so, all the buildings etc., would become the property of the lessor. The lessor sent to the Company a notice terminating the lease deed on the ground of breach by the Company of certain covenants contained therein. The time was allowed to the Company for the removal of machinery stores etc. The Company, however, secured an order from a Civil Court prohibiting the lessor from ejecting it. In land acquisition proceedings at the instance of Company for its own purpose, the questions were whether there was waiver of notice by acceptance of rent by landlord, whether there was

forfeiture of tenancy under Section 111(g) of the T.P. Act and whether there was compliance with Section 114-A of the T.P. Act. The Supreme Court held that there was no waiver of notice. When there was no evidence to show that the rent was accepted at any time after the notice was given to Company, and secondly as the rent was accepted by lessor under protest, it could not amount to waiver because there was no intention on the part of the lessor to treat the lease as subsisting. — **Basant Lal (dead) by L.Rs. and Another v State of Uttar Pradesh and Another, AIR 1981 SC 170**

When the permanent lease is void for want of sanction, acceptance of rent by landlord makes the tenant a monthly tenant. Non mention of year in the notice can be reasonably construed. Where the intention was clear, not stating that the tenancy is terminated not material. — **1973(2) Mys. L.J. Sh. N. 300.**

TRUST PROPERTY
When there are several trustee landlords one of them can terminate tenancy — **1962 Mys. LJ. 57.**

LEASES OF INDEFINITE PERIOD
The rule of construction embodied in Section 106 of the T.P. Act is applicable not only to express leases of indefinite period but also to leases implied by law which may be inferred from possession and acceptance of rent and other circumstances. — **Ram Kumar Das v Jagdish Chandra Deo, Ohabal Deb and Another, AIR 1952 SC 23**

LESSEE AND THE ASSIGNS
Where the lease is with the lessee and the assigns, the lessee and assigns being called lessees, the lease permits sub letting, and consent is lessor is not necessary for sub letting. — **1964 Mys. L.J. Supp. 112.**

In the case of a lease there is privity of contract between the lessor and the lessee and the lessee cannot divest himself of his liability to the lessor by merely making an assignment of the lease. Assignment of the lease may result in primity of estate between the assignee and the lessor inconsequence of which both the assigning lessee and assignee become liable to the lessor for the payment of rents. — **Devidasa Bhatta v B. Ratnakara Rao and Another, 1965(1) Mys. L.J. 731.**

The words "Such consent, however, not to be unreasonably withheld in the case of respectable or responsible persons" contained in the covenant in a lease allowing the lessee to assign his interest only with the lessor's written consent does not amount to a separate or independent covenant by the lessor that he would not refuse consent except upon reasonable grounds in the case of respectable person, but they limit or qualify the lessor's covenant not to assign the defined premises without the consent in writing of the lessor. — **Kamala Ranjan Roy v Baijnath Bajoria, AIR 1951 SC 1**

When the entire interest in land is transferred by lessee with reservation to take back' possession on failure of transferee to discharge lessee's liability towards lessor within stipulated time and the lessor accepts part payment from transferee without recognising him as debtor, the lessee has right to recover possession according to agreement between the lessor and the lessee. — **Parkash Chand Khurana v Hamam Singh, AIR 1973 SC 2065.**

When the tenant has sublet the premises and the subtenant caused material damage to building, the landlord can evict the tenant on the grounds that the subtenant has caused damage to the building. There is no privity of contract between landlord and subtenant. The tenants obligation to maintain the building in good condition continues even after creation of sub-tenancy. The tenant is responsible for wrong acts of subtenant and so liable to be evicted for damage caused by subtenant — M/s. Laxmi Narain Gauri Shankar v Gopal Krishan Kahoria and Another, AIR 1987 SC 8.

LEASE BY AFFLUX OF THE TIME
Where the tenant did not vacate the premises on the expiry of the lease by afflux of the time under Section 111(f), T.P. Act, and the case is governed by the provisions of the T.P. Act, the continuance in possession of the tenant after the expiry of the lease is unauthorised and wrongful and a decree for damages are mesne profits is rightly awarded against him. — **Shyam Charon v Sheoji Bhai, 1978(1) Kar. LJ. Sh. N. 10 (DB).**

CLAIM OF TITLE IN HIMSELF ON THE PART OF THE LESSEE
Where the very case of the landlord is based on a contractual tenancy, it must be determined by a notice in accordance with Section 106, T.P. Act, for the landlord to earn the right to obtain possession of the leased premises under the Rent Control Act. This point was allowed to be taken in revision for the first time. Claim of title in himself on the part of the lessee would not ipso facto put an end to the lease. It confers a right on the lessor, if he so elects, to determine the lease by a notice as required by Section 111(g) of T.P. Act. — **Dyamappa Butti v Somappa, 1968(1) Mys. LJ. 221.**

NOTICE CLAIMING RENT AT THE ENHANCED RATE

If a notice claiming rent at the enhanced rate is given by a landlord to his tenant giving him the option to vacate in case he is unwilling or unable to pay the enhanced rent and the tenant continues to be in occupation of the premises without protest, the landlord would be entitled to recover rent at the enhanced rate, unless the Court finds that the enhanced rate is itself unreasonable or penal. Where a tenant denied the right of the landlord to enhance the rent unilaterally and refused to pay enhanced rent and the landlord did not take steps to evict the tenant, the tenant is not liable for the enhancement. The landlord could not unilaterally

determine what is the fair or reasonable rent for the premises and claim it from the tenant so long as the relationship of landlord and tenant between them had not come to an end. — **J.P. Sagar v State of Mysore, 1964 Mys. L.J. Supp. 605.**

NOTICE IN THE ORIGINAL WRITTEN LEASE COULD NOT BE IMPORTED INTO THE NEW TENANCY CREATED BY HOLDING OVER

A lease of a premises for a period of 10 years on an annual rent of Rs. 100 expired on 15-10-1958. The lease provided that if after five years from the date of the lease the landlord wants the premises for constructing a house for his own use he should ask for the premises after giving the tenant six months' notice. That occasion did not arise and the tenant continued in possession even after the expiry of the period of lease. On 15-10-1965 the tenant agreed to pay enhanced rent of Rs. 125 per year and an endorsement was made on the original lease deed. On 19-5-1969 the landlord served notice on the tenant to surrender possession after six months. On the expiry of the period of six months, the tenant refused to surrender possession. Held, (1) The notice issued was not in accordance with the terms of the lease. (2) That the term as to notice in the original written lease could not be imported into the new tenancy created by holding over and the necessary consequence was that the notice issued by the landlord was invalid. — **E. Keshavayya v R, Namsimha Prabhu, 1975(2) Kar. L.J. 232 : AIR 1976 Kant. 41.**

LEASE OF FISHERY

A lease of fishery which is immoveable property as defined by Section 2(6) of the Registration Act, if it is for any term exceeding one year or reserves a yearly rent should be registered by Section 17(l)(d) of the Indian Registration Act, 1908 and Section 107 of the Transfer of Property Act. — **Bihar Eastern Gangetic fishermen Co-oper.ative Society Limited v Sipahi Singh, AIR 1977 SC 2149.**

ALTERING EXISTING REGISTERED LEASE DEED

Any agreement which alters the essential terms and conditions of an existing registered lease must be registered. — **Sunil Kumar Roy v M/s. Bhaiura Kankanee Collieries Limited, AIR 1971 SC 751.**

HEREDITABILITY OF TENANCY OF INDEFINITE TERM

The Courts in India cannot apply the principle of Law that if the term mentioned in a lease is definite the interest of the lessee is heritable and if the term mentioned is indefinite, the interest of the lessee is not heritable. Whether the interest is heritable entirely depends on the wordings of the document and the intention of the parties. — **Narayan Narasimha Deshpandey v Kasiroya Sangappa, 1960 Mys. L.J. 530.**

LEASE — OF IMMOVABLE PROPERTY FOR PERIOD NOT EXCEEDING ONE YEAR

Registration and attestation of lease deed not required — Examination of attestor not required to prove execution of such deed. Held: Section 107 of the Transfer of Property Act deals with the procedure as to how leases have to be made. Section 107 does not require attestation of a lease not exceeding one year. When the lease deed requires no attestation, Section 68 of the Evidence Act will not be applicable and lease deed could be proved by examining the scribe as done in this case. — **T. Anthonidas alias T.A. Das v S.P. Mariyappa, 1996(3) Kar. LJ. 329A.**

Lease of immovable property from year to year — Mandatory that such lease should be by registered instrument — Where it is not so made, tease is to be taken as monthly lease for purpose of Section 106 of Act. Held: Under Section 107 of the Act, it has been provided that a lease of immovable property from year to year or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. In view of this statutory provision, it was mandatory to execute a registered instrument, if the tenancy was contemplated to be annual in nature. In the present case, since admittedly it was not made by a registered instrument, the lease cannot be taken to be an annual lease. Therefore, necessarily it has to be taken as a monthly lease for the purpose of Section 106 of the Act. — **Virupakshaiah alias Veeraiafi v Shivaputrappa Basappa Golappanavar, 1996(5) Kar. L J. 53A.**

VOID LEASE – REGISTRATION COMPULSORY

Where a verbal agreement was made for the grant of a lease for 5 years and in anticipation of execution of a lease deed, the lessee was put in possession by the lessor who received 3 months rent as advance but no lease deed was executed, it was held that lease was void because of the prohibition under this Section. — **National Textile Corporation Limited v Malathesha Enterprises and Another, 1980(2) Kar. LJ. 335.**

When there is a lease agreement in respect of a building for indefinite period for carrying on business in which the rent payable by the lessee is agreed to be settled on basis of percentage of profits earned after 15 months from commencement of lease. The lease is evidenced by unregistered document. It was held that the lease was one for a period exceeding one year and hence registration was compulsory under Section 107 of the T.P. Act. — **Delhi Motor Company and Others v U.A. Basrurkar (dead) by his LRs. and Others, AIR 1968 SC 794.**

MULGENI LEASE

Where a mulgeni lease (in South Kanara District) stated that 'if any timber trees were cut and removed, the lease was liable to be forfeited and determined'. Held, this provision indicated that there was a prohibition to cut and remove timber trees and the lessee had no right in respect of timber trees. That the lessor has no rights in future growth has been recognised to be the principle prevailing in respect of trees in South Kanara in regard to permanent leases. Hence, on the basis of the custom or usage prevailing, and in the absence of any specific term in regard to future growth, the tenant would be entitled to rights in trees of spontaneous

growth or that came to be planted after the date of the lease deed : and the landlord would have no right to interfere with the right of tenant to such tree. — **Seethamma v Louis Patroo, 1975(1) Kar. LJ. Sh. N. 36.**

According to the terms of the mulgeni instrument, the tenant had a right to continue to be in possession of the property from generation to generation, the landlord having no right to resume the land. The only right reserved for the landlord was the right to recover the rent as and when it fell due and to recover it by the enforcement of a charge, which had been created on the property, leased to the tenant. The only process by which the landlord would perhaps be entitled to recover possession of the land was when there was a reversion to him of that land by reason of the death of the tenant for the time being, who left no heirs and died intestate. The tenant cut and removed five trees, which were in existence at the time of the lease. Held, (1) A lessee has no right to cut or destroy trees which existed on the leased premises when the lease was created, but that trees which have subsequently been planted on the premises by the lessee or which have spontaneously grown after the commencement of the lease may be so removed or cut by him. (2) The value of the trees removed would not represent the correct measure of damages, as the landlord had no right to the immediate possession of the land or to the trees. The measure of damages must rest on the dimunition in the value of the reversion and the dimunition in the security. The proper damages would be to estimate the diminution in the value of the property and deduct from it a discount for immediate payment. — **Madhwaraya Udpa v Dasa Tantri, 1963(2) Mys. LJ. 416: AIR 1964 Mys. 179.**

PUTTING UP FIRST FLOOR ON TERRACE BY LESSEE

Lessee running business of manufacturing vermicelli using terrace portion for drying vermicelli — Lessee commenced putting up first floor on terrace — Lessee obtained an order of temporary injunction — Contended that lessor had not reserved right of re-entry and thus had no right to put up 'building' on thereof — Rights of lessor. Held, The view that roof is not included in the definition of 'building' appears to prima fade wrong. The terrace is the top portion of the roof. Merely because the landlord has not reserved the right of re-entry, it does not mean that he has no right to put up the first floor. His right to put up first storey on the terrace of the building cannot be defeated only in the ground that he has not reserved the right of re-entry. If interference does not affect the object of the lease for which it is taken, then it cannot be said to be an interference with the quiet enjoyment of the building. — **Salauddin v Bommegowda, ILR 1985 Kar. 2959.**

TERM OF LEASE

When lease is made for a specified term a third person gets into possession under title alleged to be derived from the lessee under certain transfers. Lessor questions the validity of the Transfer and sues the third person for possession. HELD, lessor cannot succeed till the expiry of term of lease — **Parashram Mahadeo v Rajen Textile Mills (.Private) Limited, AIR 1975 SC 2079.**

COURT IS NOT AT LIBERTY TO BREAK UP THE CONTRACT

When the premises are let for residential and non-residential purposes, the contract of tenancy should be deemed to be single and indivisible. The Court is not at liberty to break up the contract. That the relief should be limited to that portion which is used for residential purposes is not valid. — **Miss S. Sanyal v Gian Chand, AIR 1968 SC 438.**

ACCESSION TO ADJOINING AREA OF LEASED PROPERTY

Encroachment by tenant during tenancy upon landlord's vacant land adjoining tenanted premises — Presumption is that land encroached upon are added to tenure for benefit of tenant so long as tenancy continues — Tenant cannot acquire title to encroached land by adverse possession but obtain only right of tenancy under landlord — Tenant is obliged to hand over encroached area also to landlord on determination of lease along with premises originally demised. Held.—There is a presumption that whenever a lessee or a tenant encroaches upon the adjacent area to his leased or tenanted premises, then such encroached area or premises or property, also gets included as the 'Leased or Tenanted' property and the tenant is obliged to protect the landlord's rights in respect of the encroached area also, and deliver up unto the landlord at the end of tenancy the said encroached area alongwith the original tenanted or leased area. . . . The open space on the northern and eastern side of the leased portion prima facie belong to the landlord. This disputed vacant land is also to be considered as tenanted property. If it is held as a tenanted property then the relationship of the petitioner in respect of the disputed property is also to be held as one of landlord and tenant. In that view the petition under Section 21(1) is maintainable for eviction. — Syed Nazmuddin v N.S. Krishna Murthy, ILR 1998 Kar, Sh. N. 65.

When the lessee claims accession to lease hold land and makes contradictory pleas in the alternative, the claim for accession of land by the lessee cannot be sustained. — Chapsibhai Dhanjibhai Dand v Purushottam, AIR 1971 SC 1878.

ACT OF COURT SHALL NOT INJURE ANY ONE

Section 108(e) — Kamataka Rent Control Act, 1961, Sections 21(l)(h) and (j), 25, 26 and 27 — Lease and right of re-entry — Termination of lease not automatic when leasehold is destroyed — It is at option of lessee — Right of entry under Rent Control Act is traceable to provisions of Section 108(e) of Transfer of Property Act — Interest of tenant does not survive in case of eviction under Section 21(l)(h) — His interest survives in case of eviction under Section 21(l)(j) — Court has ample power to protect tenant's interest in case of eviction under Section 21(1)(j). Held: The interest of the tenant does not survive in view of the order of eviction under Section 21(l)(h) of the Act. This power of the Court can be traced to the analogous rights of the parties that subsists under Section 108(e) of the Transfer of Property Act. Under general law as codified in the Transfer of Property Act, the tenant is entitled to treat the lease as subsisting in the event the landlord of

his own accord destroys the tenament. His remaining in possession of the premises in question would be legal and the landlord is not entitled to prevent his retaining possession. But in a case under Section 21(l)(j), such entry and demolition of the tenament has taken place under the authority of law. The authority of law conferred on the landlord permitted him to enter into the leasehold property, pull down the building only on his undertaking to reconstruct the same. If he abuses this permission, namely, fails to honour his undertaking, his remaining in possession of the premises after demolishing the building is tantamount to remaining there without the authority of law. It is as if he had no permission at all to enter the property and pull down the building. If that be so, the principle that the act of Court shall not injure any one should be applied and the Court be empowered to give all directions as is in law a party is entitled to, so that the parties will be restored to the position prior to the permission being granted under Section 21(l)(j) of the Karnataka Rent Control Act. This can be achieved only if permission is granted to the tenant to resurrect or reconstruct the building that is demolished by the landlord. If that be so, in a case of eviction under Section 21(l)(j), the Court has ample power and is bound as well to issue such appropriate directions to meet the ends of justice which will enable the tenant to reconstruct the building as well. — **Baburao Ganpatrao Tirmalle v Bhimappa Venkappa Kandakur since deceased by his L.Rs., 1996(2) Kar. LJ. 32F.**

TENANT ATTEMPTING TO CARRY OUT REPAIRS TO RENTED SHED AND PUT UP PERMANENT STRUCTURE WITHOUT LANDLORD'S PERMISSION, ILLEGAL.

The suit is in between the landlord and tenant. The rent karar was for a period of 11 months and therefore the defendant's position is that of a tenant holding over. Even then if the defendant felt insecurity or wanted certain repairs to the building as a measure of security, he had every right to approach the landlord, obtain his permission and put up construction. There is nothing to indicate in the evidence that defendant at any time approached the plaintiffs and obtained permission. Section 108(f) of the Transfer of Property Act provides a remedy in a situation where the landlord neglects or refuses to effect necessary repairs. Sub-section (h) empowers him to remove such fixtures even after the determination of the lease subject to the condition that he leaves the property in the state in which he received it. These things and the question of law on the point have been ignored by the Appellate Court in considering the evidence both oral and documentary. It is an error in law and defect in procedure which requires to be corrected in appeal. — **Noorulla Amin Musuba and Others v Chandru Sheniyar Naik, 1996(6) Kar. LJ. 275D.**

LESSOR IS ENTITLED TO REMOVE COMPOUND WALL PUT UP WITHOUT HIS CONSENT.
Even to effect repairs the tenant is expected to give notice to the landlord. In the instant case the appellants have not even bothered either to intimate the landlord or obtain necessary permission for the purpose of erection of compound. Further, the appellants also never bothered to know from the landlord regarding measurement of the premises bearing No. 17. Further, the appellants are also not able to establish that they had put up the compound within the premises bearing No. 17. Under these circumstances the Trial Court is justified in not exercising its discretion in the matter of granting injunction in favour of the appellants. .... The Trial Court having considered all the materials placed before it declined to grant injunction in favour of the appellants. If that is so, there is no reason to interfere in the order of the Trial Court in these two appeals. — **The Home School, Bangalore and Another v M. Shaft Ul Haji and Another, 2001(6) Kar. L.J. 93.**

OWNERSHIP/REMOVAL OF BUILDING CONSTRUCTED BY TENANT – DEPENDS ON CONTRACT.
Lease of vacant land — Condition permitting lessee to construct building on leasehold land and requiring him to surrender possession of land with building on expiry of lease without compensation — Ownership of building vests in lessee so long as lease is subsisting, and on expiry of lease, it passes on to lessor — Matter is one of contract between parties. Normally, under Section 108 of the Transfer of Property Act, before the expiry of the lease, a lessee can remove all structures and building erected by him on the demised land. All that was necessary for him to do was to give back the land to the lessor, on the termination of the lease, in the same condition as he found it. The ownership, therefore, of the building in this case was not with the lessors but was with the lessees. Under Section 108 of the Transfer of Property Act, there was nothing to prevent the lessees contracting to hand over any building or structure erected on the land by them to the lessors without receiving any compensation. In other words, although under Section 108 the lessees had the right to remove the building, by the contract they had agreed to hand over the same to the lessors without the right to receive compensation at the end of the lease, the matter being entirely one of contract between the parties. Such a contract, however did not transfer the ownership in the building to the lessors while the lease subsisted. — **S. Shivamthan (deceased) by L.Rs. v S.G. Narayana, ILR1998 Kar. Sh. N. 90.**

A lessee who has put up a building with the consent of the landlord on the leased premises, is not entitled to be compensated for the costs incurred by him in respect of the structures put up by him, when the tenancy is terminated and when he is called upon to quit and deliver the possession of the property to the lessor — **Mohammad Hayat Sahab v Radhakrishna Bhaktha, 1968(1) Mys. L.J. 63**

Where lessee has agreed to construct building of value of not less than Rs. 15,000/- which at the expiry of the lease was to become the property of the lessor and the building valued at Rs. 50,000/-, the lessor is entitled to building and not merely structures worth Rs. 15,000/-. **Y:V. Srinivasa Murthy by L.Rs. v Pillamnw and Others, 1973(2) Mys. L.J. 399.**

When the Lease deed provides for passing of ownership of superstructure built by lessee to lessor after expiry of tenancy, the lessor is under obligation to pay certain percentage of market value of structure to lessee under the agreement. The lessee cannot retain possession until amount is paid — **Madan La! v BHai Anand Singh, AIR 1973 SC 721.**

The lessor is not debarred from determining the lease or filing a suit for ejectment merely because the lessee has made construction to the knowledge of the lessor — **Jagat Ram Sethi v Rai Bahadur D.D. Jain, AIR 1972 SC 1727.**

CHALGENI LEASE

A lessee under a chalgeni lease may, in the absence of a prohibition contained in the lease itself assign his lease hold interest for the duration of the term of the lease or the balance of it at the time when the assignment is made. After the expiry of the term of the lease, the assignee has no interest subsisting as to entitle him to a declaration of his being a chalgeni tenant. A renewal of the lease by the tenant holding over and the landlord receiving the rent, is a renewal of pre existing contractual relationship, and the benefit of such renewal cannot be claimed by the assignee after the expiry of the term. — **Umamaheshiuara Temple by Trustee v Leo Cresta, 1966(2) Mys. LJ. 483.**

LESSEE FILING SUIT FOR MANDATORY INJUNCTION

Certain part of land was leased to a person. The lease granted a portion of a land on license to another for a specified period. The license was terminated after the expiry of the period. The lessee against licensee filed a suit for mandatory injunction. The licensee claimed to have purchased the land from the owner. Suit by lessee for possession is maintainable. See Specific Relief Act, 1963, Section 6. — **Sant Lal Jain v Avtar Singh, AIR 1985 SC 857.**

SUB-LESSEE RIGHTS

Premature surrender of leasehold rights by main lessee and its effect on right of sub lessee — Such surrender does not operate as eviction of sub lessee — It only brings sublessee into direct contact with lessor, making sub lessee himself main lessee under lessor on terms of existing sublease — If, after such surrender, new lease is entered into with third party, such third party who has become new lessee, does not step into shoes of his predecessor lessee who had created sublease and does not ipso facto become landlord of sub lessee for purpose of evicting sub lessee — Where main lessee, partnership firm, had prematurely surrendered its leasehold rights after creating sublease, and on such surrender, third party individual became main lessee, new lessee does not become landlord of existing sublessee for purpose of evicting him. Held: It is well established that the lease is a transfer of interest in immoveable property. Section 105 of the Transfer of Property Act, 1882 provides that a lease of immoveable property is a transfer of right to enjoy such property made for a certain time, express or implied, and for consideration. Clause (j) of Section 108 of the T.P. Act, subject to any contract to the contrary, authorizes the lessee to sublease the whole or any part of his interest in the leasehold property. .... During the subsistence of the lease, the sublessee in whom the lessee's interest is vested, acquires right to continue in possession over the demised premises during the subsistence of the lease. Therefore, coming to the facts of the present case, but for the surrender of the lease by the head lessee i.e., the firm, the petitioner was entitled to continue his possession over the petition premises till 1978 in his own right since the lease in favour of the firm was for a period of 9 years. . . . .Despite the above noted statutory provisions and consequent right of the petitioner flowing there from, the same was sought to be destroyed by the respondent on the strength of a registered lease deed dated 6-2-1974 obtained from the owner by taking a plea that he had obtained the said lease on surrendering of its leasehold rights by the firm and thus, he has stepped into the shoes of erstwhile lessee firm. Thus, according to him, he has become landlord of the petitioner as defined under Section 2(h) of the KRC Act. According to the said provision, in respect of a subtenant, the tenant, who has sublet the premises is the landlord for the purposes of the said Act.. . .It is no doubt true that the sub lessee's interest being carved out of lessee's interest, it will, as a general rule, be determined by the determination of the lease itself. But, determination by surrender of the lease by the lessee is an exception to this general rule. Surrendering being a voluntary act on the part of the lessee, the principle that a man cannot derogate from his own grant will come into play and the lessee's action will not be allowed to prejudice the sub lessee. It is this equitable principle, which has been incorporated in Section 115 of the T.P. Act. By operation of this statutory provision on surrender of the lease by the head-lessee, the sub lessee becomes a lessee of the lessor on the terms of the sublease. Thus, the under lessee, by operation of law is brought into direct contact with the lessor, except where surrender is made by the head lessee for obtaining new lease. .... .The plea raised by the respondent is that before the lease was granted to him on 6-2-1974, the firm had expressly or impliedly surrendered the lease granted in its favour. If that be so, then by operation of the statutory provisions under Section 115 of the T.P. Act, the petitioner being the under lessee, himself became the head lessee under the Math. Therefore, there could not have been any occasion for granting any competing lease to the respondent in respect of the petition premises. For this reason, it has to be held that respondent at no point of time, became the landlord of the petitioner for the purpose of the K.R.C. Act entitling him to maintain any eviction proceedings there under against the petitioner. — **Krishnasa Kheerasa Habib v Shah Parasmal Pittaji Jain, 2000(1) Kar. LJ. 12.**

THE TENANT IS NOT ENTITLED TO SUSPEND PAYMENT OF RENT

When landlord fails to give possession of one out of three bed rooms of demised premises, the tenant is not entitled to suspend payment of rent, but he must pay proportionate rent. — **Surendra Nath Bibra v Stephen Court Limited, AIR 1966 SC 1361.**

PURPOSE OF LEASE
The purpose of lease of certain land was that the premises was not to be used for any purpose other than the specified purpose. When the tenant uses the premises for other purpose which is connected with the main purpose, it could not be said that the premises was used for the purpose other than that of the lease. The inhibition of Section 108(o) is not attracted. — **Jnan Ranjan v Arun Kumar, AIR 1975 SC 1994.**

POSSESSION ON THE EXPIRY OF THE LEASE
A condition that the lessee has to put the lessor in possession on the expiry of the lease is to be read in the lease even in the absence of such condition. — Thayarammal v People's Chanty fund and Others, 1978(1) Kar. LJ. 438.

FUTURE LESSEE RIGHT TO EVICT EXISTING LESSEE
When the lease is to commence from expiry of the existing lease, the lessee can sue for eviction of original lessee. The right of transferee under the Section is not curtailed by Rent Control Act. See Karnataka Rent Control Act, Sections 3, 4 and 31. — **N. Venkataramana Bhat v A. Prabodh Naik and Others, 1975(1) Kar. LJ. 262.**

DETERMINATION OF LEASE
Where a widow having a right of residence in a family house created a tenancy, such lease stood determined on her death. Section lll(c). See T.P. Act, Section 6(g). — **Bhujabalappa Anandappa Baragali and Another v Veerappa Mahabaleshappa Doddamani, 1966(2) Mys. L.J. 56.**

Lease is determined on expiration of notice to determine thereof — Lessee is bound to put lessor into possession of property, on determination of lease — Question of bona fide requirements of landlord not required to be gone into — Provisions of Section 21(1) of Karnataka Rent Control Act, 1961 regarding eviction of tenant are not attracted when suit is under Transfer of Property Act and suit premises are situated in place to which provisions of Rent Control Act do not apply. Held: The suit instituted by the appellant under the provisions of the Transfer of Property Act, 1882. The property in dispute is situated in Akki-Alur village to which admittedly the provisions of the Karnataka Rent Control Act, 1961 do not apply. Therefore the question of bona fide requirement of the premises for appellant's use was not a matter that was required to be gone into. The appellant incidentally or inadvertently referred to the requirement of the premises for his bona fide occupation but the appellant was not required to prove that averment of bona fide requirement of the premises for a decree of eviction. In a suit under the provisions of the Transfer of Property Act, 1882 under Section 108 of the Transfer of Property Act, 1882 under clause (q), on the determination of the lease the lessee is bound to put the lessor into possession of the property. Section 111, Transfer of Property Act which deals with determination of lease states that lease of immovable property determines on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other. — **Shantaveerappa Puttappa Chaushetti v Gangaram Hemajeppa Kalal (since deceased) by L.Rs. and Others, 1996(3) Kar. L.J. 338.**

SALE OF AGRICULTURAL LAND - WHERE TENANCY EXISTED
An agreement to sell was executed in favour of the plaintiff, a tenant and the tenant continued in possession and in execution of a money decree against the plaintiff-tenant, the property was brought to sale and purchased by the decree-holder and thereafter the plaintiff brought a suit for declaring the execution sale as void and not binding on him. No objections were filed by plaintiff after the notice under Order 21, Rule 66 of the CPC was served on him. Section 28 of the Bombay Tenancy and Agricultural Lands Act prohibited Sale of tenancy rights. Held, that the question whether the plaintiff's rights of tenancy in the suit land got merged in the rights acquired by plaintiff under Section 53-A of the Transfer of Property Act cannot be raised for the first time in second appeal. Since only the right to ask for specific performance had been acquired by the plaintiff under the agreement to sell and since such right does not constitute an interest in immoveable property, there was no merger of the tenancy rights of the plaintiff with the right under the agreement to sell, under Section 111(d) of the Transfer of Property Act. Therefore, there was no bar of constructive res judicata to the plaintiff's suit, which was in respect of his rights as tenant and which were not brought to sale. The bar under Section 34 of the Specific Relief Act applies when the plaintiff is entitled to ask for consequential relief but abstains from doing so. As the plaintiff did ask for the consequential relief of possession but the Court found that he was not entitled to it, the bar under Section 34 of the Specific Relief Act did not apply and the plaintiff was therefore entitled to a declaration that the execution sale was void. — **Rangarao Ramarao Deshpande v Channappa Basappa Lakshmanahalli , 1974(2) Kar. L.J. 208 : AIR 1975 Kant. 155**

TENANT PURCHASING LAND FROM ONE OF MEMBERS OF JOINT FAMILY
Lease — Determination of — Tenant of land forming part of joint family property purchasing land from one of members of joint family — Since what he has purchased is only undivided share of member in joint property, he has no right to possession, either exclusive or joint, and consequently there is no merger of interests of lessee and lessor in property in himself — Lease in such case is not determined. Held: Section 111(d) of the Transfer of Property Act provides that lease of immovable property determines in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right. Therefore, it is clear that it is only in case the interest of the lessee and the lessor in the whole of the property stands vested at the same time in one person in the same right, there would be determination of lease. In the instant case, where the original tenant has acquired only one-fifth undivided interest of the lessor, it cannot be said that there is determination of the lease. If there is no determination of lease, the agrarian relationship of landlord and tenant continues. In the instant case, both the original tenant

as well as his sons did not seek for partition of one-fifth undivided interest in the land and take even symbolic possession of the same. Therefore, the conclusion reached by the Appellate Authority that since the original tenant had purchased one-fifth undivided interest in the land in question from the landlord, the petitioners are not entitied for conferment of occupancy right, is unsustainable in law. The order impugned is liable to be sot aside. — **Tukaram Govind Naganvakar (Deceased) by LRs. and A nother v State of Kamataka and Others, 2001(4) Kar. LJ. 505C**

LESSEE ENTERING INTO CONTRACT FOR PURCHASE

Lessee entering into contract for purchase and entitled to possession under Section 53-A — Lease stands extinguished. — **Champalal Bhaktawarmal v Smt. Sumithramma by LRs, 1972(2) Mys. LJ. 242 : AIR 1973 Mys. 110.**

For some years prior to 1949 the suit property was let out by plaintiff to defendant and defendant was running a Hotel. On 19-12-1949, plaintiff conveyed the suit property to defendant for Rs. 7,000/- with a covenant for re-purchase for the same consideration within ten years of the documents. It is also stipulated that during the period subsequent to reconveyance, defendant should not be dispossessed for the 10 years from the date of the sale and that the defendant should be hi occupation as tenant on the same rent as before. Plaintiff sued for specific performance of agreement for reconveyance. Held.—The transaction of 1949 was a sale and not a mortgage, and it brought about the extinguishment of the previous lease by merger under clause (d) of Section 111 of the T.P. Act. The covenant that during the period between the reconveyance and the expiry of 10 years from the Deed, the defendant should be in occupation as a tenant should be regarded as an agreement by plaintiff to grant a lease on the happening of a future contingency and not as providing for a revival of the previous lease. Further, no deed of reconveyance having been executed within time, the plaintiff was relieved of necessity of granting the lease. Hence plaintiff was entitled under the deed of 1949 to a Deed of reconveyance and to possession — **Shankara Rao Rama Rao v Ekiwth Mallappa, RSA No. 360/1963, dated 13-7-1966.**

RELINQUISHMENT OF THE LEASE - SURRENDER

A letter by the lessee stating that the leased premises had been kept vacant does not amount to relinquishment of the lease — **State of Mysore v B.R. Ramoo, 1967(2) Mys. LJ. 625.**

Implied surrender determining lease — Surrender can be implied from act of lessee abandoning possession and that of lessor taking over possession — Doctrine of Estoppel is basis of implied surrender — One of joint tenants vacating premises amounts to implied surrender on his part. Held: Section 111(f) of Transfer of Property Act provides that a lease of immovable property determines by implied surrender. Surrender can be implied from such facts as the relinquishment of possession by the lessee and taking over possession by the lessor. Implied surrender has its basis on the Doctrine of Estoppel. If a tenant abandons or relinquishes possession of the leasehold premises and the landlord acting on the basis of such conduct of the tenant either takes over possession or where the tenant who has abandoned that premises happens to be one of the joint tenants does something to his detriment there would be an implied surrender of the right of such tenant or joint tenant. — **Akkatai alias Sujata v Baburao SattappaAngol (dead) by L.Rs. 1995(6) Kar. LJ. 219B.**

A waiver is an intentional relinquishment of a known right. There could be no waiver unless the person against whom the warver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights. — **Associated Hotels of India Limited v S.H. Sardar Ranjit Singh, AIR 1968 SC 933.**

AGREEMENT RESERVING RIGHT OF RE-ENTRY TO LANDLORD — RIGHT DOES NOT AUTHORISE BOARD TO FORCIBLY RESUME POSSESSION

Determination of — By forfeiture — Agreement reserving right of re-entry to landlord — Right does not authorise Board to forcibly resume possession — Possession to be resumed either by initiating proceedings under Karnataka Public Premises (Eviction of Unauthorised Occupants) Act, 1974 or by filing suit. Held: The power of re-entry and 'resumption' that is reserved by the Board in the lease-cum-sale agreement, does not authorise the Board to directly or forcibly resume possession of the leased land, on termination of the lease. It only authorises the Board to take possession of the leased land in accordance with law. In this case, that can be either by having recourse to the provisions of the Public Premises Act or by filing a Civil Suit for possession and not otherwise. — **M/s. Hanuman Silks and Another v Karnataka Industrial Areas Development Board and Others, 1996(7) Kar. LJ. 277C**

MERE ACCEPTANCE OF RENT FOR AND ON BEHALF OF THE LAND LORD WILL NOT CREATE A TENANCY BY HOLDING OVER

The Touring Cinema of Respondent 1 was located on a site, which he obtained under a Lease on 3-1-1979 for 11 months. After the expiry of the lease, he has been paying rent to the son of the owner til] May, 1980. When the renewal of the Cinema **Licence** was sought for, the owner objected that Respondant 1 had no right to continue in possession. Respondant No.l had filed a suit against the owner and obtained a temporary injunction restraining interference with his possession the District Magistrate granted Renewal of Licence. The same was challenged in a Writ Petition. It was held that Respondant No. 1 cannot be said to be in lawful possession of the site within the Rule 6 of the Cinema Rules. The temporary injunction only protected Respondant 1 against unlawful interference by the owner and was not conclusive, much less indicative of the fact that Respondant No.l was holding over or a person in lawful possession of the site. There being no evidence that the owner's son was authorised to receive rents for and on behalf of the owner, nor any evidence that during the term of the written lease, the son was also receiving the rent, mere acceptance of

rent for and on behalf of the land lord will not create a tenancy by holding over. — **Kanthamma v S.A. Sudarshan and Another, 1981(2) Kar. L.J. 249.**

LEASE CONSISTING OF AGRICULTURAL LAND AS ALSO HOMESTEAD.

Main lease consisting of Agricultural land as also homestead. When Sub lease of **homestead** only is made all **such** sub-leases are Agricultural leases. The question should not be reopened even though the correctness of the view is open to question. The rule that where terms of Statutes or ordinance are clear then even a long and uniform course judicial interpretation of it may be over ruled, **if** it is contrary to clear meaning of enactment, is in applicable to decisions on the basis of which titles and transactions must have been founded. **— Nirshi Dhobin and A nother v Dr. Sudhir Kumar Mukherjee and Others, AIR 1969 SC 864.**

ILLUSTRATIONS IN T.P ACT

(a) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and 6 remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.

(c) A lets a house to B for 5 years. B underlets the house to C at a monthly rent of Rs. WO/-. The 5 years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(d) A lets a farm to B for the life of C. C dies,,but B continues in possession with A's assent. B's lease is renewed from year to year.

CASES ON BENAMI TRANSACTIONS

Benami purchase — Burden of proof of — Tests for determining — Burden of proving that purchase is benami and that apparent purchaser is not real owner, rests on party asserting it to be so — Source from which purchase money came, relationship between person who paid purchase money and alleged benamidar, custody of title deed and conduct of parties in dealing with property after purchase, are factors relevant for consideration — Where father paid money for property purchased in name of his daughter and put her in possession of purchased property and pf title deed thereof, purchase is to be held not benami purchase by father, but he intended purchase to be gift to his daughter who is to be held absolute owner. Burden of proof to establish a transaction to be benami is to be discharged by party raising the plea. The party raising such a plea, cannot succeed unless it proves that property under the deed of transfer though has been purchased in the name of a person in whose name the deed stands, but the real purchaser is a different person and that the same had not been purchased for the benefit of such person named in the deed as purchaser in addition to establishing the passing of sale consideration and conduct or dealing with property by the parties namely possession, control, etc., over property. . . . .The surrounding circumstances, the mode of enjoyment might still indicate that it was intended to be a gift to 'B' and it would then not be a case of benami notwithstanding that the purchase money did not proceed from defendant . . . .The evidence on record regarding possession, user etc., of suit properties and control and possession of title deeds is that, these were all with Smt. Kenchamma-defendant 1. This evidence establishes that Smt. Kenchamma has been the real owner and not benamidar. — G. Chikkapapanna alias G.C. Papanna v Smt. Kenchamma (Deceased) by LRs and Others, 1998(5) Kar. L.J. 360A: ILR 1998 Kar. 3450. (NOW CERTAIN BENAMI TRANSACTIONS AND RIGHTS ARISING OUT OF IT ARE BANNED)

Benami purchase — Onus and proof of — Matters to be considered in determining benami nature of transaction — Where person claiming to be real owner, has in his suit for declaration and injunction against person alleged to be ostensible owner, has proved that it was he who paid purchase money, has produced title deed from his custody, and has explained motive behind such transaction, can be said to have discharged his initial burden of proof, and he is to be held entitled to relief when his evidence has not been rebutted by opposite party. A person expressly shown as the purchaser or transferee in the deed is a document prepared after considerable deliberations, starts with initial presumption in his favour that the apparent state of affairs is real state of affairs. The burden (if proving that the sale is a benami transaction and apparent purchaser is not the real owner, always rests on the person who asserts it to be a benami transaction and thus, burden, has to be discharged strictly by adducing legal evidence of definite character. For determining whether a particular safe is a benami transaction or not, there is no absolute formula or a test to be uniformly laid for all situations, but there are certain guiding factors as mentioned below which may help the Court to arrive at the decision on this part and decide further the real intention and to determine the nature of transaction. — The source from which the purchase money came; The nature and possession of the property, after its purchase namely in whose possession the property purchased has been and in what capacity; The intention of the motive behind the transaction being given the benami character; The position and relationship of the parties and in particular between the claimant and the benamidar; The custody of the title deeds after the sale and the conduct of the parties, even subsequent to the transaction, in dealing with the property, (para 12) D. Victor v L. Sundaram (Deceased) by LRs, 1998(5) Kar. L.J. 501B. (NOW CERTAIN BENAMI TRANSACTIONS AND RIGHTS ARISING OUT OF IT ARE BANNED)

CASES ON SALE OF IMMOVEABLE PROPERTY

A transaction would be a sale only if the entire consideration is money. — P.R. Srinivasan v The Corporation of the City of Bangalore, 1957 Mys. L.J. 418 : ILR 1957 Mys. 167.

Incorrect recital regarding consideration by itself does not lead to an inference that intention of parties was to convey title only on payment of consideration, or price can be promised or paid at a later date also — Explained. — G. Hampamma v K.S. Kalingappa and Others, 1989(2) Kar. L.J. 523 : ILR 1989 Kar. 2764.

Dower due to a Muslim wife from her husband is valid consideration to support a sale in favour or the wife in payment of the dower. — Union of India v K. Mohammed Hussain, 1966(1) Mys. L.J. 279.

Muhammadan Law — Hiba-bil-iwaz — Gift for consideration is no gift but sale — Transfer of property by Muhammadan husband to his wife in settlement of her claim of mahr or dower debt is sale and not hiba or gift — If property so transferred is immovable property of value of one hundred rupees or upwards, title to property can be conveyed only by registered instrument, and not by mere oral agreement followed by delivery of possession — Where Muhammadan wife was put in possession of immovable property by her husband in settlement of his dower debt, and transfer was not effected by registered instrument, but only by oral agreement, there is no conveyance of title in favour of wife, and consequently sale effected by wife subsequently to third party is invalid. Held: A gift given in lieu of mahr, if not registered within the meaning of Section 17 of the Registration Act, such a gift is invalid in the eye of law. — Smt. Marembi and Others v Umar sab and Another, 1998(4) Kar. L.J. 643.

Oral sale of immovable properties over Rs. 100/- in value is of no effect and cannot be specifically enforced. — Mallangowda and Others v Gavisiddangowda, 1959 Mys. L.J. 261 : ILR 1958 Mys. 746 : AIR 1959 Mys. 194.

The fact that under Section 54 of the Transfer of Property Act, a sale of property of the value of less than Rs. 100 could be effected by mere delivery of possession does not mean that when parties choose to write out an instrument of sale, such an instrument need not be registered and the unregistered document cannot be used to make out the character of the possession. Section 49 of the Registration Act and Section 54 of the Transfer of Property Act prohibit such use. The vendee can prove by independent evidence that he is in possession of the property, which formerly belonged to somebody else, and that his possession can be traced to delivery of possession by that other person pursuant to a transaction of sale. The benami nature of a transaction or that the real title vests in the claimant has to be proved by evidence a acceptable to a Court of law. Where the documents relating to the property are inadmissible in evidence, custody of those documents by the claimant cannot have any value. In a case where the circumstances and arguments relied upon by the claimant are equally available to the alleged benamidar, the only safe course for the Court is to give effect to documents relating to the property which are registered as required by law. — K. Thimmiah v B.H. Nanjappa, 1965(1) Mys. L.J. 44.

RIGHT OF RECONVEYANCE Where the right to get a reconveyance was personal to the promisee, it is a personal right and cannot be transferred. — Thippaiah v Mallamma, ILR 1973 Mys. 738.

ABSENCE OF PROOF OF PAYMENT OF SALE CONSIDERATION — SALE NOT INVALID It is well-settled principle of law that a deed of transfer of immovable property whether by sale or mortgage which has been executed according to law and has been registered, becomes operative to pass on the title and the property from transferor to the transferee, namely, from the vendor to the vendee or the like, and further even if in a deed, where, it is mentioned that consideration expressed in the conveyance has been paid, but, as a matter of fact, it has been found that it has not been paid, does not render the transaction to be void for want of consideration. Once the transferring of immovable property has been done by a registered document, transaction becomes complete and effective and the passing of title or interest is not postponed, even till the future date of payment, until and unless there is an express covenant or term to that effect, in the deed, agreed between the parties. If the consideration has not been paid, then it is always open to the vendor to realise the consideration by legal means. The deed in the present case does not show by any of its terms that the passing of interest or title in the property had been postponed, instead, it is provided that vendor by this deed transfers and conveys the absolute ownership of the property. So, the deed unambiguously appears to be a sale deed. This deed does neither contain any term in writing in it to indicate that the property transferred is a security and the transfer of interest thereunder is suspended, nor does it provide that after the repayment of the alleged loan, the property will stand or be reverted or be reconveyed. No such term is contained therein. — Dr.]acob Ijjzarus Chelly v Dokka Samuel, 1995(5) Kaj. L.J. 692A.

Consideration need not be solely money consideration though in an agreement, sale price is the main consideration — If there are other considerations also by way of reciprocal promise then a party chosing to enforce the contract cannot dissect the same into two parts, namely, one which is favourable to him and the other which is unfavourable/inconvenient to him — merely becasue definition of sale is restricted to payment of prices the argument that the other consideration cannot be considered as part of the agreement held to be not acceptable. — Indira Rai v Pamshumm Kallappa Hande, ILR1988 Kar. 1307.

HOUSE PROPERTY WITH 'COMPOUND' According to dictionary meaning, compound is an enclosed space with whatever buildings there are on it. Since it is enclosed there is little point in speaking of a compound wall. In the instant case, the sale deed describes the property in the schedule as house property with compound, etc. Therefore, it is clear that the property sold is with compound which means "compound wall". Compound by itself is used to refer to the wall. Therefore, absence of the word "wall" after the house property with compound in the schedule cannot be made much of. In cities sometimes all the four walls of the compound may not be owned by the owner of the house which is enclosed with a compound. But when the property sold under a sale deed is described as house property with compound and if one takes the dictionary meaning of the word "compound", no further explanation is needed to clarify that the house

property and the enclosing compound wall are together sold under the sale deed. It is not open to interpret that the walls of the compound do not belong to the vendor. — Devikarani v Venkatesha Sastry, 1994(5) Kar. L.J. 99A.

Sale of immovable property — Execution and registration of sale deed — Plea that consideration is not paid the vendee not put in actual 'possession — Remedy — Non- payment of consideration by itself does not render the sale imperfect or invalid; remedy to vendor is for recovery of the amounts and not for declaration of title and possession — If actual possession not delivered to vendee, open to vendee to sue for possession — Explained. — **Smt. Therojamnia & Another v D.H. Sadashivaiah, 1990(3) Kar. L.J. 504.**

Future payment of consideration does not arrest passing of title if instrument registered — Title gets conveyed as soon as instrument with stipulation of consideration is registered — Non-delivery of possession does not affect conveyance of title — Delivery of possession not , essential ingredient — Right to possession incidental to right of ownership -Conveyance of title if dependent upon passing of consideration, passing of title deferred till payment of consideration — Explained. — **G. Hampamma v K.b.Kalingapa and Others, 1989(2) Kar. L.J. 523 : ILR 1989 Kar. 2764.**

The plaintiff had entered into the transaction in question in order to liquidate the loan which he had taken from the defendant-Bank. The document also discloses that the transfer was made for a consideration which could have been best fetched. The plaintiff in the document also admits that Rs. 3,000/-which was over and above the debt of the Bank was received by him in cash. So far as the provision for reconveyance is concerned it was agreed that if the plaintiff repays Rs. 13,000/- along with all the expenses which the respondent-Bank had incurred by way of insurance charges, taxes, repairs, etc., within 5 years, then the respondent-Bank will be obliged to reconvey the property in his favour. The transaction in question was entered into between the parties not in order to establish the relationship of debtor and creditor but was entered only with the sole purpose of liquidating the existing loan. The document is in fact a document of conveyance or sale with a condition to repurchase. — **Basappa Shivalingappa Revadigar (dead) by LRs. v Karnataka Bank Ltd., Kundgol, Dhanvad, 1994(5) Kar. L.J. 463.**

If a sale property of less than Rs. 100 in value is effected by delivery of possession, that sale is as provided by Section 54 of the Transfer of Property Act, a valid sale. It is not rendered invalid by reason of the execution of an unregistered instrument of sale recording it. — **Govindappa and Another v Vishivanath alias Eshwarayya, 1961 Mys. L.J. 528 : ILR 1961 Mys. 942.**

Title to property covered by a decree for specific performance passes only on the execution and registration of the sale deed and not from the date of the decree or the date of the deposit of the purchase money.In the absence of some provision in the sale deed to the contrary, title passes with the execution and registration of the sale deed. A sale deed which is executed by the Court in pursuance of a decree for specific performance is a transfer by the Court on behalf of the judgment-debtor and the sale deed so executed has got all the characteristics of a transfer inter vivos. **— Mrs. Christine Pais v K. Ugappa Shetty, 1965(2) Mys. L.J. 692.**

Municipal Property Register is not title deed. Land Revenue Patta is not. — **Hazarat Asmruddin Durga v Hussein Ktian Saheb, 1966(1) Mys. L.J. 772.**

Where the defendant purported to sell certain sites and convey title therein to the plaintiffs and it was not disclosed in the sale deeds that the Sy. No. in which the sites were situate had vested in the Government under Section 3 of the Inams Abolition Act and that the only right the vendor had in those sites was to apply for being registered as occupant thereof and that he was transferring only such right to the plaintiffs. Held, there was a breach of the duty on the part of the vendor under Section 55(l)(a) of the Transfer of Property Act and the plaintiffs were entitled to avoid the sale and claim refund of the price paid by them. — **Hanumappa v Munithimmiah, 1974(1) Kar. L.J. Sh. N. 298.**

In a suit for damages for breach of the implied warranty under Section 55(2) of the Transfer of Property Act, the non-production of the sale deed is immaterial, where no contract to the contrary is pleaded. Even if the vendee knew the defect in the title of the vendor, still he can avail himself of the statutory warranty. In such a suit, the cause of action arises on the date of dispossession and not on the date of the sale deed. — **Basappa v Kodliah, 1958 Mys. L.J. 491: AIR 1959 Mys. 46 : ILR1958 Mys. 237**.

Contract of sale — Vendee's revocation of — Vendor's defective title as ground for — Such ground is available to vendee to revoke contract even if he had prior knowledge of defective title — Even where contract of sale is completed, vendee is entitled to cancel contract and seek refund of purchase money, as statutory provision deems implied contract for title — Where contract is only at executory stage, vendee cannot be compelled to purchase, on ground that he was aware of defective title at time of entering into contract of sale. The provisions of Section 55(2) of the Transfer of Property Act deem implied contract for title and even in cases where there is a completed contract of sale, the purchaser is entitled to cancel the contract and seek the refund of purchase money. .... It is also open to the parties to waive the implied warrantee of title by a contract to the contrary. However, in a contract where it is only at an executory stage, it would not be proper in law to force upon the purchaser to purchase the property on the ground that he was aware of the defective or imperfect title at the time of agreement of sale. It does not prevent in law for the purchaser to revise his opinion before the contract is concluded however with a qualified liability on the purchaser to compensate any loss or damages which the vendor has sustained in the course of such transaction for which the purchaser

has equally contributed by his folly. — **R.L Pinto and Another v F.F. Menzes and Another, 2001(3) Kar. L.J. 571C (DB).**

Section 55(4)(a) has no application to a case where in respect of the transfer of property the prospective buyer is put in possession of the property. Such a case is governed by the equitable principle on the basis of an implied agreement arising out of taking over possession without paying the consideration amount. Where immediately after agreement the prospective buyer is put in possession, the vendor is entitled to interest on the unpaid purchase money. The circumstance that the vendor could not remove the doubts over his title cannot be such a conduct on his part, which suffices to relive the purchaser from the liability to pay interest wholly or in part. **— Malkajappa Bhimappa Bennur v Bhimappa Kashappa Parasannavar, 1965(2) Mys. L.J. 229.**

Section 55(4)(a) is based upon an established rule of law that it is the part of the right of the owner of the property to receive rent and profits of the property owned and that right continues until the title or ownership is lost. As the agreement of sale does not confer any title or transfer any title in the suit schedule property agreed to be sold, and the title continues to vest with the owner/vendor of the property agreed to be sold, evenafter the agreement of sale, it is governed by Section 55(4}(a) of the T.P. Act. — **B.R. Midani v Dr. A.B. Asivathanarayana and Others, 1992(3) Kar. L.J. 207B (DB) : ILR 1992 Kar. 2224 (DB).**

Mere agreement of sale does not have the effect of creating or vesting title in the plaintiff of the suit property. As per Section 55(4)(a) of the Transfer of Property Act, the seller is entitled to the rent and profits of the property till the ownership thereof passes to the buyer. — **G.M. Chinnaswamy v Smt. P.K. Prqfulla, 1992(3) Kar. LJ/186B (DB) : ILR 1992 Kar. 2294 (DB).**

CASES ON DOCTRINE OF PART PERFORMANCE

To invoke the doctrine a part from proving agreement of sale, transferee must prove that he, in part performance of the contract, taken possession of the property or any part thereof, or in case transferee being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract; Otherwise the doctrine of equity of part performance cannot be invoked. In the instant case either of the two things is not established. Defendant 4 in whose favour the agreement of sale as per Ex. D. 1, dated 15-12-1968, is executed, is no other than the wife of the defendant 3 (sub-tenant). In the earlier proceeding under the Rent Act for eviction, it was the case of the owner that defendant 1 was the tenant of the suit premises and he had sublet the suit premises to defendant 3- Thus, defendant 4 being the wife of defendant 3 was residing in the suit premises along with defendant 3. No evidence is adduced to prove that defendant 4 was continued in possession pursuant to Ex. D. 1 and she had done some act in furtherance of the agreement-Ex. D. 1. The agreement-Ex. D. 1 is silent. It does not state that pursuant to the agreement defendant 4 was put in possession of the suit premises. In the absence of specific evidence to satisfy the doctrine of equity of part performance, defendants 3 and 4 cannot successfully clam protection or defend their possession of the suit premises under Section 53-A of the Transfer of Property Act. It "only follows that defendant 3, as claimed by Dr. Ali Hussain in the H.R.C. No. 13 of 1973 was in possession as sub-tenant under defendant 1 and defendant 4 being his wife was residing with him. They (defendants 3 and 4) had not taken possession of the suit premises in part performance of the agreement-Ex. D. 1. Further, they have also not proved that they have done any act in furtherance of the contract. Thus, defendants 3 and 4 are not entitled to the benefit of Section 53-A of the Transfer of Property Act. — **Kareeni Baig and Others and Dr. Mohamnwd Kliizar Hussain and Others, 1988(1) Kar. L.J. 227 (DB): ILR 1988 Kar. 631.**

Part performance — Defence of — Condition necessary for making out such defence to action for ejectment by owner — Party taking such defence must prove that he has taken possession in part performance of contract to sell and that he has performed or is willing to perform his part of contract — Where document relied upon by party does not satisfy requirement of enforceable contract to sell, and party is guilty of laches and has failed to show any act done by him in furtherance of contract, party is not entitled to claim equities in law. The recital in the document does not indicate that the possession of the property was handed over under the terms of the document. Recitals in the document only discloses that the documents and keys pertaining to the property has been handed over for scrutiny. The totality of the reading of the receipt also does not spell out any other terms and conditions of the agreement of sale excepting the statement of fact about the amount of sale consideration and payment of Rs. 9,900/- as part payment towards the sale consideration. The receipt does not disclose that possession of the property was delivered by virtue of terms of the document. The documents also does not show as to when the possession came to be delivered. ..... Another requirement for invoking equity under Section 53-A of the Act the transferee has to show that he has done some act in furtherance of contract and that he has performed and willing to perform his part of contract. In this regard the conduct of the defendant has been hopeless. Nothing is done as to show what are the acts done in furtherance of the contract. He remained on the property for over 14 years.-The date of contract of agreement of sale is also not convincingly placed on contract. The appellant has remained totally indifferent and there are laches on his part in not making any efforts and has not shown that he has done any substantial acts which may give advantage to claim any equity in law like improving the property in any manner. . . . . The appellant is not entitled to invoke provisions of Section 53-A of the Transfer of Property Act to claim any equities in law. — **M.S. Narayana Rao v S.K. Pundareeka, 2001(3) Kar. LJ. 339B (DB).**

Though based on equity, doctrine forms part of substantive law granting transferee right to retain possession on ground of part performance — Object of provision, inter alia, is to lift bar of limitation in protecting possession on basis of agreement to transfer — Provision, in effect, relaxes rigour of Act and also that of Registration Act — It is exception to provision which requires contract to be registered — Where under

written contract to sell, transferee has, in part performance of contract, taken possession and continues to be in possession and has also performed his part of contract by paying full amount of consideration, transferor is estopped from seeking recovery of possession on ground that transfer was not effected under registered deed and that transferee had failed to bring suit for specific performance of contract within period of limitation prescribed therefor in Limitation Act. Section 53-A of the Act creates a statutory right in favour of transferee though the inspiration for incorporating the same might have been derived from the English equitable doctrine of part performance. But, it is now more than settled that in India the right of a transferee to defend his possession over a immovable property acquired pursuant to a contract and subject to fulfilment of statutory conditions contained in the said section is statutory in nature and cannot be whistled down on the equitable concept of latches or implied limitation. . . . Notwithstanding the fact that a transferee in possession pursuant to a contract of sale fails to file a suit for specific performance within the prescribed period of limitation, still in law, the contract remains valid and operative entitling him to exert his right to retain the possession over the property in exercise of his statutory right conferred by Section 53-A of the Act by way of defence in a suit brought against him by his transferor for recovery of possession. . . . The law of limitation does not apply to a defence raised under Section 53-A of the Act since the Section does not provide for any limitation on expiry whereof the defence contemplated in the Section will be lost or will extinguish. . . . Therefore, the right of the transferee to defend his possession envisaged under the above provision is statutory in nature and it has not been subjected to any limitation either express or implied. In that view of the matter, the Division Bench decisions of this Court cannot be said to have laid down a good law and are accordingly overruled on the legal issue involved herein. . . , The Trial Court has found that the defendant has fulfilled all the conditions which are statutorily required to be complied with to defend his possession. Without disturbing the said findings of the Trial Court, the lower appellate Court has decreed the suit on the plea of limitation which, is not tenable. Narasimhasetty (deceased) by LRs v Padmasetty, 1998 Kar. L.J. 73C FB : ILR 1998 Kar. 3230.

S. 53-A — Part performance — Unregistered sale in favour of usufructuary mortgagee — Consideration for sale partly discharge of mortgage and partly additional amount paid by mortgagee — Payment of additional amount an act in furtherance of contract of sale. A land which had been mortgaged with possession in favour of the defendant was subsequently sold to the plaintiff who sold it to the defendant under two deeds by which the defendant's mortgage debt was discharged and the plaintiff received some amount in order to make up the full purchase money. These deeds were not registered. The plaintiff sued for redemption of the mortgages in favour of the defendant. Held, that payment of money by the defendant (the mortgagee purchaser) under the unregistered deeds of sale as part of the consideration was an act in pursuance of the contract of sale within the meaning of Section 53-A of the Transfer of Property Act and the defendant was entitled to the benefit of the section. The mortgage debt having been already discharged under the terms of the sale in favour of the defendant, there was no further right left in the mortgagor to redeem. — chikkannaswamy v Haji Hayat Khan, 1957 Mys. L.J. 31.

Part performance of contract — Suit for declaration of title and possession of property — Whether defendant, who claims that he was put in possession of the property pursuant to an agreement to sell, can seek protection under Section 53-A after his remedy for specific performance had become time barred. Held.—The plaint averments and reliefs sought in the suit did clearly and unequivocally amount to denial of the agreement dated 16-12-1972. Therefore, the defendant was required to exercise his right under the agreement by filing a suit for specific performance within three years from the date he was served with the suit summons. Section 53-A incorporates doctrine of equity. Therefore, in order to invoke the protection under the doctrine of part-performance, the person invoking, must possess the right to enforce the agreement of sale. If the right under the agreement is lost by law of limitation, even if it is lost during the pendency of the suit, it is open to the party to take advantage of the same and the court to take note of it. The delay defeats equity. When the person in possession of the suit property loses his right to remain in possession, he cannot resist the suit of the true owner for possession of the same. — K. Gururao v M. Subba Rao, ILR 1992 Kar. 429 (DB).

Where the case of the appellant is that ever since his purchase he was in possession of the property, his possession has to be protected against interference by someone who is not proved to have a better title, and he is entitled to an injunction for that purpose. M. Kallappa Setty v M.V. Lakshminarayana Rao, AIR 1972 SC 2299

Person in possession under a void lease does not acquire any interest in the property, but only a right to defend possession. — M/s. Technicians Studio (Private) Limited v Smt. Lila Ghosh, AIR 1977 SC 2425.

Plaintiff put in possession of the property pursuant-to the agreement of sale — Entitled to protect his possession — Claims mesne profits — Whether the Trial Court was right in refusing the claim. Section 53-A of the Transfer of Property Act will provide a valid defence to a person to protect his possession who has been put in possession of an immovable property in part performance of the contract and the same cannot be pressed into service to claim mesne profits. — T. Dase Goivda v D. Srinivasaiali and Others, 1993(4) Kar. LJ. 108C (DB)

Where in a suit for recovery of arrears rent, the defendant pleaded that he was not a tenant, that he requested plaintiff to advance Rs. 6,500 and get a sale deed of the property in his name, and plaintiff executed an agreement to reconvey the property to defendant within 2 years, and therefore he was in possession of the house as owner under the agreement to reconvey. Held, it did not amount to a plea of part performance

within Section 53-A of the Transfer of Property Act. —M. Mariappa vA.K. Satyanarayana Setty, 1983(2) Kar. LJ. 185 : AIR 1984 Kant. 50.

For Section 53-A to apply, the terms necessary to constitute the transfer should be capable of ascertainment with reasonable certainty from the agreement. The transferee should have in part performance of the contract, taken possession of the property, or if he is already in possession and continues in possession in part performance of the contract, he should have done some act in furtherance of the contract. Where, the agreement of sale in favour of the mortgagee in possession made no reference to the antecedent mortgage, but recited that the vendor had agreed to sell for a sum of Rs. 1,550/- and to receive the consideration before the Sub-Registrar, it is not possible to say whether out of Rs. 1,550 the mortgage debt had to be deducted or it was in addition to the mortgage debt and hence the terms of the sale could not be reasonably ascertained. Further, the continuance of the mortgagee in possession must have unequivocal reference to the contract for sale. Mere continuance of possession is really of no consequence and what is necessary is that such continuance must be referable to the contract and the nexus between the contract and continuance must be unequivocal. — famil Ahmed Saheb v Mahabub Bi, 1964 Mys. L.J. Supp. 619.

CONTRACT OF SALE — TRANSFEREE OBTAINING POSSESSION OF PROPERTY PURSUANT TO Transferee's suit for specific performance of contract decreed only for refund of earnest money and not for specific performance — When earnest money decreed to be refunded has been deposited by judgment-debtor, transferee, held, cannot defend his possession. Held: Here is a case, where the plaintiff has already filed a suit for specific performance and no decree was admittedly granted to him for specific performance. He was granted only a decree for refund of the earnest money. Thus, the appellant who was the defendant in a suit has already exhausted his remedy under the alleged agreement and failed in his attempt to get the agreement enforced. Therefore, in such circumstances, he cannot defend his possession under Section 53-A and by taking recourse to the same agreement on which he had already filed a suit had failed to get a decree for specific performance. . . By virtue of the decree passed in the said suit, the plaintiff in the present suit was entitled to get back possession since no decree for specific performance was granted to the appellant who filed the suit. — **Abdul Rahimansaheb v Puttaiwva (Deceased) by L.R., 2002(5) Kar. L.J. 385.**

Where during the subsistence of a possessory mortgage; there was an agreement of sale under which the mortgagee was constituted owner and he was directed to get the property transferred to his name in the municipal, registers and on the application of the vendor, the name of the mortgagee purchaser: was mutated, held, all the conditions necessary for the application of the doctrine of' part performance existed and the mortgagee-purchaser could resist the suit for redemption. — **Babu Murlidhar v Soudagar Mohammad Abdul, 1970(1) Mys. L.J. 34.**

Provisions applies as a bar against the transferor — It debars the transferor from enforcing against the transferee any right in respect of the property of which the transferee has continued in possession. — **Sharma v Puttegowda, ILR 1986 Kar. 171.**

Contract to sell — Transferee given possession of property in part-performance of — Transferor's suit for recovery of possession — It is open to transferee to take plea in defence, of part performance of contract to protect his possession, though he cannot enforce specific performance as action for same is barred by limitation — Law of limitation, held, does not extinguish defence, but only bars remedy — Transferee held, is entitled to maintain his possession. It cannot be said that the defendants cannot maintain then possession against the plaintiff in such a suit even if right to bring suit for specific performance is barred by time. **— Smt. H.K. Putta.tliaya.mma v smt. K. Bharathi and Another, 2003(3) Kar. L.J. 158.**

Tenant agreeing to purchase, Plaintiff agreed to sell the house to defendant who was a tenant of the same and defendant paid an advance under a receipt. The agreement to sell was not in writing. Defendant paid the tax of the house and at a subsequent stage called upon plaintiff that his brother should also join in executing the sale deed. Held, the agreement was an oral one, the receipt assuming it amounted to an agreement to sell, did not mention that the transferee was continued in possession in part performance of the contract; as even a tenant in occupation is required to pay tax, it cannot be said that by paying tax defendant had done some act in furtherance of the contract; by requiring that plaintiff's brother should join in the execution, defendant had varied the terms of the contract and as such had committed breach of the contract and defendant cannot be said to be ready and willing to perform his part of the contract. Thus none of the conditions contemplated in Section 53-A of the Transfer of Property Act were satisfied. The relationship of landlord and tenant continued and defendant was liable to pay rent. **Ayyappa Nayar v Bheemappa, 1980(1) Kar. L.J. Sh. N. 23.**

An intending transferee under a contract for sale of immoveable property, who is put in possession of the property in part performance of the contract, can as a plaintiff bring an action for the possessory remedy of an injunction in protection of his possession against the transferor. As a condition attached to the grant of injunction, to afford protection to the defendant, plaintiff was directed to deposit in Court every year a sum towards profits and income of the land. — **Mahadevamma v B.S. Lingaraju and Others, 1981(2) Kar. L.J. 388 (DB).**

If plaintiffs acquire substantial rights under an agreement of sale, they are entitled to be protected against the transferor who is trying to deprive the plaintiffs of their possession contrary to Section 53-A of the Transfer of Property Act. Plaintiffs must be held to be defending their rights under Section 53-A and the suit for injunction cannot be construed as one to enforce rights conferred by Section 53-A. The commencement of possession being under the agreement of sale, _continuance of possession by the plaintiffs cannot be

deemed to be adverse, unless there has been denial of defendant's title and assertion of hostile title. — **Yenkanna v Yellanna, 1975(1) Kar. L.J. Sh. N. 35.**

The doctrine of part performance incorporated in the Transfer of Property Act by section 53A is a doctrine of equity is a fairly well-settled proposition. If that be so, and if the transferee sleeps over his right to obtain relief of specific performance there would be every justification for application of doctrine delay defeats equity in such a case. Further, for fulfilment of the essential ingredient of this section viz., that the transferee is willing to perform his part of the contract, cannot be satisfied if the right of transferee to get specific performance of the contract is extinguished by lapse of time prescribed under the Law of Limitation. A transferee who has obtained possession of immovable property in part performance of the contract cannot resist the suit for possession filed by the vendor if his right to obtain specific performance is barred by limitation and we reiterate the said principle. — **M. Azmathulla Khan (dead) by L.Rs, v Thankamma Mathews, 1994(4) Kar. L.J. 69A (DB)**

Pursuant to an agreement to sell, the tenant was put in possession of the property by way of part performance of the contract. The tenant having failed to pay the balance of consideration the landlord sued for possession. The Appellate Court directed the defendant to put the plaintiff in possession of the property provided the plaintiff paid back the amount received from the tenant. It was contended in second appeal for the first time that the decree for possession was illegal because the defendant was a tenant even before the agreement to sell and if the agreement fell the defendant would remain as a tenant.Held, that the question based on the equitable doctrine of merger sought to be raised in the present case was a mixed question of fact and law and therefore ought not be allowed to be urged for the first time in second appeal. In the case of a lessee who is also entitled to possession under Section 53-A of the Act, the earlier lease stands extinguished in such circumstances **Champalal fthaktauwma! v Smt. Sumitramma, 1972(2) Mys. L.J. 242 : AIR 1973 Mys. 110**

The equitable doctrine of part performance cannot override the provisions of a statute, by which an agreement affecting land not duly executed in manner therein required is rendered of no force in law. — **Kempe Hussain Saheb v/s Murtuza Saheb, 1963(2) Mys. L.J. 146.**

Where in a suit for declaration of his title, the defendant who was originally a tenant pleaded that he had entered into an agreement to purchase the premises and that he was not a tenant, Held, (1) .The concurrent finding of the Courts below that the documents relied upon by defendant were not proved to be genuine and properly executed was a finding of fact which could not be interfered with in second appeal; (2) Where there is nothing to indicate in the agreement of sale that the defendant was allowed to continue in possession pursuant to the agreement of sale. Section 53-A of the Transfer of Property Act could not be applied; and (3) The lease did not merge with the right, the defendant had acquired under a mere agreement of sale in his favour and defendant continued to be a tenant under the plaintiff. **1979(2) Kar. L.J. 268, rel. on. — Rudrappa by LRs v Danappa Malasiddappa, 1982(1) Kar. L.J. 284.**

CASE LAW ON GIFT OF IMMOVEABLE PROPERTIES

ACCEPTANCE OF GIFT BY DONEE — INFERENCE.

There is nothing in Section 122 **of the Transfer of Property Act** to show that acceptance of a gift should be express. Where the donee knew about the gift, being present at the time of registration of the gift deed and did not object to it, it can safely be inferred that the donee accepted the gift. — **Lingaiah v Siddamma and Others, 1982(1) Kar. L.J. 34.**

CONDITIONS IN GIFT DEED

If donor has voluntarily executed the deed and donee has accepted during his lifetime, any condition imposed on donee for full and proper enjoyment of property gifted becomes void while validity of gift deed remains intact — not control passing of title in favour of donee — **D. Venkatesha Cowda v State of Kamataka and Others, 1990(1) Kar. L.J. 242.**

Recital as to maintenance in gift deed in absence of specific recital reserving rights to revocation on failure to perform condition mentioned in gift deed — Held, cannot **have** the effect of making the gift a conditional gift enabling donor to revoke the same on failure to perform such condition. — **Narayanamma and Another v Papanna, 1988(1) Kar. L.J. 80 : ILR 1987 Kar. 3892.**

Recital as to maintenance in a gift deed in the absence of specific recital reserving right to revocation on failure to perform condition mentioned therein — **Held,** not **a** conditional gift deed — **Only** remedy available to the donor is to enforce the **condition** in **a** Court **of** law — **Donor** cannot unilaterally cancel the gift deed. — Narayanamma and Another v Papanna, **1988(1) Kar. L.J. 80 : ILR 1987 Kar. 3892.**

The super adding of a condition to a gift is permissible in law under Section 31 of the Act and acceptance of a gift by the donee is necessary for rendering the gift valid in law, therefore, when a donee accepts a gift which is burdened by a condition that a superadded, it is nothing but a donee agreeing to that condition and therefore, the consequences provided in Section 126 of the Transfer of Property Act will have to follow — Defeasance clause would not always affect the rule of perpetuity — It depends on facts and circumstances of each case. — **Govindamma v Secretary, Municipal first Grade College, ILR 1986 Kar. 1175.**

GIFT — DELIVERY OF POSSESSION.

Under the Transfer of Property Act, it is not necessary that possession of the property gifted must be delivered forthwith. Thus, where under a document the right, title and interest in the properties were vested in the donee, he becomes absolute owner, though delivery of possession is postponed, and hence the document is not a will. — **Parvati and Another v Mrutyunjaya Gurupadayya and Another, 1983(1) Kar. L.J. 14.**

REGISTERED GIFT DEED — DENIAL OF EXECUTION

Registered gift deed — Denial of execution of, by person by whom it purports to have been executed — Burden of proof of execution is on party relying upon deed and burden has to be discharged by calling at least one of attesting witnesses to prove execution — Where burden has not been discharged, deed cannot be used as evidence of gift. Held: Section 123 of the Transfer of Property Act, requires the specific mode in the matter of execution of gift of immoveable property. That gift of immoveable property can be made only by the execution of the registered deed attested by two witnesses. .... The law prescribes the specific mode that it must be effected by a registered instrument or deed signed by or on behalf of the donor and attested by at least two witnesses. Section 68 of the Indian Evidence Act, 1972 required the production of at least one of the attesting witness to prove its execution. Compliance with the provisions of Section 68 or 69 of the Indian Evidence Act is necessary to make gift deed admissible in evidence. .... None of the attesting witnesses of the deed has been examined in this case to prove the execution thereof. The deed dated 29-11-1960 could not be used as evidence and its execution cannot be said to have been proved. — **Smt. Flora Margaret v A. Larwence, 2000(6) Kar. LJ. 27B.**

MODE OF TRANSFER

Gift — Transfer of property under — Mode of transfer — Gift deed may provide for transfer of existing property to donee at future date and/or on happening of certain events — Intention of donor to be gathered by reading deed as a whole — No word thereof to be ignored as meaningless — Effect to be given to every part of deed — Where gift deed in favour of two minor donees jointly concludes with words "you shall enjoy property and live as you wish after you have attained majority and got married", the words to be interpreted that gift would take effect oniy when donees marry on attaining majority — Property not conveyed to donees as marriage between them did not take place. Held: A reading of Section 123 along with Sections 122 and 5 of the Act, it appears to me that in the matter of gift also, transfer or conveyance of the property may be provided to take place in present or in future. The gift deed may also provide that the transfer may be effective on the happening of certain conditions in future. In other words, person making the gift may provide that the interest in gifted property will stand conveyed or transferred as per deed either in present or in future. In the deed, it has to be looked into to ascertain the intention of the parties, whether the transfer has been effected in present or in future, Expression lastly used in the document, "you shall enjoy the above mentioned property and live, as you wish after you attained majority and got married". These expressions have to be taken as controlled by the expression used earlier that the intention of the author is that the right and title as an absolute owner of the property should pass on to the donees on the fulfilment of those conditions. That as the document appears to have been executed with the object of the marriage and the effect of it is that donees could get absolute ownership under the deed on the fulfilment, of both the conditions, namely, attaining the age of majority by both of them and they getting married and until and unless this had so happened, the property had to remain in possession of the husband of the donor. This action shows that till the happening of the condition, namely, the attaining the age of majority by the two donees and their getting married, the property had to remain in possession of the husband of the donor, so, the property had not been transferred to the donees, the transfer could take effect only on the donees attaining majority and getting married. That as the marriage did not takes place in the present case and the plaintiff did not marry the defendant's daughter, deed did not become effective to transfer the title of the property to the plaintiff and defendant 1 and the title of the property re-examined with the donor. Mere execution of the deed of cancellation at subsequent stage will not lead to the conclusion that the gift deed had been acted upon. The deed cancelling the gift deed might have been executed as a matter of mere precaution and for safety protection. — **Hutchegowda v Smt. Jayamma and Another, 1996(2) Kar, L.J. 751.**

ATTESTATION OF GIFT DEED

In the present case, the gift deed in question has been registered and the necessary endorsements are made by the Sub-Registrar. P.W. 2 has sworn that he had attested the deed. But he has nowhere stated in his evidence that the executrix namely, Gangavva affixed her signature or mark to the gift deed in his presence or acknowledged to him, that she had affixed her signature or mark to the gift deed. Therefore, his evidence does not satisfy the ingredients of definition 'attested'. Hence, it will have to be held that attestation by P.W. 2 and another person as required by law, has not been proved. Therefore, though Gangavva appears to have admitted execution of the gift deed as is seen from the endorsement of the Sub-Registrar, it will have to be held that the gift deed, though registered, does not satisfy the ingredients of Section 123 main part. When that is so, no title in law can be said to have passed from Gangavva to the plaintiffs, even assuming that Gangavva did have such title to transfer. — **Anant Somappa Pattar v Kalappa Devendrappa Yarakad, 1987(2) Kar. L.J. Sh. N. 177: ILR 1985 Kar. 1432.**

Gift proof of attestation. Where the attestor called as witness says he does not know who else attested and **there** is no other evidence, **held,** the gift deed was not proved **as required** by law. — **Kempamma v Honnamma, 1979(1) Kar. LJ. Sh. N. 85.**

CASES ON TRANSFERS TO DE-FRAUD CREDITORS

In a suit under Section 53 of the Transfer of Property Act, to set aside a release deed executed by the father in a joint family, the burden of establishing that the release deed was one made in fraud of creditors or with the intention of delaying or defeating them is upon the plaintiff. — Rajendra Prasad v Hundraj, 1968(2) Mys. L.J. 269.

It is not necessary that a man should be actually indebted at the time he enters into voluntary settlement to make it fraudulent, for if a man does it with a view to being indebted at a future time, it is equally fraudulent and ought to be set aside. So where a transfer was executed at the time when the executant was well-aware of the probability of a decree for a substantial sum being passed against him, this section would apply although the transferor had no present debts at the time, the transfer took place. — Thimmegawda v Ningamma, 1963 Mys. L.J. Supp. 448.

Transfer voidable when effect to evade payment arising out of pious obligations of the sons to father. The onus of proving want of good faith in the transferee is on the creditor who impugns the transactions. But, where fraud on the part of the transferor is establish i.e., by the terms of para 1 of Section 53(1), the burden of proving that the transferee fell within the exception is upon him and in order to succeed, the transferee must establish that he was not a party to the design of the transferor and that he did not share the intention with which the transfer has been effected, but that he took the sale honestly believing that the transfer was in the ordinary and normal course of business. (AIR 1963 SC 1150). Recitals in mortgages or deeds of sale with regard to the existence of necessity for an alienation have never been treated as evidence by themselves of the fact. The lack of evidence in regard to application of a substantial portion of the consideration received under Ex. D. 1 undoubtedly leads to an inference that Channaiah had kept it for his own use without discharging the other debts. That may lead to an inference that Channaiah wanted to convert the house property into cash so as to keep it away from the reach of his creditors. Such a transaction has always been held to be voidable in terms of Section 53(1) of the Transfer of Property Act although the transfer might be for adequate consideration. Although the transfer might be for adequate consideration, but such presumption cannot be drawn if the transferor was still left with other valuable properties by which he could think of conveniently discharging his remaining debts. It is not sufficient to point that Channaiah even after the sale of 'A' Schedule property under Ex. D. 1 was left with other properties. There must be material on record to show that the properties still possessed by Channaiah are of considerable value and of easy availability to other creditors to satisfy their demands. Then and then only, the transfer effected by Channaiah could escape the clutches of Section 53(1) of the Transfer of Property Act. — Basavegowda v S. Narayanaswamy and Others, ILR 1985 Kar. 3048 : AIR 1986 Kant. 225

Fraudulent transfer — Plea of — Attaching creditor can raise plea in proceedings initiated to attack attachment and he cannot be directed to file separate suit for setting aside conveyance made by judgment-debtor — Plea must be distinct and averment in written statement must be specific to declare transfer as void — Where defence based on Section 53 of Act is not set up, no evidence can be led to prove that transfer effected by judgment-debtor is to defeat attachment. Held: Section 53(1) of the Transfer of Property Act, 1882, can be applied even in proceedings where the attachment is sought to be attacked and it is not necessary to file a separate suit to set aside the document, But this dictum can be made applicable only when there is sufficient pleadings. There is absolutely no averment seeking to declare this document as sham and nominal or that the transaction was intended to defeat or delay the realisation of the claim or any other averment within the meaning of Section 53(1) of Transfer of Property Act. . . . .Case must stand or fall by pleadings. Only on the basis of the pleadings, evidence can be let in. Even if evidence is let in without pleading that cannot be relied upon. There is no pleading to bring Section 53(1) within the purview of this case. In the absence of any pleading it is not open to the Appellate Court to come to a different conclusion. . . .In this view of the matter the Appellate Court's finding is error apparent on the face of the record, the second appeal is allowed. The attachment is raised. Liberty is given to the Bank to file a suit under Section 53(1) of the Transfer of Property Act. — Lalitha Kunder v Syndicate Bank, Surathkal Branch, Dakshina Kannada District and Others, 1999(1) Kar. L.J. 694.

SHAM AND NOMINAL SALE : There is a distinction between a sham and nominal sale which is not intended to pass title and a sale which is real but which is voidable at the instance of creditors because the transfer is intended in the language of Section 53(1) of the Transfer of Property Act to defeat or delay creditors. A case of fraudulent preference could be impugned only under the law relating to insolvency and not as a fraud on creditors for which Section 53 of the Transfer of Property Act makes provision. The terms of Section 53(1) are satisfied even if the transfer does not 'defeat' but only 'delays' creditors. The fact therefore that the entirely of the debtor's property was not sold cannot by itself negative the applicability of Section 53(1) unless there is cogent proof that there is other property left, sufficient in value and of easy availability to render the alienation in question immaterial for the creditors. Where fraud on the part of the transferor is established i.e., by the terms of paragraph (1) of Section 53(1) being satisfied, the burden of proving that the transferee fell within the exception is upon him and in order to succeed he must establish that he was not a party to the design of the transferor and that he did not share the intention with which the transfer had been effected but that he took the sale honestly believing that the transfer was in the ordinary and normal course of business. An attaching creditor who has succeeded in the summary proceedings under Order 21, Rules 58 to 61 of the CPC can in a suit to set aside the summary order under Order 21, Rule 63 raise by way of defence the plea that the sale in favour of the plaintiff — the transferee-claimant — is vitiated by fraud under Section 53(1) of the Transfer of Property Act. — C. Abdul Shitkoor Saheb v Arji Papa Rao (dead) by his heirs and LRs, AIR 1963 SC 1150

CASES ON SALE OF PROPERTY WHEN THERE IS PENDING LITIGATION
ALIENATION — DURING PENDENCY OF SUIT FOR PARTITION

Whether decree binding on alienee — Rights of purchaser in final decree proceedings. As there was already a suit for partition filed by the plaintiffs including the suit schedule premises and during the pendency of that suit the alienation in favour of Jayamrna took place and to that suit for partition, Jayamma and Kambaiah both were the parties, the necessity of directing the purchaser to file a suit for general partition does not arise because there cannot be two suits for general partition between the same parties in respect of the very same property. Whatever the decree that is passed in O.S. No. 18 of 1965, Jayamma, Kambaiah and also the present appellant are bound by it. Section 52 of the Transfer of Property Act specifically provides that the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose. Therefore, the validity of such alienation would depend upon the decree that may be passed in the suit during the pendency of which the property concerned in that suit is alienated. In the final decree proceedings, the defendants in the present suit are entitled to be notified and they are entitled to put forth their claim that they being the alienees of some of the coparceners, in equity the suit schedule premises be put to the share of the alienating coparceners. If the defendants put forth such a plea on the notice being served on them the court seized of the final decree proceeding shall also afford an opportunity to the plaintiffs to put forth their say in the matter and decide the issue as to whether the defendants herein, in equity are entitled to have the suit schedule premises allotted to the share of the alienating coparceners. In the event the court allots the suit schedule premises to the alienating coparceners the plaintiffs will not be entitled to the possession of the suit schedule premises. — **Smt. Mallamma V/S B.S. Venkataram (Since deceased by L.Rs.) and Others, 1991(4) Kar. LJ. 526B (DB): ILR 1991 Kar. 2761 (DB).**

AMENDMENT OF PLAINT PROPERTY — LIS PENDENS — APPLICABILITY.

If by a subsequent amendment certain property is included in a plaint and before that amendment had been made the newly included property had already been purchased by a bona fide purchaser for value without notice, the doctrine of lis pendens will have no application to such a case. — **B.R. Rangaswamy and Others v Upparige Gowda, 1962 Mys. LJ. 384: ILR 1962 Mys. 312.**

LIS PENDENS

Where there were two agreements of sale executed by the owner of a property and he executed a sale pursuant to the earlier agreement during the pendency of a suit for specific performance of the second agreement, the sale in favour of the earlier transferee executed during the pendency of the suit for specific performance is affected by the doctrine of lis pendens. A suit for specific performance is a suit in which a right to immovable property is directly and specifically in question. When a decree for specific performance is passed transferring title to the plaintiff, that title does not relate back to the date of the agreement on which the suit is based. — **Khajabi (deceased) by L.Rs v Mohammad Hussain, 1964(1) Mys. LJ. 236.** Appellant purchased suit property during pendency of suit against first defendant — Held, purchaser bound by decree against first defendant — Case-law discussed. — **M/s. Chitalia Brothers v The South Indian Bank, 1987(2) Kar. LJ. Sh. N. 225 (B): ILR 1987 Kar. 1242.**

TRANSFER PENDENTE SUIT

Karnataka Land Reforms Act, 1961, — Transfer pendente Suit — Invalidity of — Applicability of provision to lease of agricultural land made during pendency of suit for declaration and possession — Where suit is decreed granting relief claimed therein, decree is enforceable, not only against person against whom decree has been passed and whose status has been declared as that of trespasser, but also against person claiming to be tenant under trespasser — Overriding effect provided to Karnataka Land Reforms Act is only over provisions of Sections 105 to 117 falling under Chapter V of Transfer of Property Act, and does not affect operation of Section 52 of Transfer of Property Act. Held: In this case, there is no conflict between any provision of the Land Reforms Act and Section 52 of the Transfer of Property Act. Even otherwise, all that sub-section (2) of Section 3 deals with the overriding effect of the provisions of the Land Reforms Act so far as they relate to Chapter V of the Transfer of Property Act only. It needs hardly be said that Section 52 of the Transfer of Property Act does not come within Chapter V of the Transfer of Property Act. . .. The petitioner's possession of the property during the pendency of the suit for possession instituted by the respondent cannot avail to support a claim of deemed tenancy as the claim is hit by Section 52 of the Transfer of Property Act. If Kallappa had no semblance of title to the property he could hardly confer a better title to the petitioner in this case. — **Revanappa v Muniyappa (Deceased) by L.R. and Others, ILR 1998 Kar. 3021.**

LIS PENDENS

Karnataka Land Reforms Act, 1961, Section 138 — Lis pendens — Principle of — Applicable to agricultural leases also — Principle is not abrogated by non obstante clause of Section 138 of Karnataka Land Reforms Act — Suit for specific performance of agreement to sell agricultural land constitutes lis pendens and transferee pendente lite is bound by order passed against his transferor — Tenancy created by transferee pendente lite does not bind decree-holder who is entitled to possession in execution. Such of the provisions of the Transfer of Property Act which are not inconsistent with the provisions of the Land Reforms Act are not barred from their applicability to the matters and proceedings covered under the Land Reforms Act. In that view of the legal position, Section 52 of the Transfer of Property Act very much operates against alienation of agricultural land which is the subject of tenancy claim by any person before the Land Tribunal. .... A plain reading of Section 52 of the Transfer of Property Act makes it clear that any party to a pending suit or proceeding which

is not collusive is prohibited from transferring any right to an immoveable property which is directly and specifically in question and is the subject of such suit or proceeding so as to affect the rights of any other party thereof which may be acquired by him under any decree or order ultimately passed or made therein. Explanation to Section 52 makes it further clear that pendency of a suit or proceeding shall deem to commence from the date of presentation of the plaint or the institution of the proceedings in a Court of competent jurisdiction and to continue until the suit or proceeding had been disposed of by a final decree or order and till complete satisfaction or discharge of such decree or order. Thus Section 52 creates a clear bar on transfer of any immoveable property which is the subject of a suit proceeding by any party thereto so as to affect the right of the other party which he may ultimately acquire under a decree. — **Smt. Siddarajamma v The Land Tribunal, Tarikere and Others, 1999(1) Kar. L.J. 682A,** Lease by manager pending final decree partition proceedings is affected by lis pendens. — **Manjunatha Gopalakrishna v Venkataramanakrishna, 1973(2) Mys. L.J. Sh. N. 304.**

LIS PENDENS

1st defendant obtained a decree on a mortgage in 1923 against 2nd defendant and purchased the property in 1929. In a suit between plaintiff and 2nd defendant in 1920 questions relating to the suit properties were in question but by consent those claims were dismissed and plaintiff ultimately obtained a money decree and in execution purchased the suit properties, in January 1930. Held, the mortgage in favour of 1st defendant and proceedings subsequent were not affected by lis pendens. No right at all in respect of the property was declared in favour of plaintiff. Hence, plaintiff could not plead lis pendens in respect of a mortgage executed before plaintiff made his purchase in January 1930. — **Dhanvar Finance Corporation v Dattobarao, ILR1973 Mys. 735.**

LIS PENDENS

Lis pendens —The doctrine of lis pendens is basically a provision to deter or prohibit any mischievous private transfers in the course of legal proceedings and it would also come in the way of any other*transfers but that doctrine has no application on the facts of the present case which concern a Court execution. — Has no application to execution sale of immovable property, which is also subject-matter of contract for sale between judgment-debtor and intending purchaser — Party entitled to purchase under contract for sale has no locus standi to apply for cancellation of execution sale claiming benefit under doctrine of lis pendens, as no right in property accrues to him under such **B.M. Manjunatha Gupta v M.G. Shivanagouda and Others, 1997(1) Kar. L.J. 415C**.

LIS PENDENS

Suit not collusive at inception, but parties thereto subsequently coming to compromise for purpose of defeating right of bona fide transferee pendente lite — Decree passed in terms of compromise — Doctrine, held, will not apply. Section 52 of the Act will not wipe out the effect of a sale validly executed by the person who has the authority to sell pendente Site but it is only to subordinate the rights based on the decree in the suit. As between the seller and the purchaser, the transaction is perfectly valid and operates to vest a title in the purchaser. . . . Thus one of the important ingredients for application of the principle of lis pendens is that the suit should be non-collusive in character. .... The doctrine of lis pendens being essentially a doctrine of equity, and fraud and collusion, being antithesis of equity, cannot be encouraged by Courts nor any decrees obtained by fraud or collusion can defeat the rights of the alienees of immovable property. .... Certainly the doctrine has no applications, in all cases where the very suit is instituted by collusion between the parties so also it does not apply to compromise decrees obtained by collusion or by fraud. . . . Appellate Judge has in detail considered the evidence and has found as a matter of fact, collusion between the plaintiff and defendants to the appeal R.A. Nos. 16 and 17 of 1979 in entering into the compromise and obtaining a decree thereunder. The reasoning of the Appellate Court on this finding cannot be faulted. .... The Appellate Court was right in holding that the alienations made by defendant 6 in favour of defendants 1, 4 arid 5 are not hit by the doctrine of lis pendens. — **Ramanagouda Siddanagouda Biradar and Others v Basavantraya Madivalappa Mulianumi and Others, 2001(6) Kar. L.J. 545.**

MORTGAGE AND ATTACHMENT PRIOR TO PARTITION SUIT

Where a mortgage of a family property was created before the institution of a partition suit, a sale in execution in enforcement of the mortgage pending partition suit, is not affected by the doctrine of lis pendens. A mortgagee becomes a transferee of the interest in the imrnoveable property on the date of mortgage and acquires on that date the right to sell the mortgaged property for the recovery of the debt. Neither the institution of the suit nor the sale in execution of the mortgage decree, can fall within Section 52 of the Transfer of Property Act, since such a sale.does not involve a transfer of property. In bringing the suit property to sale, the mortgagee does no more than to enforce a right which had come into being long before the other suit was commenced. Similarly, where family properties were attached by creditors long before a partition suit was commenced, the partition suit which was subsequently instituted cannot to any extent affect the rights of the creditors in the earlier suits to enforce their rights which had accrued to them very much before the partition suit was commenced. — **Kamalamma v K. Srinivasa Rao, 1966(1) Mys. L.J. 451.**

LIS PENDENS

A Final mortgage decree was passed on 9-11-1937 and the mortgagee decree-holders purchased the properties in execution sale. While applying for possession it was discovered that while the properties had been described properly with reference to the boundaries, the survey numbers were wrongly given. Therefore, the decree-holders applied for amendment of the plaint, the schedule to the decree and the sale certificate, and they were amended on 25-7-1954. Meanwhile appellant got the properties attached in execution of a money decree against the mortgagor and purchased them in execution on 22-11-1939. Held,

the purchase of the properties in execution of the money decree by appellant subsequently to the passing of the final decree in the mortgage suit was affected by the doctrine of lis pendens. The attachment by appellant did not create any right over the properties attached and hence there was no need for the mortgagees to implead appellant as a party either to the proceedings in the mortgage suit, or the subsequent sale or in the proceedings relating to the amendment of the schedule. — **Katta Nagappa Setty v H.L. Lingaraj Urs, 1964(2) Mys. LJ.l.**

LIS PENDENS

One K mortgaged with possession the suit properties on 12-12-1929 in favour of W. In execution of a money decree against K, W purchased the equity of redemption and the rights of K came to be vested in defendants 1 and 2. The representatives of K filed C.S. No. 200 of 1947 under Section 16 of the Jamkhandhi Agriculturists' Relief Act, 1939 against W and his assignee for accounts in respect of the 1929 mortgage. The suit O.S. No. 200 of 1947 was dismissed by the Trial Court; but on appeal in C.A. No. 267 of 1959, the case was remanded for fresh disposal. After remand, the Trial Court drew up a preliminary decree for redemption holding that the mortgage stood discharged and the final decree was passed on 11-4-1962 and the plaintiffs were put in possession of the properties on 15-4-1962. Defendants 1 and 2 did not contest the appeal and also the suit after remand.

Defendants 1 and 2 executed a mortgage of the properties on 10-8-1953 and the mortgagee obtained a final decree for sale therein. Plaintiffs filed the present suit for declaration that the decree obtained on the mortgage executed by defendants 1 and 2 in 1953 was not binding on them.

Held,

(1) Having regard to the allegations in the plaint and the written statement in C.S. No. 200 of 1947, title to the equity of redemption was directly and specifically in question even on the date when the suit was instituted for accounts and therefore the mortgage deed of 1953 was affected by lis pendens. The proceeding commenced under Section 16(1) of the Jamkhandi Agriculturists' Relief Act ending with a decree for redemption should be considered as a single proceeding and the ultimate relief granted by the Court under sub-section (3) should be held to relate back to the date on which the litigation was commenced, and all transactions entered into in respect of the immovable property by persons who are parties to the said suit after the commencement of the litigation must be held to be subject to the final result of the litigation. The question for decision in C.S. No. 200 of 1947 was whether the mortgage debt had been discharged or not, and whether mortgagor had the right of redemption or not. Both the questions related to the mortgagor's right to property and arose directly for decision in that suit. They cannot be considered as collateral matters.

(2) The Court, while applying Section 52 of the Transfer of Property Act, cannot be calied upon to decide whether the decision in the former case was correct or incorrect. Hence, the question whether the Court could have granted' the declaration that the sale in execution of the money decree was a nullity could not be gone into.

(3) Apart from the fact that defendants 1 and 2 remained absent when the appeal in C.A. No. 267 of 1959 was heard, there being no other evidence of collusion, collusion was not established.

(4) The judgments in C.S. No. 200 of 1947 and C.A. No. 267 of 1959 were admissible for the purpose of Section 52 of the Transfer of Property Act. The judgments were proceedings admissible both under Sections 40 and 43 of the Indian Evidence Act.

(5) If the plaintiffs were right in their contention that the mortgage executed pending their suit did not affect their rights, it was unnecessary for them to adduce further evidence regarding the title to the suit properties. — **Narayan Govind Anikhindi v Krishnaji, 1973(2) Mys. L.J. 176.**

LIS PENDENS

S. 52 —Partition suit — Widow claiming maintenance — Amendment of written statement by widow claiming share — Defendant transposed as plaintiff — Sale after suit but before transposition of parties — If affected by lis pendens. One co-sharer instituted a suit for partition and in that suit a co-sharer's widow claimed maintenance. She obtained an amendment of her written statement and in place of maintenance, she prayed for a share in the suit property as the heir of her deceased husband and was transposed as plaintiff in the suit and the original plaintiff was transposed as defendant. The alienation in favour of the 1st defendant took place after the institution of the suit but before the present plaintiff applied for amendment of the written statement. Ultimately, the plaintiff's claim for a share was decreed. Held, that the alienation, in favour of the 1st defendant was affected by the rule of lis pendens. Once the requirements of Section 52 of the Transfer of Property Act are satisfied, it is immaterial what was the nature of the dispute between the parties to the suit. — **Parameshwar Shivambhat v Saraswati, 1966(1) Mys. L.J. 680.**

LIS PENDENS

S. 52 — Suit for maintenance praying for charge — Sale pending — If affected — Admission — Value and weight — Approbate and reprobate — Principle of — Pleadings — No specific issue — Effect. The original owner of the properties died leaving a widow, three sons K, M and B and three minor daughters, Sh, Sr and D. On 1-9-1918, the three brothers executed a usufructuary mortgage in favour of AH over properties including those in the present suit. The widow and two of the minor daughters filed in 1919 suits in forma pauperis against the brothers for maintenance and marriage expenses and for a charge on the properties. The suits were decreed and in execution of the decree of D, the present properties were sold and purchased by D on 2-8-1928. K was adjudicated insolvent on 19-2-1926. L.Rs of AH filed a suit on the mortgage in O.S. No. 8 of 1933 and in execution of the mortgage decree the properties were sold and purchased by C in 1937, who sold them to KR the present plaintiff. The three brothers entered into a partition on 6-9-1938 and K sold the present suit properties which fell to his share on 30-1-1920 to N and ultimately they vested in the defendants. Plaintiff filed a prior suit O.S. No. 92 of 1938 alleging that the decree and sale in O.S. 100 were collusive and

obtained a decree. But on appeal the matter was compromised, which recognised the title of plaintiff. Plaintiff sued for declaration of his title and removal of obstruction on the basis of title of C by purchase in execution of the decree on the mortgage of 1-9-1918. The defendants were not made parties to the mortgage suit O.S. No. 8 and hence claimed their right of redemption. It was held by the High Court that by reason of Section 52 of the Transfer of Property Act, the title of N (and of the defendants) under sale dated 30-1-1920 came to an end. When D purchased the properties in execution. It was contended that the sale of 30-1-1920 was not hit by Us pendens by reason of the maintenance suit O.S. 100, on the grounds to the question of lis pendens was not raised in the plaint, that the suit O.S. 100, the decree and sale were all collusive and the execution sale in O.S. 100 was void as the official receiver of K's estate was not impleaded in that suit.

Held,

(1) Though the plaint did not aver lis pendens and there was no issue, it was raised by plaintiff at the very commencement of the trial, evidence was let in without objection by defendants and the question was argued on merits by defendants and therefore the absence of a specific pleading did not bar the question of lis pendens being argued. As both parties went to trial on the question of lis pendens and as the defendants had not been taken by surprise, the plea was open to the plaintiff.

(2) That the predecessor of defendants AH had been stating in the several proceedings that the sale dated 2-8-1928 was fraudulent, did not amount to allegation of collusion. In a collusive suit, the combat is a mere sham while in a fraudulent suit it is real. The statements of AH and his L.Rs in the prior proceedings as admissions w< not conclusive but only a piece of evidence, which could be shown to be erroneous or untrue. The judgment in O.S. No. 92 of 1938 not being inter parties was not admissib; in his litigation, and there having been an appeal, the findings lost their finality and when the parties settled the matter, they ceased to possess any force even inter parties.

The plea that the decree and sale in O.S. 100 were collusive was not barred by the principle of approbate and reprobate. The maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election and its operation must be confined to reliefs claimed in respect of the some transaction and to the persons who are parties thereto. Plaintiff obtained no advantage against the appellants by pleading collusion in O.S- No. of 1938 nor did he acquire rights thereby and there was also no question of election, because the relief claimed then and now are the same, though on different and even inconsistent grounds.

(3) As K had sold the property on 30-1-1920, it did not vest in the official receiver when he was adjudicated on 19-2-1926 and non-impieading of the official receiver did not affect the sale of 2-9-1928 in execution of O.S. No. 100 of 1919. The sale of 30-1-1920 though pendents lite was operative between the parties and a transferor pendente lite cannot be treated for purposes of Section 52 of the Transfer of Property Act as still retaining title to the properties. Even assuming that the equity of redemption vested in the official receiver on the adjudication of K, his non-joinder in the execution in O.S. 100 did not render the purchase by D a nullity and under that sale she acquired a good title subject to any right which the official receiver might elect to exercise and it was not open to attack by the purchaser pendente lite under the deed dated 30-1-1920 and his representatives.

(4) Hence, the sale deed dated 30-1-1920 under which the appellants claimed was subject to the result of the sale deed dated 2-8-1928 in execution of the decree in O.S. No. 100 of 1919 by reason of the rule of lis pendens and it became avoided by the purchase by D on 2-8-1928. The appellants as purchasers of the equity of redemption from K did not have the right to redeem the mortgage of 1-9-1918. — **Nagubai Amal and Others v B. Shama Rao and Others, ILR1956 Mys. 152 (SC).**

LIS PENDENS

During suit, sale by defendant, pursuant to earlier agreement — Plaintiff getting sale deed executed — Suit for possession limitation, Pending a suit for specific performance, defendant sold the property on 30-12-1948 (to the present 2nd defendant) in pursuance of an earlier agreement to sell. Plaintiff's suit was decreed and he got a sale deed executed through Court on 29-12-1955. The present suit was filed on 14-12-1961 for possession,

Held,

(1) That the sale by defendant on 30-12-1948 was affected by lis pendens under Section 52 of the Transfer of Property Act, notwithstanding that the alleged agreement for sale in favour of the transferee from the defendant was of a date earlier than that of the agreement in favour of the plaintiff. 1964(1) Mys. L.J. 236, rel.on.

(2) The principle of lis pendens being a principle of public policy, no question of good faith or bona fides arises. Hence, the transferee from one of the parties to the suit cannot assert, or claim any title or interest adverse to any of the rights and interests acquired by another party under the decree in suit. Hence, the possession of transferee from the defendant was not adverse to plaintiff.

(3) The plaintiff's right to ask for possession arose on the execution through Court of the sale deed on 20-12-1955 and the suit for possession filed within six years from that date was not barred by limitation. — **Mohammed AH Abdul Chanimomin v Bisahenii Kom Abdulla Saheb Momin, 1973(1) Mys. L.J. 130 : AIR 1973 Mys. 131.**

PURCHASER AT AN AUCTION SALE

A purchaser at an auction sale held in terms of a consent mortgage decree, is not entitled to recover actual physical possession of the premises in the occupation of lessees, the lease in respect of which were created after consent mortgagee decree was passed on an application under Order 21, Rules 95 and 96 of the CPC. The auction purchaser derives his right to obtain possession only after the sale in his favour has become absolute and sale certificate has been obtained by him. Section 52 of the Transfer of Property Act also did not help the auction purchaser. He was an outside purchaser was not the mortgagee, nor was he a party to the suit in which the compromise decree was passed. Section 52 in clear terms speaks of the right of the parties

to the suit or proceeding. **AIR 1973 SC 569** Rule of lis pendens may not strictly apply to previous Court auction sales. — **Syndicate Bank v Pundalika Nayak, ILR 1986 Kar. 3776.**

TRANSFER PENDENTE LITE

Doctrine of lis pendens appiies to auction sale held by executing Court of judgment-debtor's property which was subject-matter pending suit or decree pending execution — Doctrine to be applicable, decree pending execution at time of auction sale must be valid decree — Where decree was invalid at time of auction sale, but was validated subsequent to auction sale, it would not affect title of auction purchaser who was bona fide purchaser for value without notice of decree — Thus in case where property is subject-matter of suit for specific performance of contract to sell which was decreed, but mortgage decree instead of decree of specific performance was wrongly drawn up and during pendency of that wrong decree, same property was brought to auction sale by Bank as decree-holder, auction purchaser is not affected by mortgage decree which was then not executable — Subsequent amendment ...and rectification of such decree would not bind auction purchaser as he was not made party to amendment.

Held: Doctrine of lis pendens does apply to auction sales by the Executing Court of any immoveable property of judgment-debtor which way-subject of dispute in a pending suit. . . . .The doctrine of lis pendens does not operate and would be inapplicable in the case of purchase by an innocent purchaser of the immovable property which is the subject of an existing illegal or inexecutable decree and that its amendment or rectification made subsequent to his purchase does not ensure to the benefit of the decree-holder as against him, to which amendment proceeding he was not a party. .... .In the case on hand the plaintiffs had remained callous and indifferent in seeking rectification of the said void decree dated 31-5-1977 and the material on record demonstrates that they and the judgment-debtor as well appear to have deliberately allowed the auction purchaser to purchase the property during existence of that illegal decree of which he had no knowledge, whatsoever, plaintiffs had not acquired under the said decree any right to purchase the property in question. The decree in its present form was inexecutable and the Trial Court had no power to deal with the property under the same. The auction purchaser was not bound by the subsequently rectified/amended decree since he was not a party to that amendment proceeding. Therefore, the considerations of equity require protection of interest of the intervening auction purchaser of the property when pitted against the plaintiffs' claim to the right to purchase the same under the said void decree. In the facts and circumstances of the case, the doctrine of Us pendens cannot be held operative against the purchase of the said property by the auction purchaser. — **B.V. Vasantha v Sha Poonawchand (deceased) by LRs. and Others, 1997(3) Kar. L.J. 691A : ILR 1997 Kar. 1561.**

TRANSFER PENDENTE LITE

Transfer pendente lite — Applicability of doctrine of lis pendens to — Lis pendens which starts from presentation of suit, continues till decree is executed, and doctrine is attracted to all transfers made during period — Private sale made by judgment -debtor who is aware of decree and of attachment made before judgment, and who has no evidence to prove that transfer is for consideration, has to be held fraudulent and voidable at instance of auction purchaser, even though sale was made after dismissal of execution petition for non-prosecution but before its restoration. The judgment-debtor is aware of the decree and the attachment before judgment and also attachment in execution. Therefore, the transfer is intended to defeat or delay the creditors. The private sale embarked upon by the respondent is hit by Us pendens and no title can pass on to the vendor, the respondent herein. . . .The Court auction sale must be respected as against the private sale indulged by the judgment-debtor when the matters are pending and fought tooth and nail by the decree-holder. — **Kanthilal v Smt. Padma Maiya and Others, 1999(3) Kar. L.J. 193D : ILR 1999 Kar. 2114.**

TRANSFEREE PENDENTE LITE — RIGHT.

Transferee during the pendency of a suit for partition of parts of an estate assessed to payment of land revenue to Government which is the matter of the suit, have locus standi to appear before the revenue authorities in proceedings under Section 54 of the CPC, and ask for an equitable partition of the lands, even though they had not been impleaded as parties to the suit in the Civil Court. The position of a transferee during the pendency of a suit or proceeding is similar to the position of an heir or a legatee of a party who dies during the pendency of a suit or proceeding, or an official receiver who takes over the assets of such party on his insolvency. — Khemchand Shankar v Vishnu Hari, 1983(1) Kar. L.J. Sh.N.78(SC).

LIS PENDENCY

AIR 2008 SC 2560, GURUSWAMY NADAR VS P. LAKSHMI AMMAL(D) THROUGH LRS. & ORS

Transfer of Property Act, 1882 - s. 52 - Principle of lis pendens - Applicability of - Pendency of suit for specific performance - Subsequent sale of the same property by owner to second purchaser - Held: As suit was filed before second sale of the property, principle of lis pendens would be attracted even though the subsequent purchaser purchased the same in good faith and his rights were protected u/s. 19(b)

Dismissing the appeal, the Supreme court HELD:

1. Section 19 of the Specific Relief Act, 1963 clearly states that subsequent sale can be enforced for good and sufficient reason but in the instant case, there is no difficulty because the suit was filed on 3.5.1975 for specific performance of the agreement and the second sale took place on 5.5.1975. Had that not been the position then the effect of section 19 read with section 52 of the Transfer of Property Act would have been evaluated. But in the instant case, it is more than apparent that the suit was filed before the second sale of the

property. Therefore, the principle of lis pendens would govern the instant case and the second sale cannot have the overriding effect on the first sale. The principle of lis pendens is still settled principle of law.

2. Normally, as a public policy once a suit has been filed pertaining to any subject matter of the property, in order to put an end to such kind of litigation, the principle of lis pendens has been evolved so that the litigation may finally terminate without intervention of a third party. This is because of public policy otherwise no litigation will come to an end. Therefore, in order to discourage that same subject matter of property being subjected to subsequent sale to a third person, this kind of transaction is to be checked. Otherwise, litigation will never come to an end.

3. In the instant case, it is apparent that the appellant, who is a subsequent purchaser of the same property, purchased the property in good faith but the principle of lis pendens will certainly be applicable to the instant case notwithstanding the fact that under section 19(b) of the Specific Relief Act his rights could be protected. Under section 19(b) of Specific relief act all subsequent purchasers for value who has paid money in good faith and without notice of the original contract, cannot be brought in, to enforce specific performance of original contract.

The Full Bench of Allahabad High Court in Smt. Ram Peary case referred to the work of Story on Equity which expounded the doctrine of lis pendens in the terms as follows: " Ordinarily, it is true that the judgment of a court binds only the parties and their privies in representations or estate. But he who purchases during the pendency of an action, is held bound by the judgment that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired; and such purchaser need not be made a party to the action. Where there is a real and fair purchase without any notice, the rule may operate very hardly. But it is a rule founded upon a great public policy; for otherwise, alienations made during an action might defeat its whole purpose, and there would be no end to litigation. And hence arises the maxim pendent elite, nihil innovetur; the effect of which is not to annul the conveyance but only to refer it subservient to the rights of the parties in the litigation. As to the rights of these parties, the conveyance is treated as if it never had any existence; and it does not vary them."

The Full Bench of the Allahabad High Court in Smt. Ram Peary case has considered the scope of Section 52 of the Transfer of Property Act. The Full Bench has referred to a English decision in Bellamy v. Sabine wherein it was observed as under: " It is scarcely correct to speak of lis pendens as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind required that the decision of the Court in the suit shall be finding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end."

R.K.Mohammed Ubaidullah & Ors. v. Hajee C.Abdul Wahab (D) by L.Rs. & Ors. [AIR 2000 SC 1658]. In this case it was observed that a person who purchased the property should made necessary effort to find out with regard to that property, whether the title or interest of the person from whom he is making purchase was in actual possession of such property. In that context their Lordships observed that subsequent purchaser cannot be said to be bona fide purchaser of the suit property for value without notice of suit agreement and plaintiff would be entitled to relief of specific performance. Their Lordships after considering the effect of Section 19 of the Specific Relief Act as well as Section 52 of the Transfer of Property Act held that subsequent purchaser has to be aware before he purchases the suit property. So far as the present case is concerned, it is apparent that the appellant who is a subsequent purchaser of the same property, he has purchased in good faith but the principle of lis pendens will certainly be applicable to the present case notwithstanding the fact that under section 19(b) of the Specific Relief Act his rights could be protected.

LAW OF EVIDENCE

● **Rules of evidence and Domestic tribunals:-** Not governed by strict rules of evidence but rules of natural justice and ordinary principles of proof to be followed- **AIR1976SC1080, AIR 1963 SC 375, AIR 1968 SC 236,**

● **Affidavits and O 19 of CPC:-** Evidence by affidavit cannot be taken as evidence unless permitted by order 19 of cpc. Rule 3 of it says that affidavit should carefully express how much of the statement is within the personal knowledge and how much of it is on belief. The source of such information should be disclosed. **AIR 1988 SC 1381, AIR 1952 SC 317, AIR 1956 CAL 496.**

● **Relevant fact: -** The statement of witnesses to the effect that they heard from other persons at the scene of the offence immediately after the occurrence that the accused fired the gun is admissible as a relevant fact. **AIR 1979 SC 22.**

● **Proof of fact: -** The inference of proof of a fact in dispute, having been established, can be drawn from the given objective facts, direct or circumstantial **AIR 1996 SC 1599.**

● **Paper cutting: -** Paper cutting cannot be relied upon as evidence in proof of sale deed. **AIR 1996 SC 2710.**

● **Result of investigation: -** It is not a legal evidence, only finding of the guilt accused can be based only on the evidence produced during trial and not on the result of investigation by police. **AIR 1997 SC 2485, AIR 1997 SC 2985. AIR 1971 SC 28.**
● The mere fact that the prosecution witnesses are police officers is not enough to discard their evidence in the absence of their hostility to the accused. **AIR 1973 SC 2783, AIR 1998 SC 1474.**
● An accused is entitled to know from the I.O. what witnesses have been examined in the course of investigation, whether the witness examined in the court were examined by him or not, non examination of I.O. is a serious omission on the prosecution. **AIR 1956 Mys 51 at 55. 1988 CrLJ 734, at 737.**
● Non examination of the I.O. is of no consequence when the defence has failed to shake the credibility of the eye witness or to point out material contradiction in the prosecution case. **AIR 2000 SC 1582.**
● Discrepancy in the deposition of two police officers as to recovery and the independent witnesses, though available, having not been examined, such a discrepancy would not inspire confidence about the reliability of the prosecution case. **AIR 1995 SC 2339 (P-4).**
● Where the I.O. has taken pliable (weak) witnesses as panch witnesses knowingly, the entire raid would become suspect and evidence of police witnesses by themselves would not be sufficient to base conviction. **1994 CrLJ 1020 (P-8) (Bom), 1995 CrLJ 3623 (P-2) (SC).**

● **False defense: -** Infirmity or lacuna in prosecution cannot be cured by false defense or plea. **AIR 1984 SC1622, AIR 1988 SC 1766, AIR 1982 SC 1157, AIR 1981 SC 34, AIR 1981 SC 765, AIR 1982 SC 1227, AIR 1981 SC 1675.**

● **Circumstantial evidence:-** Standard of proof- circumstances relied upon must be fully established-**AIR 1960 SC 29.**
● Chain of evidence furnished by those circumstances must be so far complete as not to leave any reasonable ground for a conclusion consistent with innocence of the accused **1997 CrLJ 3702 (Guj).** and further it must be such as to show that within all human probability the act must have been done by the accused **AIR 1971 SC 2016,**
● **and** if two views are possible on such evidence, the view pointing towards the innocence of the accused is to be adopted. **AIR 1983 SC 446, AIR 1984 SC 1622, AIR 1989 SC 1890-**
● **Court** has to consider the total cumulative effect of all the proved facts each one of which re-enforces the conclusion of guilt. **AIR 1970 SC 648. –** It is the cumulative result of all the circumstances which must unerringly point to the guilt of the accused and not one circumstance by itself. **AIR 2001 SC 2677.**
● **Circumstances** should exclude the possibility of guilt of a person other than the accused. **AIR 1992 SC 2045,** There is no difference between criminal and civil cases regarding admissibility of circumstantial evidence. **AIR 1966 SC 1734.**
● Appreciation of cir-evi cannot create presumption of guilt. **AIR 1980 SC 1168. AIR 1980 SC 1382.**

● **Land acquisition cases: -** The mere statement about the sales without examining the vendee or person attesting the sales, are not admissible in evidence for determining the value of the lands. **AIR 1979 SC 472.**

● **Document:-** Not produced in court but only document which has a reference of it is produced this is not a proof of that document **AIR 1961 AP 495.**
● Where there is conflict between oral testimony and documentary evidence, it is always desirable and safe to let the documents speak for themselves. **AIR 1960 BOM 148.**

● **Judges view: - A judge is not entitled to allow his view or observation to take the place** of evidence, because such view or observation of his cannot be tested by cross examination and the accused does not get an opportunity to furnish any explanation for the same. **AIR 1956 SC 415.**

● **Tape-recorded evidence: -** Requisites- conversation to be relevant- voice to be identifiable- accuracy to be proved by eliminating the possibility of of erasing the tape record. **AIR 1973 SC 157. –** Must be sealed at the earliest point of time and not opened except under the orders of the court **1993 CrLJ 2863 (BOM). Para.11.**

● **Interested witness:-** The term interested postulates that the person concerned must have some direct interest in seeing that the accused person is somehow or other convicted because he had some animus towards the accused. Evidence has to be weighed. **AIR 1978 SC 1084.**
● Where a witness was known both to the victim and accused, his evidence would be material and could not be criticized on the ground that, as he knew the father of the accused, he was an interested witness. **AIR 2001 SC 1103.**
● The evidence of interested witness has to be tested in the light of probabilities and the previous statements and the surrounding circumstances. **AIR 1994 SC 549.**
● The mere fact that a witness had good neighbourly relations with the deceased is no ground to discard his evidence. **AIR 1991 SC 1853.**
● The evidence of the eyewitness could not be discarded simply because they were known to the younger brother of the deceased. **AIR 1996 SC 3098.**
● The testimony of an interested witness must be viewed with a high degree of caution and the court must also look for independent corroboration. **2000 CrLJ 430 (P-11) (Kant) St of Kant V sheik khader.**
● There is no rule of law to the effect that the evidence of partisan witness cannot be accepted. Interested evidence is not necessarily false, but is accepted with caution. **AIR 1988 SC 1028, AIR 1985 SC 1092.**
● The evidence of interested witness should however be scrutinized with care. **AIR 1980 SC 443, AIR 1978 SC 191, AIR 1977 SC 2274, AIR 1975 SC 216, AIR 1997 SC 2835, AIR 1993 SC 1544, AIR 1999 SC 1776.**

● Where the incident had taken place in broad day light and there was no reason to falsely implicate the accused, the testimony of interested witness could not be brushed aside. **AIR 1965 SC 202, AIR 1965 SC 328.**
● Where a witness sustained an injury at the time of occurrence and gave consistent version as given in the FIR and the accused also admitted his presence at the scene, his evidence cannot be rejected as interested witness. **AIR 1989 SC 1822.**
● No infirmity in evidence of interested witnesses, can't be disbelieved merely for being related to the deceased, **AIR 1996 SC 3265.**
● Testimony of eye witness cannot be discarded merely because of their being interested witness. **AIR 1973 SC 2407, AIR 1965 SC 202, AIR 1957 SC 614, AIR 1994 SC 1459.**
● When the witness who is interested in the deceased made improvements in the prosecution case propounded by them from the time of investigation stage, their evidence cannot be relied upon. **AIR 1981 SC 1223.**
● Where the offence was the outcome of faction and the eye witness are interested persons, their evidence has to be examined in the light of other evidence. **AIR 1992 SC 950.**
● Their evidence has to be scrutinized, carefully and rejected if it is tainted with falsehood. **AIR 1974, AIR 1969 SC 1034, AIR 1965 SC 1179, AIR 1959 SC 200.**
● The evidence of independent witness who is neither connected with the accused nor to witness, cannot be doubted. **AIR 2000 SC 3480.**

● **Credibility of witness:-** The credibility of a witness depends upon knowledge of the facts he testifies, his disinterestedness, his integrity and how he stood the test of cross examination. **AIR 1957 SC 199.**
● Where nothing is elicited in cross-examination to dis credit witness, merely he is residing far away and he has no reason to be present there at that time is no ground to reject evidence. **AIR 1997 SC 2828, AIR 1999 SC 994(P-5).**
● In case of police raid and search, acquaintance of the independent witness with the police and the fact that he helped the police in the action would not by itself discredit his evidence. **1998 CrLJ 863 (SC) (P-10).**

● **Related witness: -** They may not spare the real culprit – **AIR 1974 SC 839, 2165,276. AIR 1971 SC 1656, AIR 1977 SC1085.**
● Court should scrutinize that evidence carefully – **AIR 1996 SC 3429**
● Evidence as to murder and dacoity, by inmates and relatives of deceased is natural witness. **AIR 1953 SC 364, AIR 1980 SC 184, AIR 1977 SC 472, 2001 CrLJ 3299 (Para-6) (sc).**
● Eye-witness is closely related to the victim, his evidence is to be closely scrutinized but corroboration is not necessary for acceptance of such evidence. **AIR 1965 SC 328**
● In related witness whether corroboration is necessary or not will depend on the particular facts and circumstance of the case. **AIR 1953 SC 364, AIR1965 SC 328.**
● The evidence should not be accepted without due care and caution and without corroboration. **AIR 1960 SC 1340. AIR 1984 SC 1622**
● It cannot be discarded mechanically **AIR 1965 SC 202.**
● Where the witnesses belonged to the party of the deceased, it would not be safe to rely upon their evidence without finding independent corroboration for their testimony.**1993 CrLJ 2609 (P-17)(SC) St of Kant V Bheemappa. ● AIR 1993 SC 2644.**
● Mere relationship is no ground for rejection of evidence- **AIR 1985 SC 1384, AIR 1983 SC 1081, AIR 1981 SC 942, AIR 1981 SC 1390, AIR 1981 SC 2073, AIR 1975 SC 1501, AIR 1979 SC 702, AIR 1979 SC 1822, AIR 1992 SC 891, AIR1992 SC 1011, AIR 1972 SC 1172, AIR 1971 SC 460, AIR 1953 SC 364.**

● **Dowry case:-** The petitioners coerced her concerning demand of dowry at ganganagar, court at jind had no jurisdiction. **1994 (1) Crimes Pun-Har 390-Rakesh Kumar VS State of Haryana.**
● Having regard to dominant object of the act which is to stamp out the practice of demanding dowry. **AIR 1983 SC 1219.**
● It is nobody's case that articles were agreed to be given to the accused after the marriage as consideration for marriage. **Nanjanna vs State of Karnataka 1987(2) CrLJ Karn 1386, 1986(2) KarLJ 463, 1987(1) Crimes 210.**
● If the dowry items are not demanded as consideration for the marriage they would not constitute dowry. **Harbans Singh vs Smt Gurcharan Kaur 1990 CrLJ Del 1591.**
● Dowry demand- consideration for marriage- consideration as defined under contract Act **AIR 1982 Pun&Har 372 (FB).**
● **T.K.Narayanaswamy vs State of Karnataka 1991 CrLJ Karn 2115.**
● When the alleged demand at the relevant time did not fall within that definition, the rule of presumption under section 8A of DP Act cannot be made use against the accused. **1993 (1) Crimes (MP) 764.**

● **Independent witness:-** Where the evidence of eye witnesses was found creditworthy, non-examination of independent witness does not affect the prosecution case more so when the incident had taken place suddenly and the people in the nearby place might not have seen the actual attack and might not have known the assailants as they belonged to another village. **AIR 1994 SC 1029.**
● Turning hostile of the independent witnesses itself cannot be a ground for the acquittal of the accused. **AIR 2001 SC 229.**
● Where no independent witness was available and other witnesses had turned hostile, the evidence of the police witnesses, being reliable, could form basis of conviction. **AIR 1999 SC 2259, 1993 CrLJ 3844 (P-15) (Bom).**

● **Trap case:-** Evidence of trap case witnesses should be scrutinized with extra care. **AIR 1976 SC 294 , AIR 1976 SC 449 , AIR 1973 SC 498.**

● **Poor and illiterate witness:-** Fabric of truth should be the guiding factor, and not the village or rustic background of the witness. **AIR 1973 SC 2622. AIR 1975 SC 246.**
● It is not proper to presume that persons holding clerical posts cannot act as independent witnesses **AIR 1980 SC 873.**
● Evidence has to be judged on merits, and it does not matter whether the witness is poor or wealthy person. **AIR 1965 Mys 264.**
● The evidence of illiterate and ignorant eye witness shall not be rejected on the ground that there are minor contradictions in the evidence. **AIR 1976 SC 1541.**
● There is a limit to extend the benefit of illiteracy to such a witness. It should not induce the court to ignore the infirmities in his evidence and to fill in the lacuna in prosecution case. **AIR 1974 SC 873.**

● **Criminal background of witness:-** A previous convict can testify **AIR 1977 SC 701, AIR 1976 SC 2588, 1964 (1) MysLJ 393.**
● Where a witness stated that the accused sold goods to him, his testimony cannot be disregarded merely on the ground that he was a habitual receiver of stolen property. **1966 CrLJ 848 (Mys)**
● The evidence of a public servant should not be discarded as unreliable merely because he was previously suspended. **1976 CrLJ 274.**

● **Eye witness :-** The court cannot proceed on the hypothesis that eye witnesses are implicitly reliable. Every piece of evidence has to be subjected to the test of objectivity. **AIR 1974 SC 1936.**
● Considerations to asses eye-witness evidence (1) whether in the circumstances of the case, is it possible to believe his presence at the scene of occurrence or in such situations as would make it possible for him to witness the fact deposed by him and (2) whether there is anything inherently improbable or unreliable in his evidence. **AIR 1996 SC 3073, State of Mysore vs Raju Shetty (1961) 1 CrLJ 403,**
● Where the eye witnesses were most natural witnesses, giving benefit of doubt to one accused and acquitting him would not affect the evidence of those witnesses.**AIR 1993 SC 1386.**
● Where the presence of eye witnesses on the spot was found to be natural and there was nothing to show that they were deposing falsely, their testimony could not be discarded even though they had bad antecedents. **AIR 1996 SC 3265.**
● The evidence of eye witness, if accepted, is sufficient to warrant a conviction, though in appropriate cases the court may, as a measure of caution, require some confirming circumstances by way of corroboration **AIR 1985 SC 866,**
● The presence of the eye witness on the scene of occurrence cannot be doubted merely because they saw lesser number of blows being dealt than actually found on the person of the victim. **1996 CrLJ 305 (MP).** ● Where no explanation of the bleeding wound on the head of the accused was given by the eye witnesses, it was held to be sufficient for the acquittal. **1997 CrLJ 3839 (BOM), AIR 1976 SC 2263.**
● Where the defence failed to explain how the eye witnesses sustain injuries, conviction was not interfered, **AIR 1997 SC 2985.**
● Where the evidence is of the only eye witness to connect the accused with the crime and when the witness gives different version in the committing court and in the sessions court, it would be a good ground for acquitting the accused. **AIR 1967 SC 1027.**
● It is not safe to base the conviction on the sole evidence of an eye witness unless some corroboration is found in the other evidence or material record. **AIR 1972 SC 1309.**
● Where the only eye witness brother of the deceased stated that hands of the deceased were bound forcibly by the accused and shot dead, and the medical evidence by the doctor was that he had not note or find any imprint of rope on the wrist of the dead body, it was held by SC that it was hardly a ground for rejecting the evidence of the eye witness. **AIR 1981 SC 936.**
● Where the evidence of the sole eye witness was found to be infirm, accused was entitled to acquittal. **AIR 1994 SC 542.**
● It is not proper for the court to disregard the evidence of important eyewitnesses on general grounds or probabilities, without examining the intrinsic merits of their evidence. **AIR 1981 SC 1442.**
● The witness failed to give consistent and detailed account of their injuries and made improvements, the same was held to be no ground to acquit the accused. **AIR 1994 SC 1187.**
● The evidence of an eyewitness cannot be disregarded only on the ground that he did not intervene to save the deceased. **AIR 1981 SC 1227.**
● Evidence of eyewitness cannot be discarded on the basis of vague evidence of other witness who was subsequently treated as hostile. **AIR 1994 SC 561.**
● Where the presence of eye witnesses at the place of occurrence was proved, their evidence could not be disbelieved merely because they happened to be relation of the deceased. **AIR 1998 SC 2903.**
● An eyewitness cannot be disbelieved merely because he has not been examined by the prosecution or that he has not given any statement to the police before he was examined in the case. **AIR 1993 MP 79.**
● In the face of evidence of eye witnesses mere suspicion that the grandson of the deceased had the motive to commit the offence as he wanted to get the property of the deceased old woman was held not sufficient to discredit the eye witnesses. **AIR 1992 SC 1579.**
● When the version of eye witness is corroborated by expert evidence (medical or forensic) , the motive is strong-conviction proper. **AIR 1993 SC 2654, 1487, 2473. AIR 1994 SC 503, AIR 1996 SC 3431. AIR 1973 SC 512**
● Corroborated evidence of eyewitnesses cannot be discarded merely because of some contradictions in their depositions. **AIR 1997 SC 234, AIR 1997 SC 2828.**

● Evidence of eyewitness, the son of deceased, natural, corroborated, reliable. **AIR 1997 SC 1843,**
● Evidence of eyewitness cannot be rejected on the ground that she did not give details of occurrence in her evidence under section 161 & 164 Cr.P.C. **AIR 1994 SC 826.**
● Where an eyewitness did not come forward and tell the I.O, but gave evidence long after in court, his omission to inform I.O condemns testimony as an after thought. **AIR 1975 SC 216.**
● Where the eye witness failed to identify one of the nine accused persons, benefit of doubt should go to that one accused and not to others. **AIR 1997 SC 1160.**
● Uncorroborated evidence of the sole witness is itself not sufficient to warrant conviction. **AIR 1982 SC 1595.**
● Veracity of an eyewitness cannot be doubted on the ground that no independent witnesses from the nearby places were examined by the prosecution. **AIR 1998 SC 2606.**
● Where the sole alleged eyewitness of murder, a close relative of the deceased, made no attempt to save him and his statement about the time of occurrence was contradictory to the medical evidence could not be relied upon without some independent corroboration. **AIR 1993 SC 1462.**
● Where an eyewitness gave a dramatic account of the incident with minute details of the attack on each victim, but admitted in the cross examination that he was also attacked simultaneously, it was held such evidence of eye of the eyewitness cannot be relied on. **AIR 1981 SC 1230.**
● Where direct evidence is cogent, reliable and unimpeachable, the medical evidence cannot override. **AIR 1988 SC 2154,** Distinguishing **AIR 1977 SC 1753.**
● Where the testimony of eyewitness was clouded with grave suspicion and discrepancy in material particulars, it was unsafe to record conviction on his testimony. **AIR 1994 SC 1251.**
● Where there is no serious discrepancies in the testimony of eyewitness and the facts stated in FIR, regarding time, place, and the manner of occurrence including the name of the assailant, and it is corroborated with medical evidence, witness reliable, small discrepancy does not warrant rejection of his evidence. **1988 CrLJ 1477. AIR 1994 SC 969.**
● Where nothing is elicited in the cross examination of the eye witnesses to impeach their testimony, it could not be discarded merely because they are the relatives of the deceased. **AIR 1999 SC 994.**
● Where the two eyewitnesses contradicted each other on the material particulars of the offence, and their subsequent behaviour was also abnormal, it was held that conviction based on their evidence could not be sustained. **1984 CrLJ 528.**
● Conflicting versions of eye witnesses as to time and place of occurrence and nature of injuries to deceased. **2001 CrLJ 3798 (P-9&11) (Ori). ●**

● **Injured Witness :-** Before the evidence of injured witness can be accepted, the court should be satisfied that he is a truthful witness and the account furnished by him is in consonance with probabilities.**2000 CrLJ 1566 (P-16) (Bom)**
● The witness who himself received injuries of serious nature during assault would not let go culprits. **1993 CrLJ 2609.(P-17) (Kar) (SC) .**

CASE LAW ON REGISTRATION

When the agreement itself is not compulsorily registrable, the deed of assignment of rights thereunder cannot be placed on a higher pedestal. The reassignment deed is not a document compulsorily registrable. **Ganapaty Govindaiah and Others v Ningappa Ramappa and Others, 1980(1) Kar. LJ. 89 (DB).**

A document required to be registered compulsorily — Not registered — What effect? Undoubtedly the document involved in the instant case is a sale deed. It requires to be registered, both under Section 17 and Section 54 of the Transfer of Property Act. If a sale deed is not registered in the case of a tangible immovable property, value of which is Rs. 100/- and upwards, it is not recognised as a completed sale deed and does not convey any title. Equitable considerations are entirely foreign to the concept of conveyance of title, in view of the statutory provisions. Application of equity is confined to a limited class of cases such as Section 53-A of the Transfer of Property Act. Therefore, non-registered sale deed is not permitted to be looked into for the purpose of finding out whether the title has passed to the buyer and whether such a document affects any immovable property comprised therein. The fact whether the first respondent is in actual possession of the property in question may be a collateral purpose but that purpose cannot be sought to be achieved so as to advance other purposes prohibited under Section 49 of the Act. The limited purpose for which the deed could be produced is to prove the character of the possession at the most. That will not solve the question involved in the instant case. — Mrs. Devikarani Roerich and Another v M/s. K.T. Plantations Private Limited, Bangalore and Another, 1993(4) Kar. LJ. 742.

Mortgage with possession — Subsequent release of a portion of property — Registration Compulsory — Absence of registration — Document admissible in evidence only to prove factum of payment — Explained. — R. Krishnamurthy v Smt. Annapurnamma and Others, 1988(3) Kar. LJ. 185 : AIR 1989 Kant. 209.

Sales of property under a registered sale deed — Purchaser's possession of the property disturbed by the claim of prior creation of a right of maintenance in the property in favour of the seller's wife — The document creating interest in the property — Not registered — Held: A document creating interest in immovable property is necessarily to be registered. Such a document requiring registration, but not registered is inadmissible as evidence of any transaction affecting such property or conferring such right. —- Smt. Lakshmamma v Sombegowda and Others, 1995(2) Kar. LJ. 228.

Agreement of loan and memorandum reciting earlier deposit of title deeds — Registration. —An agreement referring to the loan, the mode of repayment and its utilisation (which does not mention about any mortgage) does not require to be stamped under Article 6, Schedule of Karnataka Stamp Act, nor requires to be registered. A memorandum stating that on an earlier date a mortgage by deposit of title deeds has been created also does not require to be stamped or registered. — Syndicate Bank v Sowdagar Moinuddin and Sons and Others, 1981(2) Kar. L.J. 416 : AIR 1982 Kant. 351.

An award about division of properties which did not of its own accord create any interest in immoveable property but recorded divisions already made and accepted by parties does not require registration. —1961 SCR 792.

Letter containing mere record of events leading to deposit of title deeds and not containing the terms of the mortgage transaction does not require registration. — Rajamma v Mahant P, Krishnanadagiri Goswamy and Others, 1973(2) Mys. L.J. 73.

When the award sought to effect a partition of the joint family properties, it requires registration under Section 17(b) of the Karnataka Registration Act.
A declaration of right, title or interest within the meaning of Section 17 of the Registration Act is not a statement of an existing state of affairs, but one from which a new right, title or interest directly flows. This is so because the word 'declare' in Section 17 must be read in the same sense as the words 'create, assign etc./ used in the same section, that is, as implying a definite change in the legal relationship of the parties to the property by an expression of Will embodied in the document. — 1962 Mys. L.J. Supp. 211.

Award between partners — Registration — Documents mentioned in Section 14(2) not filed — Effect — Filing award by partner authorised by arbitrator — Valid. A dispute between the petitioner and respondent who were running a rice mill was referred to arbitration and respondent filed the award into Court. The award valued the mill and the shares and directed that respondent should take up the management of the mill, that on account of appellant's investment be should be paid each year a sum for 10 years and be repaid the amount invested at the end of ten years and also if they agreed they could carry on the business jointly. The award did not contain any schedule of properties and did not allot any shares in immovable properties to either of the parties. Held: (1) The declaration of the value of the mill and of the shares of the partners were recitals setting out the existing facts and rights and such a declaration of mere facts will not bring the award within Section 17(l)(b), Registration Act and render it compulsorily registrable. Very serious consequences follow non-registration and such provisions should be strictly construed. Further an award when not merged in a judgment and decree cannot operate to create, declare, etc., any right, title or interest as contemplated in Section 17(l)(b). The mere fact that it may limit or even terminate the right of one of the partners will not be sufficient to bring the award within Section 17(l)(d). The interest of a partner in partnership assets cannot be regarded as a .right or interest in immovable property, within Section 17(l)(b) — AIR 1959 A,P. 380, foll. In dealing with the share of the partners the award cannot be understood as dealing with any right or interest in any immovable property forming part of the assets of the partnership. (2) Failure to file the documents referred to in Section 14(2), Arbitration Act along with the award did not vitiate the proceedings or render the filing of the award invalid or otherwise than in accordance with law. (3) It is not necessary that the arbitrators themselves should file the award in Court and under Section 14(2) the arbitrators could cause the award to be filed in Court. — Nagesh Venkat Rao Desai v Srinivasacharya Narayanacharya, 1966(1) Mys. L.J. 362.

Award of arbitrator relating immovable property — Held. Section 17(l)(b) of the Registration Act enjoins that any non-testamentary instrument which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property should be registered. Therefore, the question is, does the document itself extinguish or purport to create or declares any right in immovable property. It certainly declares the share of the parties in the property but it enjoins that only upon payment of Rs. 40,800/- Mrs. Vasisht would vacate the house. It further enjoins that "she will be entitled to live in the house in the portion occupied by her till the full payment of Rs. 40,800/- is made to her and she will not be liable to pay any rent for the occupation of the portion and on the said payment, she will not have any right and also no interest left in the said property". So her right in the said property and her interest in the property ceases on payment of the amount of Rs. 40,800 and not otherwise, not by the operation of document itself. The document itself creates a right by itself to get Rs. 40,800 and right to obtain the payment and on payment the obligation of relinquishment of her right or interest in the property. It does nothing more. . . .In that view of the matter, though there is no dispute about the propositions, these two decisions would be applicable to the facts of the instant case, we are of the opinion on an analysis of the award that it did not create any right in any immovable property and as such it was not compulsory to register it. — Captain Ashok Kashyap v Mrs, Sudha Vasisht and Another, 1987(3) Kar. L.J. Sh. N. 15 , AIR 1987 SC 841.

Family arrangement — Unregistered — Effect.1974(1) Kar. L.J. Jr. 120 Sh. N. 296. Karnataka Registration Rules, 1965, Rules 148 and 151 — Encumbrance Certificate — Application for removal of entries mentioned in — Sub-Registrar, not being competent to decide question of title, cannot entertain such application for deleting, modifying or altering entries relating to registered documents — Where person claiming ownership over immovable property finds that someone else has sold same property under registered sale deed, appropriate course of action for him is to file suit for declaration and consequential relief, or to ignore such sale deed and leave it to person claiming title there under to establish his title through appropriate proceedings — He cannot require registering authority to cancel registration of document. In detail: - Every

document affecting an immovable property (as provided in Section 17) has to be registered, so that any person who wants to deal with such property can find out about the encumbrances, legal obligations, rights and ownership of such property; and such registration acts as constructive notice to a person who subsequently acquires such property or any part thereof, or share or interest therein. Every document so registered is copied (or copy filed) in Book I and particulars thereof (name of executant/s and claimant/s under the document and description of the property and nature of transaction and the consideration) are entered in the statutory Indexes I and II. When a person wants to ascertain whether any transactions have taken place in regard to an immovable property or the particulars of such transaction, he can either apply to the Registration Office to make a search or seek permission to personally inspect the Indexes. An Encumbrance Certificate or Nil Encumbrance Certificate, as the case may be, is issued by the Registration Office showing the result of such search. The Encumbrance Certificate or Nil Encumbrance Certificate issued is not a document of title or document affecting title to a property, but is only a list of the acts and encumbrances affecting an immovable property being copies of entries in Indexes, made on the basis of the documents registered and entered in Book I. The Registering Officer has no power or authority to modify or delete any entries made in Book I or in the Indexes relating to Book I, by holding an enquiry relating to the validity of the document. Consequently, he cannot delete or modify any entry made in an Encumbrance Certificate (except where it may relate to a clerical error). . . . When a person who claims to be the owner or a person interested in an immovable property, finds that someone else has executed and registered a sale deed or other deed in regard to his property, claiming to be the owner or a person interested in the property, the appropriate course for him is to file a suit for declaration and consequential reliefs. If he is satisfied such sale deed is executed by a person without any title and that the deed is void ab initio, he may even choose to ignore the same and leave it to the person claiming title under such deed to establish his title in appropriate proceedings. A Court of Law has the jurisdiction to declare a document to be void or even cancel a document. But under no circumstances, a person claiming to be the owner of a property or a holder of a property, can require the Registering Authority to cancel the registration of a document or to cancel the entry made in Book No. 1 in regard to a registered document or to delete or remove the entry made in the indexes relating to Book No. 1. The Registering Officer has no such power. Consequently, the question of the Registering Officer deleting any entry either from the Indexes of Book No. 1 or the extracts therefrom contained in the Encumbrance Certificate by holding transaction covered by a registered instrument is illegal or void, does not arise. — M. Ramakrishna Reddy v Sub-Registrar, Rajajinagar, Bangalore and Another, 1999(6) Kar. L.J. 68.

Partition deed — Declaring rights of different coparceners in detail signed and attested, requires registration. — Varde Gowda v Nanjundiah, 1971 Mys. L.J. Sh. N. 79.

While a surrender of a lease need not be in writing and registered, if it is in writing affecting immovable property of over Rs. 100 would require registration. — 1969(1) Mys. LJ. 203.

Where the award directed that the 1st party should obtain a release deed from the 2nd party on payment of a certain sum before a certain date, held the award did not itself operate as a conveyance in favour of the 1st party and did not require registration. — Gopala Gowda v Devegowda, 1974(2) Kar. L.J. Jr. 68 Sh. N. 52.

Security bond under Order 41, Rule 6, CPC — Registration. A security bond executed under Order 41, Rule 6, CPC mortgaging properties worth more than Rs. 100 is not compulsorily registrable under Section 17(l)(b) of the Registration Act and it is exempt from registration under Section 17(2)(vi) of the Act. — S. Rarm Bhatta v B. Kodandamma Bhatta, ILR 1963 Mys. 536:1963(2) Mys. L.J. 253.

Mere list of properties allotted at partition cannot be construed as an instrument of partition — Registration is not required. — Roslian Singh and Others v Zile Singh and Others, 1988(1) Kar. L.J. Sh. N. 8 (SC): AIR 1988 SC 881.

Surrender by tenant to landlord — Registration —Right under — Exercise after repeal of section. Where the value of a tenancy is over Rs. 100, a surrender deed executed by the tenant in favour of the landlord comes within clause (b) of Section 17(1) of the Registration Act and must be registered. In view of Section 17(l)(b) and Section 49, the unregistered document cannot be received in evidence of the transaction of surrender affecting the property. A surrender can be effected without an instrument. But, if a surrender is effected by a document, the same must be registered. Even if a document is not admissible, the fact of surrender could be established by evidence de hors the document, that is, by other evidence. Nadig Neelakanta Rao v State of Mi/sore, AIR 1960 Mvs. 87 : "59 Mys. L.J. 905.

Unregistered partition deed — Evidentiary value of Such document is admissible in evidence to prove intention of coparceners to become divided in status.Such document is admissible to prove an intention of coparceners to become divided in status. The present document also may be used only for that purpose — Chikke Gowda and Another v L. Govinde Gowda, 2001(1) Kar. L.J. 194.

Document which effects partition of immovable properties worth more than Rs. 100/- inadmissible in evidence if the same is not registered under Section 17(l)(b) — Documents when contain several other matters which do not require to be registered;— Admissibility in evidence — Extent of —Stated:- The document is executed by defendants 1 and 3 and attested by three witnesses. It effects partition of the joint family properties in addition to moveables the immoveable properties, mentioned therein worth more than Rs. 100/- between defendants 1 and 3. As such, as required by Section 17(l)(b) of the Indian Registration Act, 1908, it ought to have been registered. Admittedly, the document Ex. D-l has not been registered. As such it

could not have been considered as a valid document affecting immoveable properties mentioned therein and it could not have been received in evidence to prove the partition. However, the document contains several other matters which do not require to be registered. It contains the list of moveable and immoveable properties belonging to the joint family consisting of late Sri Govind Rao, father of defendant 1 and Plaintiffs and his brother Gunde Rao. It also contains a recital that late Govinda Rao and Gunde Rao (defendant 3) were the members of a Hindu joint family and they possessed moveable and immoveable properties of the joint family mentioned therein- It also contains a declaration of defendants 1 and 3 that they did not want to continue as members of the joint family. In other words, it contains the statement of defendants 1 and 3 to severance of their status as members of the joint family. A document containing these matters is not required to be registered. Defendants 1 and 3 have admitted the execution of Ex. D-l and the properties comprised therein as the joint family properties. The recitals contained in the document are not at all disputed by any one of them. As such, though the document Ex. D-l is inadmissible as evidence of partition effected between defendants 1 and 3, nevertheless it is admissible to prove that the properties mentioned therein are the joint family properties and the first defendant and the 3rd defendant, being the members of the joint family, were in possession of the joint family properties mentioned therein on the date of the document and they severed their status as members of the joint family on the date of the document and they are in possession of the properties mentioned therein. — Umakant Rao v Lalitabai and Others, 1988(2) Kar. L.J. 155 (DB): ILR1988 Kat. 2067 (DB).

Partition deed — Not registered — Admissibility—Partition means partition by metes and bounds and also severance in status. So far as severance in status is concerned, though it is recited in a document, such a document does not require registration and is admissible to show that there was a severance in status. — Mallappa Durgappa v Durgavva and Others, 1982(1) Kar. L.J. 246: AIR 1982 Kant. 214.

First respondent purchased certain items of properties through Court sale from liquidator of Bank-Second respondent had sold previously those items of properties by virtue of execution of decree to Bank-Second sale took place of those properties through execution decree from second respondent to appellant — Appellant challenged first sale — High Court held — Properties were under attachment — Registration not compulsory — Appellant does not get valid right to those properties since they have been already sold — Properties though not form part of schedule, would also become part of decree — Attached properties liable to be sold as integral part of decree — Held view of High Court correct in law. Held:- Here we are concerned with the question whether items 1 to 7 properties brought to sale in execution of decree in O.S. No. 95 of 1953 are a part of decree or order of the Court, relating to the subject-matter of the suit or proceeding. We have already held that Items 1 to 7 of the properties mentioned in the separate application, which was the subject-matter of the attachment before the judgment, have become part of the decree and also the order of the Court in the proceedings under Order 38, Rule 6 of C.P.C. Therefore, the decree, though passed on compromise, formed part of the decree and order of the Court in Court proceedings. The immovable properties whose sale is impugned are not properties other than the subject-matter of the suit or proceedings. Therefore, the view of the High Court is correct in law. — S. Noordeen v V.S. Thiru Venkita Reddiar and Others, 1996(4) Kar. LJ. 710 (SC).

Sale of immovable property — Unregistered agreement to reconvey — Suit for specific performance. An agreement to reconvey does not require registration and is therefore admissible in evidence and a suit for specific performance can be founded on it. AIR 1926 Bom. 131 dist. — Narayanaswamy v Muniyamma, AIR 1974 Mys. 13 :1973(1) Mys. LJ. 310.

Exemption from registration — Decree or order of Court — Decree passed in suit for declaration of title and possession, on becoming final without being challenged in appeal, operates as res judicata, barring subsequent suit for similar relief by another party, irrespective of whether decree is registered or not — Where such decree passed in 1951 had become final, another decree passed subsequently in 1972 granting similar relief to another party, on ground that decree of 1951 was not registered, later decree of 1972, is a nullity — Court which passed decree in 1972 erred in not applying bar of res judicata. Held: The decree was passed on 10-12-1951. But unfortunately the First Appellate Court has failed to understand the validity of the decree so passed and held that the decree is not a registered one and the title has not passed through the plaintiff's mother. This is an erroneous approach. Declaration of a right in immoveable properties made in decree does not require registered instruments to convey the title. Registration of such decree is optional under the provision of the Registration Act.... It is unfortunate that the appellate Judge is not aware of the law on the point and held otherwise that effecting the rights of the plaintiff. This finding is therefore prima facie an error apparent on the face of record and such findings has to be set aside. In other subsequent suit after this suit namely, O.S. No. 156 of 1972 cannot operate as res judicata. In fact the plaintiff who is claiming through his mother is certainly entitled to the property. — Dhaesa (deceased) L.Rs v Bandagisab and Another, 2000(2) Kar. L.J. Sh. N. 20.

Compromise decree — Charge on other than subject-matter Unregistered — Priority over attachment.—If the immoveable property over which a charge was created by a compromise decree was not the subject-matter of the suit, the decree is not exempt from registration under Section 17(2){vi), Registration Act. The unregistered decree is ineffective insofar as it creates a charge and cannot take precedence over an attachment of the property. — Bhogilal v Nizam Sugar Factory Ltd., 1968(1) Mys. L.J. 514.

Where all the properties of the firm including the suit property were by consent treated to be properties in the suit in which a compromise was made, such a decree does not require to be registered — Shivdas Subrao and Another v V.D. Divekar and Another, 1968(2) Mys. L.J. 111.

Compromise decree creating charge on immovable property in favour of any party to suit is compulsorily registrable unless amount secured is less than Rs. 100/- — Registration operates as constructive of charge, as contemplated in Section 3 of Transfer of Property Act, to subsequent transferees. HELD: When a charge of immoveable property is created by an instrument such instrument must be registered unless the amount secured is less than Rs. 100/-.Registration of an instrument under Section 17(1) of the Registration Act to operate as a constructive notice contemplated under Section 3 of the Transfer of Property Act to the subsequent transferee, it must be shown that its registration was done strictly in the manner prescribed by the Registration Act and that the registered document was entered or filed, as the case may be, in the books kept under Section 51 of the Act, and that the particulars of the transaction under the registered deed were correctly entered in the indexes kept under Section 55. In the instant case sufficient evidence has been brought on record satisfactorily establishing the fact of due registration of the said decrees in the office of the concerned Sub-Registrar. — Sha Champalal Oswal v Pedalu Achanna and Another, 1998(1) Kar. L.J. 365A.

Tahsildar making the instrument of Partition — Nothing to show that the same is made in exercise of his powers under Chapter XI of Coorg Land and Revenue Regulation, 1899 — Held, requires registration. — M.S. Seethamma v M.K. Neelamma, 1987(2) Kar. L.J. Sh. N. 156: ILR 1985 Kar. 883.

Registration — Validity. Nittoor Sreenivasa Rao and Hegde, J J.—Before a document could be invalidated under Section 28, the party who wants to invalidate the same should establish that either the relevant property mentioned in the deed is non-existent or the same was not intended to be passed under the deed. What is contemplated in the latter case is not the fraud of the vendor alone but of all the parties to the transaction. The burden of proving that the vendor had no saleable interest in the property included in the deed or that the parties did not intend to transfer the same, is on the person alleging it. It is sufficient if the vendor had some saleable interest in the property, as on the date of sale. Subsequent events have no direct bearing on the question of validity of the registration. It is not the law that if the vendee fails to establish good title in the vendor the deed becomes invalid under Section 28. The crucial question is whether the parties to the deed did not intend to transfer the property. The intention of the vendees is of the utmost importance, because it is his intention that makes the transaction real or a make-believe one. — Annaji Vishnu v Balkrishna, R.A.B. Nos. 29 and 30/56, dated 14-8-1958.

whether sub-registrar can probe into validity or otherwise of the document tendered for registration? Held.—Section 34 of the Act lays down the nature of enquiry to be held by the Sub-Registrar before registering a document. It is quite patent that the Sub-Registrar is required to make an enquiry whether the document has really been executed by a person who purports to execute the document, and further as to the identity of the executant or his representative who appears before him. It is well-settled that the question as to the validity of the document is alien to such an enquiry. If the executant admits having executed a document, the Sub-Registrar must order registration of the document if presented in accordance with the provisions of the Act. In the instant case undoubtedly the Sub-Registrar and the District Registrar have exceeded their jurisdiction in pronouncing upon the validity of the sale deed by referring to the agreement of exchange said to have been reached between the parties. Such matters are undoubtedly beyond the scope of the enquiry contemplated under Section 34 of the Act. Therefore, the Sub-Registrar and the District Registrar exceeded their jurisdiction in refusing to register the sale deed on such ground. — A.G. Shivalingappa (since deceased) by LRs. and Others v A.C. Shankarappa and Another, 1990(3) Kar. L.J. 408A : ILR 1991 Kar. 1804.

Sale deed — Registration — Document effective from date of execution. Held. — A plain reading of Section 47 of the Act, shows that a document becomes operative from the time of its execution and not from the time of its registration. Section 47 states from what date the document becomes operative and Section 75 states from what date the registration takes effect. — Rathnakar v H.S. Madhava Rao and Others, 1990<4) Kar. L.J. 541 : ILR 1991 Kar. 2190.

Ex. P-l, a sale deed dated 17-9-1962 executed by plaintiffs 1 and 2 in favour of defendant was refused registration by the Sub-Registrar on denial of execution by the plaintiffs 1 and 2, but was compulsorily registered on 25-8-1964 by the order of the District Registrar dated 19-8-1964 under' Section 75(1) of the Registration Act. Meanwhile plaintiffs 1 and 2 executed sale deeds Exts. P-2 and P-3, dated 10/11-10-1962 of the same property in favour of plaintiff 3 and they were registered on 11-10-1962. The sale deed Ext. P-l, dated 17-9-1962 in favour of defendant prevailed over the sale deeds Exts. P-2 and P-3, dated 10/11-10-1962, notwithstanding the fact, that the sale deed Ext. P-l was registered long after the sale deed Exts. P-2 and P-3 registered. Section 75 only determines the date of registration in respect of documents compulsorily registered in pursuance of an order under Section 75(1). It does not deal with the effect of registration of a document. That topic is dealt with by Section 47. The right of priority will have to be determined by the combined operation of the provisions of Sections 48 and 54 of T.P. Act and Sections 47 and 48 of the Registration Act. Section 47 of the Act is attracted to all successive sale deeds executed by the same vendor in respect of the same property. The question of priority has therefore to be determined only with reference to Section 48. Therefore if a person effected a transfer of property, he cannot thereafter deal with the same property, ignoring the rights already created by the earlier transfer effected by him. AIR 1973 Mys. 276 :1972(2) Mys. L.J. 408,

Admissibility of unregistered Release deed in evidence. — Umakant Rao v Lalitabai and Others, 1988(2) Kar. L.J. 155 (DB) : ILR 1988 Kar. 2067 (DB).

Award unregistered — Could be looked into for ascertaining who was in possession and cultivating. — Yellappa v Ahamadbai, 1974(1) Kar. L.J. jr. 35 Sh. N. 117.

Partition deed or palupatti — Unregistered — Document admissible only to prove factum of partition and nothing more. — Ananda Setty v Chowda Setty, 1988(1) Kar. L.J. 583.

Where in a suit for declaration of title and injunction, partition is set up as a defence, that the plaintiff has not been an in exclusive possession but that the defendants have been in possession of portions in pursuance of the partition, and the memorandum evidencing the partition was unregistered. Held, the memorandum was receivable in evidence for proving that the defendants having got into possession lawfully. The nature of possession being a collateral fact, admissions contained in such memorandum can be construed as collateral facts and to prove the admissions of the parties, the document could be received in evidence. Though Sections 21 nor Section 145, Evidence Act require such admissions to be put to the party, who had made such admissions justice and fair play require that the attention of the party is called to such admissions and the explanation if any offered by him is taken into consideration before considering the probative value of such admissions. Where the lower Appellate Court excluded the document as being unregistered and inadmissible in evidence without examining whether it could be taken into consideration for any collateral purpose, the matter was remitted for fresh disposal. — Hussaina Sab and Others v Jalaluddin, 1982(2) Kar. LJ. 593.

Though an unregistered lease deed for a period of four years cannot be relied upon by either party to establish the lease for a period of four years, that can be relied upon in proceedings under Section 21 of the Rent Control Act, to prove that the respondent was a tenant. (1969)1 SCWR 341 relied upon. — Abdul touack v H.K. Gopal Shetty, AIR 1974 Mys. 7 : 1973(1) Mys. L.J. 541.

The unregistered document could not be used in evidence for proving the passing of money from the mortgagee to the mortgagor. The claim for refund be treated as a collateral transaction within the meaning of the proviso to section 49, Registration Act. In the case of a usufructuary mortgage the mortgagor is under no personal obligation to pay the amount and hence an unregistered usufructuary mortgage deed is inadmissible in evidence for any purpose. B. Ahamed Khan v Pyarijan and Another, 1981(2) Kar. L.J. 254.

Under a partition deed the suit property was allotted to the six sons in six equal shares. Under the deed each one of the sons was to pay Rs. 100 to the father till his death for his expenses. On 8-5-1953 an agreement Ex. P-3 was entered into between the father and the sons, under which the father relinquished his claim to Rs. 100 per month receivable from each of the sons and each of the sons released and relinquished their rights in the suit property and it was stated that, to effectually clothe the father with rights in the property, necessary registration thereof should be done in due course of time. On 14-5-1953 a registered deed Ex. P-l called a deed of relinquishment was executed in favour of the father by the six sons, under which the sons transferred the suit property to the father. Ex. P-l did not recite any consideration for the release. The plaintiffs who were some of the sons claimed that the two documents Exts. P-3 and P-l were inoperative and that their rights under the partition deed continued. Held, on its terms Ext. P-l conveyed title from the sons to the father and must be regarded as a transfer of undivided interest by the coparceners without consideration and therefore was void. Ext. P-3 though styled an agreement was a transfer of the rights of the sons to the father and was compulsorily registrable and was not admissible to prove that the transaction under Ex. P-l was supported by consideration. The unregistered document could not be read along with the registered document Ext. P-l, so as to construe the terms of the registered document. When the parties without registering Ext. P-3, within a week of it, they prepared Ext. P-l and got it registered, they must be held to have superseded Ext. P-3. Hence, both as a matter of law as well as matter of fact, Ext. P-3 must be kept out of account in assessing the legal value of Ext. P-l. Oral evidence to prove that there was consideration for Ext. P-l was prohibited by Section 92, Evidence Act. The second proviso to Section 92 could not be made use of to alter or qualify or add to what was a term of the contract or transaction, embodied in Ext. P-l. The terms of a registered document could not be varied by an unregistered document. S. Sajjansa v S.N. Dhondusa, 1970(1) Mys. LJ. 489.

Sale of property less than Rs. 100 in value — Unregistered deed can be used to prove delivery of possession and character of possession. — K. Thimmiah v B.H. Nanjappa, 1965(1) Mys. LJ. 44.

Unregistered Palupatti or memorandum of Partition — Can only be admitted in evidence for purpose of proof of factum of partition, but S. 50(2) never for purpose of proving contents or even possession of properties mentioned therein. — Ananda Setty v Chowda Setty, 1988(1) Kar. L.J. 583.

An unregistered sale deed can be used for the collateral purpose of proving the nature or character of possession. Hence a mortgagee who has obtained a sale deed but which is unregistered can prove his possession as owner and title by adverse possession. Head-note in 1965(1) Mys. LJ. 44 is not correct. — Raoji Appaji v Badibi, 1971(2) Mys. L.J. 161.

Unregistered lease deed — No total bar to reception in evidence — Can be used for collateral purpose of proving nature of possession. Held: The petitioners-plaintiffs case does heavily depend on this document. It may be true that since the document is not a registered one, that there would be certain restrictions as regards its evidentiary value and to what extent the Court can look at it and what sort of inferences or conclusions can be drawn. That does not mean that the learned Judge was justified in having refused to admit the document in evidence. There is no total bar to the reception in evidence of an unregistered document but that it will have to be subject to the limitations prescribed in Section 49. — Gundu Pralhad Patil and Others v Balu Shahu Vajantri and Another, 1996(3) Kar. L.J. 574A.

Unregistered agreement to reconvey is admissible in evidence. — Narayanaswamy v Muniamma and Others, 1973(1) Mys. LJ. 310.

Unregistered lease could be looked into to understand nature of possession. — Doddappa alias Sidranuippa Nagappa Yatgiri and Others v Basavanneppa Basappa Chinniwalar, 1978(1) Kar. LJ. 414.

Partition of immovable property of value exceeding Rs. 100/- — Deed not registered — Effect — Admissibility extent of — Stated. — Umakant Rao v Lalitabai and Others, 1988(2) Kar. LJ. 155 (DB): ILR 1988 Kar. 2067 (DB).

Certified copy of Sale Deed is admissible to prove contents of original Sale Deed stated to have been lost. In view of the provisions of Section 57 of the Registration Act, the certified copies have been made and declared to be admissible for the purpose of proving the contents of the original documents. Section 65 of the Indian Evidence Act provides in what circumstances and conditions the secondary evidence may be given of the existence, condition and contents of a document. As per clause (0 of Section 65, a certified copy of the original document is permitted to be given in evidence. A reading of Section 65 clause (f) of the Indian Evidence Act along with Section 57 of the Indian Registration Act, the certified copies had-been admissible in the present case to prove the contents of the original Sale Deeds as according to the plaintiff's statement, original Sale Deeds had been lost. Under Sections 58, 59 and 60 of Registration Act, it is clearly provide that the endorsement certificate including those facts shall be admissible piece of evidence with the affixture of the date and signature for the purpose of proving that the document has been duly registered and all that has happened in his (Registrar's or Sub-Registrar's) presence or as had been admitted before him. Once the execution of the Sale Deeds and the receipt of the sale consideration by the vendor from the vendee has been admitted by the vendor before the Registrar, the contents of the document and the admissions contained in the deed by itself became more important. piece of evidence. The certified copy of that Sale Deed is admissible piece of evidence to prove the contents of original deed which had been lost. The Sale Deed per se contains the admissions of the vendors that they executed the Sale Deed after having received the consideration and they transferred their title and delivered the possession of the property to the vendee and these admissions are admissible in evidence, as the evidence of execution of Sale Deeds in the form of admission before the Registrar. — Hanumappa Bhirwppa Koujageri v Bhimappa Scmgappa Asari, 1996(5) Kar. L.J. 67A.

Entries in books of Sub-Registrar are only copies of original documents presented by parties for registration and are not original documents which are returned to parties — Certified copy of entry is only secondary evidence which is admissible as evidence only if original is proved to have been lost or destroyed. HELD: The entries made in Book No. 1 or Book No. 2 etc., are only entries of books. May it contain a copy of original document, i.e., copied in the book concerned but the said entry by itself is not the original document. The entry may be a copy, in register or book, from the original deed itself, which original deed is, as per Section 61(2) of Registration Act, returned to person presenting it. So the copy of entry which is given under Section 57 is not the copy from original deed itself but the copy from the copy of deed only. Sub-section (5) of Section 57 makes provision for copy from copy of document given under Section 57(1), (2) and (3), admissible only for limited purpose namely of proving the contents of the original document. Such a copy cannot be termed to be certified copy of the original document, but a copy of the entry or of the (copy) of the document. It may be a secondary evidence but not covered by clause (f) of Section 65 of the Evidence Act. Before leading secondary evidence, such as the certified copy thereof, the party concerned has to lay foundation and establish reason for non-production nor availability of original document. ... .In the present case, clauses (e) and (f) of Section 65 of the Evidence Act are not applicable. Therefore, in order to produce the certified copy of entry under Section 57 of the Registration Act, as secondary evidence the plaintiff-appellant had to make out case of foundation to lead secondary evidence, but plaintiff-appellant has failed to lay the foundation therefor. Certified copy of the entry relating to deed of settlement in the book of Sub-Registrar's Office, could not be admissible as secondary evidence under Section 65(e) or (f) of the Evidence Act, read with Section 57 of the Registration Act. — G. Chikkapapanna alias G.C. Papanna v Smt. Kenchamma (Deceased) by LRs. 1998(5) Kar. L.J. 360D.

Sale deed — Proof of execution of — Suit for declaration and perpetual injunction against other party claiming title to suit property under disputed sale deed — Where party seeking relief and disputing sale deed has failed to prove fraud, coercion or misrepresentation, vitiating sale deed executed by himself, he is not entitled to relief against party claiming title on basis of sale deed which is proved to have been duly executed. Held: The endorsements are found in the sale deed and the registration has been completed as per such endorsements and certificate made available are presumed under Section 60(ii). Therefore it is not open to the executant to say that he has not executed the document. The Appellate Court misread the situation which was neither warranted by the pleading nor by the evidence. It is for the person who attacks the document to rebut the presumption and the presumption in favour of the registered document cannot be easily thrown out without positive evidence. Admittedly the sale deeds were executed by the plaintiffs. But they claim that it was a document of collateral security. Since the mandatory requirements of Section 58 of the Registration Act has been complied with and there is no evidence to the contrary, the sale deeds are held proved and are valid sale deeds. — Shekarappa and Another v Beerappa and Another, 2000(3) Kar. L.J. Sh.N.18.

An endorsement by the Sub-Registrar on the document that money was paid in his presence has presumptive value. — Chikkaramanna v Rajamma, RSA 426/63, dated 11-7-1966.

The presumption arising from the entry of the Sub-Registrar that a certain sum was paid to the executant is rebuttable. — ILR1967 Mys. 217.

Effect of Sub-Registrar's endorsement prima facie proof of payment of amount stated therein though not a conclusive evidence of receipt of consideration — Being merely prima facie evidence of fact, certificate by itself is admissible and no proof is necessary to prove said fact, But however, it is open to party challenging it to lead evidence to contradict it and disprove the same. — Kanialamnia v Ramabhadra Gupta, ILR 1988 Kar. 20 (DB).

Section 59 — Non-compliance with requirement of the provision renders the document void. — Kenchawwa v Amagonda, 1988(1) Kar. L.J. 530 (DB) : ILR 1988 , Kar. 1185 (DB).

Section 59 — Provision is Mandatory — Failure to comply with Mandatory requirement of the provision and failure to prove execution of — Document is in accordance with Section 58 renders the document void. — Kenchawwa v Amagonda, 1988(1) Kar. LJ. 530 (DB): ILR 1988 Kar. 1185 (DB).

Section 60 — Though the Court is not bound to take the Sub-Registrar's endorsement, as conclusive proof of the fact of execution, such an endorsement and the certificate along with the evidence of witnesses who speak to the signature, is sufficient to hold that the document is proved to have been signed. — Amir B. by LRs. and Others v Committee of Management of Neelasandra Mosque and Another, 1968(2) Mys. LJ. 410.

Nittoor Sreenivasa Rao, Offg. C.J. and Kalagate, J.—The registration endorsement on a mortgage deed showed that the executant submitted the deed for registration on the very day of execution; that he admitted before the Sub-Registrar the execution of the deed and the receipt of the consideration, that he was identified by persons known to him personally and that the Sub-Registrar then signed the deed on the very day stating that it was registered. The executant also signed the deed along with two others. There was also the seal of the Sub-Registrar's Office but it did not show the number and page of the book in which the document had been copied as required by Sections 60 and 61(1) of the Act. Held: by reason of non-compliance with the requirements of Sections 60 and 61(1), the document was not a duly registered document. The non-compliance with the provisions of Section 60 and 61(1) could not be said to be merely a defect in Procedure, but was a total violation of the provisions or requirements of the Act. which made the registration of the document incomplete. The requirements of Sections 60 and 61(1) were essential requirements and could not be regarded as merely ministerial acts, non-compliance with which could be cured by Section 87 of the Act. — Sharnappa v Pathru Saheb, AIR 1963 Mys. 335 :1963(1) Mys. L.J. 109.

Sale deed — Refusal by Sub- Registrar to register — Refusal not on ground of denial of execution, but on basis of report of Tahsildar to whom matter was referred, that land revenue documents were false — Sub-Registrar- held, is not entitled to refuse registration on such ground, when deed is presented to him complete in all respects. Held: When the document was presented for registration fulfilling all the requirements the Sub-Registrar had no option but to register the document unless the document is not in conformity with the provisions of the Indian Registration Act of 1908 and the relevant rules. The document presented in the instant case by the petitioner before the second respondent had no defects under the provisions of the Act and rules for its registration by him. Hence the refusal to register the document by the second respondent on the basis of the report furnished by the Tahsildar is contrary to Section 60 of the Act..... The registration of the deed was refused on the basis of the communication received from the Tahsildar that the revenue documents were all bogus and false. The Sub-Registrar was entrusted with the duty of registering the documents in accordance with the provisions of the Act and he was not authorised to go into the genuineness or otherwise of the documents presented before him. If the documents are bogus or false, the party affected by it will have the right to initiate both civil and criminal proceedings to prosecute the party who tries to have benefit from such document and also to safeguard his right, title and interest. It was not for either the Tahsildar or the Sub-Registrar to express opinion as to the genuineness or otherwise of the documents unless called upon by the Court of law or any other authorised investigating agency. There was no occasion for the Sub-Registrar to refer the document to the Tahsildar when presented for the purpose of registration. Thus, both the Tahsildar and the Sub-Registrar have exceeded their jurisdiction in the matter in submitting his report regarding registration of the document and upon such report the second respondent should not have made an endorsement on the document and refused to register the document by him. — Smt. Sulochanamma v H. Nanjundaswamy and Others, 2001(1) Kar. L.J. 215A.

The registration certificate is proof that the document was duly registered and not that it was duly executed. — T.N. Narayanachar and Others v V.S. Venkatarathan and Others, 1961 Mys. L.J. 794.

While passing the impugned order Registrar did not follow the procedure prescribed under Section 74 of the Act. He should have treated the appeal as a representation seeking his intervention for registration of the document and he should have given appropriate direction in that regard, but he has failed to exercise his power under the provisions of the Act, but he has passed an order on the appeal on irrelevant grounds which reasons are contrary to law, hence the impugned order is liable to be quashed..... After the rejection of the appeal, the petitioner applied for return of the document before the third respondent but the document was not returned to the petitioner. As a consequence of which, the petitioner was deprived the right to approach the Civil Court under Section 77 of the Act. On the other hand, the document was handed over to the Counsel for the first respondent, who did not handover the same to the petitioner. Thus, due to non-return of the deed to the petitioner and by wrongly handing over the same to the wrong person, the petitioner and her husband were prevented from approaching the Civil Court under Section 77 of the Act. All these happened because of

failure to perform the statutory duty by the Sub-Registrar and the District Registrar. .... Admittedly, the sale deed was presented for registration on 21-5-1987. In spite of fulfilling all the requirements and completing all the formalities, the same has not been registered so far. Thus, the petitioner is not only deprived of enjoying his property rights but she has been subjected to untold misery and hardship. Taking judicial note of the inconvenience, hardship, mental agony and the misery suffered by the petitioner all these years and having regard to the money spent on various litigations on account of the mischief committed by the Sub-Registrar and the District Registrar, this Court, instead of awarding damages, impose cost on these two officers. .... Cost of Rs. 10,000/- is awarded on the State Government to be payable to the petitioner within a period of four weeks and the same shall be recoverable equally from the concerned Sub- Registrar and the District Registrar. — Smt. Sulochanamma v H. Nanjundaswamy and Others, 2001(1) Kar. L.J. 215B.

Normally, in an appeal under Section 72, the District Registrar cannot hold an enquiry under Section 74 regarding the execution of the document. However, in a case where the Sub-Registrar refuses registration on the ground of non-appearance of the executant within the prescribed time under Section 34 though he could have refused registration under Section 35 on the ground of deemed or implied denial, then it is open to the aggrieved party to file an appeal under Section 72 read with Section 73 challenging the order of the Sub-Registrar and requesting the Registrar to treat the refusal as one under Section 35 and to hold an enquiry regarding execution of the document. In such appeal, if the District Registrar opines that the Sub-Registrar ought to have refused the registration on the ground of deemed denial under Section 35, he would be competent to modify the order of refusal passed by the Sub-Registrar and then proceed to hold an enquiry under Section 74, even though there may not be a specific reference to Section 73 in the memorandum of appeal. When the first appellant has made it clear that she has denied the execution of the document, no injustice is caused to her by the District Registrar deciding to hold an enquiry regarding execution. On the facts and circumstances of this case it cannot be said that the District Registrar had either no jurisdiction at all or exceeded his jurisdiction in passing the impugned order. This is not a fit case where this Court should interfere with that order which is essentially just and proper, (ii) Rule 187 has to be read along with Section 38. If a commission has been issued for examining the executant at the place of his or her residence then that has to be treated as step taken to enforce the appearance of the executant and the failure of the executant to appear before the Commissioner could constructively be treated as denial of execution. Where actions in personam are started in two Courts of concurrent authority, the plea of Us alibi pendens is a good defence to the second action. It cannot be said that the Civil Court alone has got jurisdiction to decide about question of execution of a document, which is required to be registered. The law confers power on the District Registrar to go into that question for purposes of either registering or refusing to register a document. So far as the doctrine of Us alibi pendens is concerned, if at all it is applicable, it would apply to second action. The appeal before the District Registrar was pending when the suit was filed. As such that plea cannot be put forward in the appeal. Considering the scope of the enquiry before the District Registrar and the scope of and contentions raised in the suit, there is no justification to stay the proceedings before the District Registrar. — Devikarani Roerich and Another v M/s. K.T. Plantation Private Limited, Bangalore and Another, 1994(2) Kar. L.J. 583 (DB).

Where the executant appears before the Registrar after the due date for registration and makes no application for condonation of delay, whatever statement he makes cannot have any legal effect. Therefore it must be taken that as matters stood before the due date, there was no denial of execution by the executant before the Sub-Registrar. Consequent refusal by the Registrar to register must be said to be on a ground other than denial of execution within Section 72(1) of the Act. Where the executant does not deny execution but states that there is want of consideration, such case falls within Section 72(1). Hence the executee is entitled to appeal to the Registrar and file a suit under Section 77 on the refusal to register. It was not necessary for him to have filed an application under Section 73. - D. Venkatarayappa v K. Hirannaiah, 1973(2) Mys. L.J 389.

Section 74 of the Act enjoins upon the District Registrar to hold an enquiry and come to the conclusion as to whether the document has been 'executed'. Being satisfied that the vendor has signed the sale deed is not enough. The District Registrar must come to the conclusion that the signature had been affixed after understanding the contents and tenor of the document. Where the District Registrar refuses to summon witnesses who are prima facie connected with the execution of the document, it amounts to a denial of opportunity to the party to prove his contentions. — Banasettappa v District Registrar, Bangalore, 1965(2) Mys. L.J. 733.

When a document is presented for registration before a Registrar, the authority has to examine whether necessary general stamp paper has been produced, properly executed and the executant admits execution of the document, and if he is satisfied on all those matters, and necessary registration fee is Paid, he is bound to register the same without concerning himself with any other aspect and more so with the requirement of the Karnataka Town and Country Planning Act, 1961. Thus, refusal to register on the ground that the layout plan of the area has not been approved by the Town Planning Authority is illegal. — Makam Satyanarayana Setty v State ofKarnataka, 1982(2) Kar. LJ. Sh. N. 70.

While disposing of an appeal under Section 72, the District Registrar has no power or jurisdiction to direct payment of consideration to the executant, as a condition precedent for getting the document registered. — Doddahalli Shivanegowda v District Registrar, Bangalore, 1969(1) Mys. L.J. 525.

Plaintiff presented the sale deed executed by 1st defendant before the Sub-Registrar on 18-8-1966. As the Sub-Registrar refused to register the document plaintiff took up the matter in appeal to the District Registrar, who directed the Sub-Registrar to register the sale deed. Accordingly, the sale deed was registered on 27-9-

1968. In the meanwhile 1st defendant purported to sell the property to 2nd defendant on 27-12-1967 and got it registered the same day. Held, that the document in favour of plaintiff must be held to have been registered on the date it was first presented for registration i.e., 18-8-1966 and must be deemed to have been registered earlier than the sale to 2nd defendant for the purpose of determining priority. — B.R. Gopalakrislina Setty v Kanakaiah Setty and Others, 1982(1) Kar. LJ. 161.

SPECIFIC RELIEF ACT

Azhar Sultana .Vs B. Rajamani & Ors. ...February 17, 2009 Supreme Court HELD:

1. In view of the fact that approval was required to be obtained from the competent authority, the plaintiff could not have proceeded on the assumption that the suit could be filed within a period of three years from the date of refusal on the part of the original defendant to execute the said deed of sale in terms of the agreement.

2. It may be true that the name of the purchaser was not disclosed but then it was open to the plaintiff to ask for other and better particulars of the said statements. Why she had to wait for a period of more than three years for impleading the subsequent purchasers as parties has not been explained. Even an application for injunction was filed only in September 1985. According to her husband, she came to learn about the sale of property in the name of defendant No.5 only on 29.9.1986. Why an inquiry was not made in the Registration Office although the deed of sale was a registered one again defies anybody's comprehension. Readiness and willingness on the part of the plaintiff, therefore, is required to be considered from the aforementioned backdrop of events.

3. It was not necessary that the entire amount of consideration should be kept ready and the plaintiff must file proof in respect thereof. It may also be correct to contend that only because the plaintiff who is a Muslim lady, did not examine herself and got examined on her behalf, her husband, the same by itself would lead to a conclusion that she was not ready and willing to perform her part of contract.

4. If the plaintiff has failed to establish that she had all along been ready and willing to perform her part of contract, it would not be necessary to enter into the question as to whether the defendant Nos.5 and 6 were bona fide subsequent purchasers for value without notice or not. Furthermore, grant of decree for specific performance of contract is discretionary. The contesting respondents herein are living in the property since 1981 in their own right. There is absolutely no reason as to why they should be forced to vacate the said property at this juncture.

5. The conduct of the respondent was not good but, similarly, one cannot lose sight of the conduct of the appellants as well. She had also not brought any evidence to show that she did not have the notice of the said deed of sale. Thus, the interest of justice would be subserved if this Court refuses to exercise its discretionary jurisdiction in terms of Section 20 of the Act, directing the defendant to pay a sum of Rs.60,000/- to the plaintiff which sum would include the amount of advance paid by her.

6. It is also a well settled principle of law that not only the original vendor but also a subsequent purchaser would be entitled to raise a contention that the plaintiff was not ready and willing to perform his part of contract. [See Ram Awadh (Dead) by LRs. & Ors. v. Achhaibar Dubey & Anr. [(2000) 2 SCC 428 para 6]

7. In Veerayee Ammal v. Seeni Ammal [(2002) 1 SCC 134] it was observed : "When, concededly, the time was not of the essence of the contract, the appellant-plaintiff was required to approach the court of law within a reasonable time. A Constitution Bench of Hon'ble Supreme Court in Chand Rani v. Kamal Rani held that in case of sale of immovable property there is no presumption as to time being of the essence of the contract. Even if it is not of the essence of contract, the court may infer that it is to be performed in a reasonable time if the conditions are (i) from the express terms of the contract; (ii) from the nature of the property; and (iii) from the surrounding circumstances, for example, the object of making the contract. For the purposes of granting relief, the reasonable time has to be ascertained from all the facts and circumstances of the case."

8. It was furthermore observed : "The word "reasonable" has in law prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to give an exact definition of the word "reasonable". The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which he thinks. The dictionary meaning of the "reasonable time" is to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In other words it means, as soon as circumstances permit. In P. Ramanatha Aiyar's The Law Lexicon it is defined to mean: `A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than `directly'; such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea."

2008 (6) SCR 726 WAHEED BAIG VS BANGI LAKSHMAMMA & ORS BENCH: DR. ARIJIT PASAYAT & P. SATHASIVAM:-

Specific Relief Act, 1963 - s. 13 - Suit for specific performance of agreement of sale - In respect of the property allotted to the alleged vendor by Government - Suit decreed - Set aside by first appellate court - In second appeal, High Court confirming the decree and directing the Government Department to transfer the property in favour of the alleged vendor and then to transfer the same to the vendee as per the agreement - On appeal, held : The agreement was null and void - The property vested with the Government and the allottee thereof had no alienable right thereto - Direction of the High Court is not correct

The High Court could not have directed transfer of the property in favour of the appellant and thereafter directing him to transfer the property by giving full effect to the agreement for sale. Such a course is unknown in law.

Section 13 of Specific Relief Act, 1963 deals with rights of a purchaser in certain cases, where a person contracts to sell or let certain immovable property having no title or only an imperfect title. These rights enable the purchaser to take action when title of vender is bettered in the circumstances given in this Section. The vender is under a duty to prove his title and to convey what he has contracted to convey. The Section gives right to purchaser in the event there is a defect in title as enumerated in Clauses (a) to (d) to compel the vender to convey the title or to secure the concurrence or conveyance or to redeem the mortgage etc. as the case may be.

In the instant case the Labour Department was not a party to the agreement. It was not bound to sell the property to the appellant. The land belonged to the Government and the land in question was given on lease cum sale agreement basis by the Labour Department. There was a clear stipulation that the lessee is not the owner of the property and did not have any right to sell or mortgage or otherwise to dispose of the property until sale price finally determined by the Commissioner of Labour in his sole discretion is paid in full. At the time alleged agreement of sale was entered into, the appellant was not the owner of the property.

The alleged agreement between the first plaintiff and the first defendant was without the knowledge of the defendant No.2, it was null and void and it was not binding upon the Government even if certain payments were made by the plaintiff. The title in the property still vests in the Government and was not registered in favour of the first defendant. The first defendant had no right to sell or alienate the property to any other person. In terms of the agreement, notice was given to the first defendant to reside in the property immediately, otherwise allotment of the same would be cancelled more particularly when there was sub letting. The Government has constructed the quarters for the industrial workers on rental basis and subsequently there was a decision to sell those to the industrial workers. The arrangement was for the benefit of the industrial workers and therefore the defendant No.1 had no alienable right in the property.

The agreement for sale does not refer to any condition that after payment of installment, the lessee can become the owner and the agreement for sale was to take effect. Since the appellant was not the owner of the property, he could not have entered into an agreement to sell a property of which admittedly he was not the owner.

AIR 2008 SC 2019, GURDIAL KAUR (D) THROUGH LRS VS PIARA SINGH (D) THROUGH LRS BENCH: S.B. SINHA & V.S. SIRPURKAR

Specific Relief Act, 1963 - ss. 12, 16 (c), 20 and 28 - Agreement of sale - Failure to execute sale deed - Suit for specific performance of contract - Subsequent change in the revenue survey numbers in respect of the land in question - Trial court denying decree of specific performance holding that vendee failed to comply with requirements of s. 16 (c) having failed to state that he was always ready and willing - However directed refund of the advance amount paid by the vendee - First appellate court denying the decree of specific performance on the ground that there was failure to show readiness and willingness in respect of the changed revenue survey numbers - High Court in second appeal decreeing the suit - On appeal, held: Decree of specific performance is liable to be passed in respect of the land which formed subject matter of the original agreement - Change in revenue survey numbers in respect of those lands would not bring the contract of sale to an end as the subject matter of the agreement substantially remained the same - In the facts of the case vendee has fulfilled the critirea of readiness and willingness - Further averment/proof regarding readiness and willingness after change in survey numbers not required, to the extent subject matter was same.

Partly allowing the appeal, the Supreme Court HELD:

A suit for specific performance of contract provides for a discretionary remedy. The Court in terms of Section 20 of Specific Relief Act, 1963, may for sufficient and cogent reasons refuse to grant a decree for specific performance of contract. Like any other suit, the Court in terms of Order 7 Rule 7 CPC may, however, take into consideration the subsequent events including the change in the revenue survey numbers in respect of a particular land. In other words, if the land in suit remains the same which was the subject matter of an Agreement of Sale, a decree for specific performance can be granted. The matter, however, would be different where having regard to the consolidation or any other proceedings, the subject matter of land itself changes resulting in substantive change in the original agreement.

The appellants did not spell out as to what were his objections in regard to amendment of plaint. When the second application for amendment of plaint was filed, no objection thereto was raised. Allegedly, in the suit for recovery of possession, the appellants mentioned the same description of land. How despite alteration in the description of the land in respect of a part of the suit premises, the respondent came into possession, if at all, is not known. The plaintiff/respondent did not bring on records any material to show that owing to consolidation proceedings or otherwise, there had been a change in the suit land in the sense that some other lands had been allotted to the predecessor of the appellant instead and in place of the lands in suits. The plaintiff/respondent was categorical in his statement as to why the amendment had to be brought about, but neither the same was opposed nor any amended written statement/additional written statement was filed. Except the two plots, identity of the rest of the plots remained the same.

The rigours of Section 16(c) of the Act, however, are not such which would for all intent and purport to be strictly construed. It is, however, trite that, even for the said purpose, the entirety of the plaint must be taken into consideration. If upon reading the plaint in its entirety, the Court comes to the conclusion that for all intent and purport, the requirements of Section 16(c) stood complied with, no exception thereto can be taken.

In the instant case, the plaintiff has not only expressed his readiness to purchase the land, his willingness to do so can be culled out from other averments made in the plaint as and in particular the one where he had stated that he had gone to the Registration Office for getting the deed of sale executed and registered but it was the defendant, who did not turn up thereafter. He has also fulfilled the criteria of his readiness and willingness to perform his part of the contract as not only he had paid half of the consideration amount on the date of the execution of the agreement, he had deposited a balance sum on the date of presentation of the plaint. Thus, the Court of First Appeal was right in holding that he was ready and willing to perform his part of the contract.

The Court of First Appeal, however, committed a serious error insofar as it failed to take into consideration that the identity of a part of the land being the same, it was not necessary to make any further averment or proof that he had been ready and willing to perform his part of the contract in respect of the subject matter of the agreement. Readiness and willingness to perform one's part of the contract must be confined to the subject matter thereof. If subject matter of the suit remained the same only because Khewat Nos. or Khatauni Nos. changed, the same ipso facto would not change. To the extent the subject matter of the agreement remains the same, a suit for specific performance of the contract can be decreed.

Proper substantial question which should have been framed having regard to the admitted position is as to whether the contract of sale came to an end only on account of change of Khasra Nos., although the subject matter of the agreement substantially remained the same. If on the admitted fact, it is found that at least substantial portion of the land remained the same, there does not exist any bar in granting a decree in respect of a part of the suit property. For the said purpose, even Section 12 of the Specific Relief Act would not stand as a bar. If a decree for specific performance cannot be granted in respect of the entirety, an option in terms thereof has to be exercised.

Respondent, furthermore has all along been in possession of the major portion of the land since a long time. He is said to have made improvements on the land. It would be not, thus, equitable to deprive him from possession at least from that portion of the land which was the subject matter of the original agreement.

However, having regard to the fact that the plaintiff/respondent No. 1 was denied the decree for specific performance of contract by two courts, although he had been in possession of the lands, in question from 1964, this Court in exercise of its discretionary jurisdiction under Article 142 of the Constitution of India as also Section 28 of the Specific Relief Act directs him to pay a further sum of Rs. 30,000/- to the appellant.

AIR 2008 SC 1960, PURAN RAM VS BHAGURAM & ANR BENCH: TARUN CHATTERJEE & HARJIT SINGH BEDI

Specific Relief Act, 1963: s.26 - Rectification of instrument - Suit for specific performance of agreement for sale - Part of suit property wrongly described by mutual mistake in the agreement for sale and in the plaint - Prayer for amendment of plaint and agreement for sale to correct a part of description of suit property - Permissibility of - Held: Permissible by virtue of proviso to s.26 - The relief claimed in the suit would remain same and would not change the nature of suit from suit for specific performance to suit for declaration - Code of Civil Procedure, 1908 - Order 6 r.17. Code of Civil Procedure, 1908: Order 6 r.17 - Amendment application - Held: Can be allowed by court in its discretion even where the relief sought to be added by amendment is barred by limitation.

When the description of a part of the suit property was found to be a mutual mistake, appellant filed an application under Order 6 Rule 17 CPC seeking the amendment of the plaint and for giving the description of the suit property……. The trial Court rejected the prayer for amendment of the plaint on the ground that plaint was filed on the basis of agreement to sell and since no prayer was made for amending the agreement, the application for amendment of the plaint could not be allowed. The appellant filed another application for amendment of the plaint seeking amendment this time not only of the plaint but also of the agreement to sell. The First Appellate Court allowed the said application. Aggrieved respondent No.2, who was purchaser of suit property, from respondent no.1 filed a petition under Article 227 of the Constitution of India. High Court

allowed the petition on the ground that relief sought for by the appellant by way of amendment of the plaint could not be allowed in view of the expiry of the period of limitation; and that if such amendment was allowed, the nature of the suit would change from a suit for specific performance of contract for sale to a suit for declaration which was not permissible. Hence the present appeal.

Partly allowing the appeal, the Supreme Court HELD:

In a suit for specific performance of contract for sale, it is permissible to amend a part of the description of the suit property not only in the plaint but also in the agreement in terms of s.26 of the Specific Relief Act, 1963. A reading of the two conditions made under s.26 of the Act show that either party may institute a suit to have the instrument rectified or a party who has already filed a suit in which any right arising under the instrument is in issue may claim in his pleading that the instrument be rectified. The main issue in the instant suit for specific performance of the contract for sale was relating to the agreement for sale in which a part of the description of the suit property was wrongly given by mutual mistake and therefore, needed to be amended. S.26, of course, says that it would be open to a party to institute a suit for correcting the description of the suit property, but the proviso to s.26 clearly permits that where a party has not claimed any such relief in his pleading, the court shall at any stage of the proceeding allow him to amend the plaint on such terms as may be just for including such claim. From a plain reading of the provisions under s.26 of the Act, there is no reason why the prayer for amendment of the agreement to correct a part of the description of the suit property …. could not be granted. It is only a correction or rectification of a part of the description of the suit property, which cannot involve either the question of limitation or the change of nature of suit. The relief claimed in the suit remained the same i.e. a decree for specific performance of the contract for sale and by amendment, no declaration has been sought for in respect of the instrument. So far as the question of limitation is concerned, the suit, admittedly, was filed within the period of limitation. Therefore, even if the amendment of plaint or agreement is allowed, that will relate back to the filing of the suit which was filed within the period of limitation.

The High Court ought not to have interfered with the order of the trial court when the order of the trial court was passed on sound consideration of law and facts and when it cannot be said that the order of the trial court was either without jurisdiction or perverse or arbitrary.

The court may, in its discretion, allow an application for amendment of the plaint even where the relief sought to be added by amendment is allegedly barred by limitation. It is well settled that allowing and rejecting an application for amendment of a plaint is really the discretion of the Court and amendment of the plaint also should not be refused on technical grounds.

The question of limitation would not arise when mis-description of the name of the original plaintiff or mis-description of the suit property arose in a particular case. Apart from that in the present case, although, the relief claimed before as well as after the amendment remained the same i.e. a decree for specific performance of the contract for sale, even then, in the facts and circumstances of the case, the High Court should not have interfered with the discretion used by the trial court in allowing the application for amendment of the plaint.

Submission's that the application for amendment could not be allowed inasmuch as the same was barred by limitation was repelled by Supreme court in the above case holding that: "We are unable to accept this contention …….. In this regard, we may observe that the court may, in its discretion, allow an application for amendment of the plaint even where the relief sought to be added by amendment is allegedly barred by limitation. This view was also expressed by this Court in Pankaja & Anr. Vs. Yellappa (Dead) by LRs. & Ors. [(2004) 6 SCC 415]. In that decision, it was held that there is no absolute rule that in such a case, the amendment should not be allowed and the discretion of the court in that regard depends on the facts and circumstances of the case and such discretion has to be exercised on a judicious evaluation thereof. It was further held in that decision that an amendment, which subserves the ultimate cause of justice and avoids further litigation, should be allowed. It is well settled by a catena of decisions of this Court that allowing and rejecting an application for amendment of a plaint is really the discretion of the Court and amendment of the plaint also should not be refused on technical grounds. In this connection reliance can be placed on a decision of this court in Jai Jai Ram Manohar Lal Vs. National Building Material Supply, Gurgaon [AIR 1969 SC 1267]. In paragraph 8 of the said decision this Court observed that "since the name in which the action was instituted was merely a misdescription of the original plaintiff, no question of limitation arises; the plaint must be deemed on amendment to have been instituted in the name of the real plaintiff on the date on which it was originally instituted."

AIR 2008 SC 1267, B.K. SRI HARSHA (D) BY L.R. & ANR VS M/S BHARATH HEAVY ELECTRICALS LTD BENCH: DR. ARIJIT PASAYAT & P. SATHASIVAM

Specific Relief Act, 1963; Ss.16 & 20 The suit was for specific performance and the Trial Court recorded findings about adverse possession. That being so, triable issues are involved. When triable issues are involved, the appeals should not be summarily dismissed or disposed of in the manner done. A bare reading of the High Court's judgment shows that there was no serious effort made by it to analyse the various points raised. The High Court has given a finding regarding adverse possession in a suit for specific performance. There is total non-application of mind by the High Court. The manner in which the appeals were dismissed cannot be said to be proper. Hence, the matter is remitted to the High Court to consider the same afresh

The nature of suit for specific performance of contract has been highlighted by Supreme Court in several cases. In Rajeshwari v. Puran Indoria (2005 (7) SCC 60), it was inter- alia observed as under: "Normally, a suit for specific performance of an agreement for sale of immovable property involves the question whether the plaintiff was ready and willing to perform his part of the contract in terms of Section 16 of the Specific Relief Act, whether it was a case for exercise of discretion by the court to decree specific performance in terms of Section 20 of the Specific Relief Act and whether there were laches on the part of the plaintiff in approaching the court to enforce specific performance of the contract. In some cases, a question of limitation may also arise in the context of Article 54 of the Limitation Act on the terms of the agreement for sale. Other questions like the genuineness of the agreement, abandoning of the right to specific performance, a novation and so on, may also arise in some cases. No doubt, a finding on the three primary aspects indicated earlier would depend upon the appreciation of the pleadings and the evidence in the case in the light of the surrounding circumstances. The right to specific performance of an agreement for sale of immovable property, when filed, raises questions of substantial importance between the parties as to whether the plaintiff has satisfied the requirements of Section 16 of the Specific Relief Act, whether it is a case in which specific performance of the contract is enforceable in terms of Section 10, whether in terms of Section 20 of the Act, the discretion to decree specific performance should be exercised by the court and in some cases, whether the suit was barred by limitation and even if not, whether the plaintiff has been guilty of negligence or laches disentitling him to a decree for specific performance. These questions, by and large, may not be questions of law of general importance. But they cannot also be considered to be pure questions of fact based on an appreciation of the evidence in the case. They are questions which have to be adjudicated upon, in the context of the relevant provisions of the Specific Relief Act and the Limitation Act (if the question of limitation is involved). Though an order in exercise of discretion may not involve a substantial question of law, the question whether a court could, in law, exercise a discretion at all for decreeing specific performance, could be a question of law that substantially affects the rights of parties in that suit."

S. Brahmanand and Others v. K.R. Muthugopal (Dead) and Others [(2005) 12 SCC 764] wherein this Court laid down the law: "Thus, this was a situation where the original agreement of 10-3-1989 had a "fixed date" for performance, but by the subsequent letter of 18-6- 1992 the defendants made a request for postponing the performance to a future date without fixing any further date for performance. This was accepted by the plaintiffs by their act of forbearance and not insisting on performance forthwith. There is nothing strange in time for performance being extended, even though originally the agreement had a fixed date. Section 63 of the Contract Act, 1872 provides that every promisee may extend time for the performance of the contract. Such an agreement to extend time need not necessarily be reduced to writing, but may be proved by oral evidence or, in some cases, even by evidence of conduct including forbearance on the part of the other party.

"**In R.K. Parvatharaj Gupta v. K.C. Jayadeva Reddy [(2006) 2 SCALE 156],** wherein, it was observed: " In terms of the said Article, a suit for specific performance of a contract is required to be filed within three years; in the event no date is fixed for the performance, within a period of three years from the date when the plaintiff has notice that performance is refused.."

The said decision has again been noticed in **Gunwantbhai Mulchand Shah & Ors. v. Anton Elis Farel & Ors. [(2006) 3 SCALE 82]** wherein it has been held: "We may straightaway say that the manner in which the question of limitation has been dealt with by the courts below is highly unsatisfactory. It was rightly noticed that the suit was governed by Article 54 of the Limitation Act, 1963. Then, the enquiry should have been, first, whether any time was fixed for performance in the agreement for sale, and if it was so fixed, to hold that a suit filed beyond three years of the date was barred by limitation unless any case of extension was pleaded and established. But in a case where no time for performance was fixed, the court had to find the date on which the plaintiff had notice that the performance was refused and on finding that date, to see whether the suit was filed within three years thereof. We have explained the position in the recent decision in R.K. Parvatharaj Gupta v. K.C. Jayadeva Reddy 2006 (2) Scale 156.

In Chairman, Life Insurance Corpn. and Others v. Rajiv Kumar Bhasker [(2005) 6 SCC 188], Court held: "Agency as is well settled, is a legal concept which is employed by the Court when it becomes necessary to explain and resolve the problems created by certain fact situations. In other words, when the existence of an agency relationship would help to decide an individual problem, and the facts permits a court to conclude that such a relationship existed at a material time, then whether or not any express or implied consent to the creation of an agency may have been given by one party to another, the Court is entitled to conclude that such relationship was in existence at the time, and for the purpose in question."

In Veerayee Ammal v. Seeni Ammal [(2002) 1 SCC 134] it was observed : "When, concededly, the time was not of the essence of the contract, the appellant-plaintiff was required to approach the court of law within a reasonable time. A Constitution Bench of this Hon'ble Court in Chand Rani v. Kamal Rani held that in case of sale of immovable property there is no presumption as to time being of the essence of the contract. Even if it is not of the essence of contract, the court may infer that it is to be performed in a reasonable time if the conditions are (i) from the express terms of the contract; (ii) from the nature of the property; and (iii) from the surrounding circumstances, for example, the object of making the contract. For the purposes of granting relief, the reasonable time has to be ascertained from all the facts and circumstances of the case." It was furthermore observed : "The word "reasonable" has in law prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to

know as to what was reasonable. It may be unreasonable to give an exact definition of the word "reasonable". The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which he thinks. The dictionary meaning of the "reasonable time" is to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In other words it means, as soon as circumstances permit. In P. Ramanatha Aiyar's The Law Lexicon it is defined to mean: `A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than `directly'; such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea.' " It is also a well settled principle of law that not only the original vendor but also a subsequent purchaser would be entitled to raise a contention that the plaintiff was not ready and willing to perform his part of contract.

CONTRACT

ALKA BOSE VS PARMATMA DEVI & ORS. 2008(16) SCALE 281 ,

Contract Act, 1872: s.10 - Agreement to sell signed only by vendor and not by purchaser - Suit for specific performance - Maintainability of, challenged on the ground that agreement was not valid/concluded - Held: Agreement to sell signed by vendor alone and delivered to purchaser, and accepted by purchaser was a valid contract - Moreover, vendor acknowledged receipt of earnest money and further receipt of part of consideration amount - Evidence of witnesses also show that it was concluded contract - Notice by purchaser conveying willingness and readiness to pay balance sale consideration - Plaintiff entitled to decree for specific performance.

Dismissing the appeal, the Court HELD:

1. There was no valid reason to disturb the factual finding based on acceptable materials. The Single Judge of the High Court committed an error in taking a contrary view.

2. All agreements of sale are bilateral contracts as promises are made by both - the vendor agreeing to sell and the purchaser agreeing to purchase. An agreement of sale comes into existence when the vendor agrees to sell and the purchaser agrees to purchase, for an agreed consideration on agreed terms. It can be oral. It can be by exchange of communications which may or may not be signed. It may be by a single document signed by both parties. It can also be by a document in two parts, each party signing one copy and then exchanging the signed copy as a consequence of which the purchaser has the copy signed by the vendor and a vendor has a copy signed by the purchaser. Or it can be by the vendor executing the document and delivering it to the purchaser who accepts it. S.10 of the Contract Act, 1872 provides all agreements are contracts if they are made by the free consent by the parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void. The proviso to s.10 of the Act makes it clear that the section will not apply to contracts which are required to be made in writing or in the presence of witnesses or any law relating to registration of documents. Even an oral agreement to sell is valid. If so, a written agreement signed by one of the parties, if it evidences such an oral agreement will also be valid. In any agreement of sale, the terms are always negotiated and thereafter reduced in the form of an agreement of sale and signed by both parties or the vendor alone (unless it is by a series of offers and counter-offers by letters or other modes of recognized communication). In India, an agreement of sale signed by the vendor alone and delivered to the purchaser, and accepted by the purchaser, has always been considered to be a valid contract. In the event of breach by the vendor, it can be specifically enforced by the purchaser. There is, however, no practice of purchaser alone signing an agreement of sale.

In Bismillah Begum (Smt.) v. Rahmatullah Khan (dead) by Lrs. (AIR 1998 SC 970) it was held as follows: "We may also add that in contracts relating to re-conveyance of property, time is always the essence of the contract as laid down by the Federal Court in the case of Shanmugam Pillai v. Analakshmi Ammal (AIR 1950 FC 38) and also laid down by this Court in Caltex (India) Ltd. V. Bhagwan Devi Marodia (AIR 1969 SC 405). The relevant passage in the judgment of Supreme Court in Caltex (India) Ltd. reads as follows: "At common law stipulations as to time in a contract giving an option for renewal of a lease of land were considered to be the essence of the contract even if they were not expressed to be so and were construed as conditions precedent. Equity followed the common law rule in respect of such contracts and did not regard the stipulation as to time as not of the essence of the bargain. An option for the renewal of a lease, or for the purchase or re-purchase of property must in all cases be exercised strictly within the time limited for the purpose otherwise it will lapse."

In Chunchun's case it was observed by Supreme Court as follows: "If the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage, whether the documents, are contemporaneously executed or not. In the case of agreement of re-purchase, the conditions of repurchase must be construed strictly against the original vendor and the stipulation with regard to time of performance of the agreement must be strictly complied with as the time must be treated as being of the essence of the contract in the case of an agreement of reconveyance."

COMPROMISE

ARJAN SINGH VS PUNIT AHLUWALIA & ORS. MAY 14, 2008

Partly allowing the appeal, the Supreme Court HELD :

1. A compromise which does not satisfy the requirements of law would be unlawful and, therefore, decree in terms thereof cannot be passed. When a compromise is entered into, the Court has a duty to see as to whether the same meets the requirements of law. It may be true that parties to the suit signed the compromise petition. But, in the instant case, indisputably, the appellant has a rival claim. The suit filed by him, vis-a-vis, the one filed by `S' was required to be considered together. The court could exercise its discretionary jurisdiction in one of the suits or the other, having regard to Section 20 of the Specific Relief Act, 1963. By reason of a compromise or otherwise, the claim of the appellant could not have been defeated.

2. It is only pursuant to or in furtherance of the said purported terms of settlement, the deed of sale was executed on 25.3.2003. The settlement entered into by and between the parties proceeded on the assumption that no decree for specific performance would be passed in the case of the appellant. It wrongly recorded that the appellant is only a proforma defendant in the suit. The said compromise, was unlawful.

3. The trial court has rightly held that it was a case where the first part of Order 23 Rule 3 of the Code of Civil Procedure, 1908 would apply. As the appellant was not a party to the settlement, the same was not binding on him.

4. The Trial Court, however, was right in holding that the purported compromise was bad in law. It was unlawful being without any written consent of all the parties. Indisputably, not only the same was not binding on the parties, the court in a case of this nature while considering the appellant's case shall not take note of the fact that any deed of sale has been executed pursuant thereto. Respondent No.3, as a logical corollary of these findings, would not be entitled to set up the plea of being bona fide purchaser for value without notice. The court may also pass such other order or orders, as it may deem fit and proper keeping in view its discretionary jurisdiction under Section 20 of the Specific Relief Act, 1963. To that extent the judgment of the trial court is upheld and that of the High Court set aside.

WAKF PROPERTIES

2008 (7) SCC 310 MOHAMMEDIA COOP. BUILDING SOCIETY LTD VS LAKSHMI S. COOP. BUILDING SOCIETY LTD. & ORS

Wakf Act, 1954: ss.3(f), 36(2) and 36-A and r. 12 of A.P. Wakf Rules, 1974 - Mutawallis/Mujawars - Functions and duties of - Alienation of wakf property - Mujawars entering into an agreement of sale of Wakf property - Later in a public auction property sold to the highest bidder - Suit by earlier vendee society for specific performance of contract - Decreed by trial court - Decree affirmed by High Court -HELD:
Allowing the appeals, the Supreme Court HELD:

1. `Mujawars' or a person or a Committee were included in the definition of `Mutawalli' in the Wakf Act, 1954 only by way of Act 69 of 1984. A `Mutawalli' is a manager or trustee of the property. Mujawars were not even that. Mujawars, prior to the amendment of the Act, were not even authorized to enter into the agreement for sale. That was not the purpose for which they were appointed. They were appointed as the Dargah in question was not being properly looked after and the then surviving Mutawallis failed and/or neglected to perform their statutory duties. The functions of the Mutwalli and/or Mujawars in the light of the provisions of the Wakf Act and the Rules framed thereunder must be viewed in the context of the statute and on the basis of the common concept. Mutwallis have no ownership right or estate in the Wakf property unless the deed of Wakf says so.

2. It is only when a sanction is granted, the sale is to be held by public auction. Such public auction shall also be subject to confirmation by the State Wakf Board. However, Board for reasons to be recorded in writing may permit sale otherwise than by public auction if it is of the opinion that it is necessary so to do in the interest of the wakf.

3. It is the duty of the State to oversee its functions. Why for 22 years, no enquiry was conducted and why no action had been taken pursuant to the said GOMs dated 25.10.1986 is a matter of serious concern. The Government should have taken the purport of its orders and memos issued by it to their logical conclusion. They failed to do so. The State Government would be well advised to cause an enquiry to be made into the entire affairs of the State Wakf Board and others concerned vis-a-vis the transactions carried out in the matter, albeit after giving an opportunity of hearing to the parties. The State Government would initiate appropriate proceedings and take appropriate action against all concerned including its own officers as also those of the Board and Dargah and the allottees in the event they are found guilty.

MITAKSHARA CO-PARCENARY AND JOINT FAMILY

2008 (7) SCC 46, HARDEO RAI VS SAKUNTALA DEVI AND OTHERS BENCH: S.B. SINHA & V.S. SIRPURKAR

Hindu law - Mitakashra Coparcenary property and Joint Family property - Distinction between. - Held: Mitakashra Coparcenary is a body of individuals created by law whereas joint family is constituted by agreement of the parties. The appellant and the respondent's father entered into an agreement to sell a property. In the agreement, the appellant made a representation that the joint family property was partitioned and the co-sharers were in possession of the separate properties. Respondent's father paid certain sum out of the total amount and was put in the possession of the property. However, the appellant did not execute the sale deed. Respondent filed suit for specific performance. Appellant contended that he was forced to sign a blank stamped paper on which agreement of sale was scribed later; and that the property was a joint family property. Respondent's father was examined. The scribe of the agreement as also witnesses were examined. Trial court decreed the suit. The appeal by the appellant was allowed on the ground that the property was a joint family property. Aggrieved, respondent filed appeal and the Division Bench of High Court allowed the same. Hence, the present appeal.

Dismissing the appeal, the Supreme Court HELD:

1. There exists a distinction between a Mitakashra Coparcenary property and Joint Family property. A Mitakashra Coparcenary carries a definite concept. It is a body of individuals having been created by law unlike a joint family which can be constituted by agreement of the parties. A Mitakashra Coparcenary is a creature of law. Thus, it is necessary to determine the status of the appellant and his brothers.

2. For the purpose of assigning one's interest in the property, it was not necessary that partition by metes and bounds amongst the coparceners must take place. When an intention is expressed to partition the coparcenary property, the share of each of the coparceners becomes clear and ascertainable. Once the share of a co-parcener is determined, it ceases to be a coparcenary property. The parties in such an event would not possess the property as "joint tenants" but as "tenants in common".

3. Even a coparcenary interest can be transferred subject to the condition that the purchaser without the consent of his other coparceners cannot get possession. He acquires a right to sue for partition. Where a coparcener takes definite share in the property, he is owner of that share and as such he can alienate the same by sale or mortgage in the same manner as he can dispose of his separate property.

4. The first appellate court did not arrive at a conclusion that the appellant was a member of a Mitakashra co-parcenary. The source of the property was not disclosed. The manner in which the properties were being possessed by the appellant vis-a-vis, the other co-owners had not been taken into consideration. It was not held that the parties were joint in kitchen or mess. No other documentary or oral evidence was brought on record to show that the parties were in joint possession of the properties. One of the witnesses examined on behalf of the appellant admitted that the appellant had been in separate possession of the suit property. Appellant also in his deposition accepted that he and his other co-sharers were in separate possession of the property.

5. The representation made by the appellant is noticed. If the representation to the respondents' father was incorrect, the appellant should have examined his brothers. He should have shown that such a representation was made under a mistaken belief. He did nothing of that sort.

6. In view of the admission made by the appellant himself that the parties had been in separate possession, for the purpose of grant of a decree of specific performance of an agreement, a presumption of partition can be drawn. The Single Judge of the High Court committed a serious error in so far as it failed to take into consideration the essential ingredients of a Mitakshra Coparcernary.

JUDICIARY

As observed by Hon'ble Dr. Justice A.S. Anand, former Chief Justice of India : "Courts have to function within the established parameters and constitutional bounds. Decisions should have a jurisprudential base with clearly discernible principles. Courts have to be careful to see that they do not overstep their limits because to them is assigned the sacred duty of guarding the Constitution. Policy matters, fiscal, educational or otherwise, are thus best left to the judgment of the executive. The danger of the judiciary creating a multiplicity of rights without the possibility of adequate enforcement will, in the ultimate analysis, be counter productive and undermine the credibility of the institution. Courts cannot "create rights" where none exists nor can they go on making orders which are incapable of enforcement or violative of other laws or settled legal principles. With a view to see that judicial activism does not become "judicial adventurism", the courts must act with caution and proper restraint. They must remember that judicial activism is not an unguided missile failure to bear this in mind would lead to chaos. Public adulation must not sway the judges and personal aggrandizement must be eschewed. It is imperative to preserve the sanctity and credibility of judicial process. It needs to be remembered that courts cannot run the government. The judiciary should act only as an alarm bell; it should ensure that the executive has become alive to perform its duties".

JUDICIAL REVIEW OF PRESIDENT AND GOVERNOR ORDERS

The position, therefore, is undeniable that judicial review of the order of the President or the Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the following grounds:

(a) that the order has been passed without application of mind;
(b) that the order is mala fide;
(c) that the order has been passed on extraneous or wholly irrelevant considerations;
(d) that relevant materials have been kept out of consideration;
(e) that the order suffers from arbitrariness

PUBLIC POLICY:

The words 'Public policy' or 'opposed to public policy', inter alia, find reference in Section 23 of the Indian Contract Act, Foreign Awards (Recognition and Enforcement) Act, 1961, U.P. (Temporary Control of Rent and Evictions) Act, 1947 and Arbitration and Conciliation Act, 1996. By reason of the said provisions the judiciary has been conferred with power to determine as to the factors of public policy which may form the basis for interference with a contract or award. What is 'opposed to public policy' would be a matter depending upon the nature of the transaction. The pleadings of the parties and the materials brought on record would be relevant so as to enable the court to judge the concept as to what is for public good or in the public interest or what would be injurious or harmful to the public good or the public interest at the relevant point of time as contra-distinguished from the policy of a particular government. A law dealing with the rights of a citizen is required to be clear and unambiguous. Doctrine of public policy is contained in a branch of common law, it is governed by precedents. The principles have been crystallized under different heads and though it may be possible for the courts to expound and apply them to different situations but it is trite that the said doctrine should not be taken recourse to in 'clear and incontestable cases of harm to the public though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world'.

In Zoroastrian Cooperative Housing Society Ltd. and Another vs. District Registrar, Cooperative societies (Urban) and Others [(2005) 5 SCC 632], however, this Court observed: "In the context of Section 23 of the Contract Act, something more than a possible or plausible argument based on the constitutional scheme is necessary to nullify an agreement voluntarily entered into by a person." It was further observed: "Normally, as stated by this Court in Gherulal Parakh v. Mahadeodas Maiya, the doctrine of public policy is governed by precedents, its principles have been crystalised under the different heads and though it was permissible to expound and apply them to different situations it could be applied only to clear and undeniable cases of harm to the public. Although, theoretically it was permissible to evolve a new head of public policy in exceptional circumstances, such a course would be inadvisable in the interest of stability of society."

A contract being "opposed to public policy" is a defence under section 23 of the Indian contract Act and the courts while deciding the validity of a contract has to consider:
a) Pleadings in terms of Order VI, Rule of the Code of Civil Procedure.
b) Statute governing the case
c) Provisions of Part III and IV of the Constitution of India
d) Expert evidence, if any.
e) The materials brought on record of the case.
f) Other relevant factors, if any.
A party in a suit against whom illegality is pleaded also gets an opportunity to defend himself. Hence this essential function to decide on what is public policy can not be delegated to executive through a subordinate legislation. The legislature of a State, however, may lay down as to which acts would be immoral being injurious to the society. Such a legislation being substantive in nature must receive the legislative sanction specifically and not through a subordinate legislation or executive instructions. The phraseology 'opposed to public policy' may embrace within its fold such acts which are likely to deprave, corrupt or injurious to the public morality and, thus, essentially should be a matter of legislative policy.

The said phraseology came up for consideration before Supreme Court in Central Inland Water Transport Corporation Limited and Another vs. Brojo Nath Ganguly and Another etc. [(1986) 3 SCC 156] where a note of caution has been sounded that it being a 'very unruly horse', once when gets astride one does not know how far it would carry him. The question as to whether the statement as regard the validity of a contract on the ground that it is opposed to public policy must normally be viewed within the parameters fixed therefor by longstanding authorities or precedents but in deciding a case it may not be covered by such authorities and lacking precedents, the preamble of the Constitution or the principles underlying the fundamental rights and the Directive Principles in our Constitution can be taken recourse to.

Supreme Court in Rattan Chand Hira Chand vs. Askar Nawazjung (Dead) by Lrs. and Others [(1991) 3 SCC 67] quoted the following from Prof. Winfield's Article "Public Policy in the English Common Law" : "Some judges appear to have thought it [the unruly horse of public policy] more like a tiger, and refused to mount it at all, perhaps because they feared the fate of the young lady of Riga. Others have regarded it like Balaam's ass which would carry its rider nowhere. But none, at any rate at the present day, has looked upon it as a Pegasus that might soar beyond the momentary needs of the community." It was further observed: "All courts have at one time or the other felt the need to bridge the gap between what is and what is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute or a document or of an action of an individual which is certain to subvert the societal goals and endanger the public good."

In Chitty on Contracts, 28th edition at page 838, it is stated: "Objects which on grounds of public policy invalidate contracts may, for convenience, be generally classified into five groups :
first, objects which are illegal by common law or by legislation;
secondly, objects injurious to good government either in the field of domestic or foreign affairs;
thirdly, objects which interfere with the proper working of the machinery of justice;
fourthly, objects injurious to marriage and morality; and
fifthly, objects economically against the public interest.

This classification is adopted primarily for case of exposition. Certain cases do not fit clearly into any of these five categories." The learned author observed that doctrine of public policy is somewhat open-textured and flexible which has been the cause of judicial censure of the doctrine and has been seen by the courts as being vague and unsatisfactory, a treacherous ground for legal decision, a very unstable and dangerous foundation on which to build until made safe by decision as also being not immutable, stating that the commercial practice which was once permissible may be found to be mischievous and vice-versa.

In Cheshire, Fifoot & Furmston in their Law of Contract, Fourteenth Edition at page 407 states: "Assuming, then, that contracts vitiated by some improper element must be divided into two classes, how are the more serious examples of 'illegality' at common law to be distinguished from the less serious? Which of the contracts that have been frowned upon by the courts are so patently reprehensible so obviously contrary to public policy that they must be peremptorily styled illegal? Judicial authority is lacking, but it is submitted that the epithet 'illegal' may aptly and correctly be applied to the following six types of contract:
A contract to commit a crime, a tort or a fraud on a third party.
A contract that is sexually immoral.
A contract to the prejudice of the public safety.
A contract prejudicial to the administration of justice.
A contract that tends to corruption in public life.
A contract to defraud the revenue.

There remain three types of contract which offend 'public policy', but which are inexpedient rather than unprincipled. A contract to oust the jurisdiction of the court. A contract that tends to prejudice the status of marriage. A contract in restraint of trade." Prof. Winfield in his article "Public Policy in the English Common Law" reported in 42 Harvard Law Review 76 stated: "First among these is the principle that it cannot conflict with existing Parliamentary legislation. It may be useful in resolving a doubtful point in the interpretation of an enactment. But there cannot be public policy leading to one conclusion when there is a statute directing a precisely opposite conclusion. Moreover, where a rule of the common law is itself clear, arguments based upon public policy are beside the mark, however useful and admissible they may be where a new or doubtful question arises. There has been a noticeable tendency to regard public policy as a last resort for molding the law."

Brahma Nand Puri Vs. Neki Pur since deceased represented by Mathra Puri & Anr., AIR 1965 SC 1506, wherein it has been held that in a suit for ejectment the plaintiff has to succeed or fail on the title he establishes and if he cannot succeed on the strength of his title his suit must fail notwithstanding that the defendant in possession has no title to the property.

Whether a civil or a criminal case, the anvil for testing of 'proved', 'disproved' and 'not proved', as defined in Section 3 of the Indian Evidence Act, 1872 is one and the same. A fact is said to be 'proved' when, if considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of a particular case, to act upon the supposition that it exists. It is the evaluation of the result drawn by applicability of the rule, which makes the difference. "The probative effects of evidence in civil and criminal cases are not however always the same and it has been laid down that a fact may be regarded as proved for purposes of a civil suit, though the evidence may not be considered sufficient for a conviction in a criminal case. BEST says : There is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision: but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. While civil cases may be proved by a mere preponderance of evidence, in criminal cases the prosecution must prove the charge beyond reasonable doubt."

In the words of Denning LJ "It is true that by our law there is a higher standard of proof in criminal cases then in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. So also in civil cases there may be degrees of probability." Agreeing with this statement of law, Hodson, LJ said "Just as in civil cases the balance of probability may be more readily fitted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others."

In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the Court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored with him. However, as held in A. Raghavamma & Anr. Vs. Chenchamma & Anr., AIR 1964 SC 136, there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of

onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title.

APPEAL AND SUBSTANTIAL QUESTION OF LAW

U.R. VIRUPAKSHAIAH VS SARVAMMA & ANR. 2009 (1) SCALE 89 ALLOWING THE APPEAL, THE SUPREME COURT HELD:

In view of the Code of Civil Procedure (Amendment) Act, 1976, it is now essential for the High Court to formulate a substantial question of law. Although the High Court has requisite jurisdiction to formulate a substantial question of law at a subsequent stage which was not formulated at the time of admission of the second appeal, but the requirements laid down in the proviso appended to s.100 of the Code were required to be met. The High Court formulated the additional substantial question of law while dictating the judgment in open court and did not record any reason therefor. Before such a substantial question of law could be formulated, the parties should have been put to notice. They should have been given an opportunity to meet the same. The prayer of the appellant to grant some time to deal with the said question was declined. The High Court failed to take into consideration the fact that by framing the additional substantial question of law, a new case is sought to be made out

The High Court proceeded on the presumption that the plaintiff and the defendants belong to the fourth generation of the common ancestor. In holding so, the High Court wrongly included the propositors as the first generation. The plaintiff and the defendants were the third generation of the propositors. It is well settled that the presumption in regard to existence of joint family gets weaker and weaker from descendant to descendant and such weak presumption can be rebutted by adduction of slight evidence of separate possession of the properties in which even the burden would shift to the plaintiff to prove that the family was a joint family. But it is evident that no such contention was raised. No substantial question of law in this behalf was framed.

The High Court's jurisdiction to interfere with a finding of fact may not be limited in a case of this nature where the finding of fact had been arrived at upon taking into consideration inadmissible evidence and based on presumptions which could not have been raised. The premise on which, therefore, the High Court reversed the judgment of the courts below was non-existent.

The High Court did not deal with the substantial questions of law formulated at the time of admission at all. The judgment of the High Court is set aside and the matter is remitted to it for consideration of the matter afresh. In the event the High Court opines that any substantial question of law should be framed suo motu or at the instance of the appellant before it, it shall give an opportunity of hearing to the other side.

CO-OWNER

JAI SINGH AND ORS. VS GURMEJ SINGH 2009 (1) SCALE 679

Sale - Joint property - Inter-se rights and liabilities of co-sharers - Governing principles - Explained. Dismissing the appeal, the Supreme Court HELD:

The principles relating to the inter-se rights and liabilities of co-sharers are as follows:

(l) A co-owner has an interest in the whole property and also in every parcel of it.
(2) Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.
(3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.
(4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other as, when a co- owner openly asserts his own title and denies, that of the other.
(5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.
(6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.
(7) Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to disturb the arrangement without the consent of others except by filing a suit for partition.

When a co-sharer is in exclusive possession of some portion of the joint holding he is in possession thereof as a co-sharer and is entitled to continue in its possession if it is not more than his share till the joint holding is partitioned. Vendor cannot sell any property with better rights than himself. As a necessary corollary when a co-sharer sells his share in the joint holding or any portion thereof and puts the vendee into possession of the

land in his possession what he transfers is his right as a co-sharer in the said land and the right to remain in its exclusive possession till the joint holding is partitioned amongst all co-sharers.

HINDU LAW: ALIENATION OF UNDIVIDED CO-PARCENARY PROPERTY

A gift by a coparcener of his undivided interest in the coparcenary property is void. Thamma Venkata Subbamma (dead) by Lrs. v. Thamma Rattamma and Ors. 1987 (3) SCC 294

PARTITION SUIT

DR. CHIRANJI LAL (D) BY LRS. VS HARI DAS (D) BY LRS. AIR 2005 SC 2564,

Limitation Act, 1963-Article 136- Decree passed in a partition suit-Period of limitation for execution of such decree commences from the date of the decree and not from the date of engrossment of the decree on the stamp paper-Engrossment of the decree on stamp paper would relate back to the date of the decree-Indian Stamp Act, 1899-Section 35.

In a suit for partition filed against the predecessor-in-interest of the appellants, final decree was passed on 7th August, 1981 in favour of the predecessor-in-interest of the respondents. There was no order of the Court directing the parties to furnish stamp papers for the purposes of engrossing the decree. The stamp papers required for engrossing the decree were furnished by respondents on 25th May, 1982 and the decree was engrossed thereafter. The execution application was filed on 21st March, 1994 in the High Court. The appellant raised objection that the execution application was barred by limitation in view of Article 136 of the Act, but the execution court rejected the objection. That order was upheld by the Division Bench in appeal, which held that unless and until the decree is engrossed on the stamp paper it is merely a judgment of the Court and there is no decree available for execution and therefore, the starting point of limitation in case of execution of a decree in partition suit is the date when the decree is engrossed on the requisite stamp papers as that would be the date when decree becomes enforceable. Hence the present appeal.

The Indian Stamp Act, 1899 is a fiscal measure enacted with an object to secure revenue for the State on certain classes of instruments. Since a decree in a suit for partition creates rights and liabilities of the parties with respect to the immovable properties, it is considered as an instrument liable for the payment of stamp duty under the Indian Stamp Act.

The Indian Stamp Act is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of initial defect in the instrument.

The engrossment of the final decree in a suit for partition would relate back to the date of the decree. The beginning of the period of limitation for executing such a decree cannot be made to depend upon date of the engrossment of such a decree on the stamp paper. The date of furnishing of stamp paper is an uncertain act, within the domain, purview and control of a party. No date or period is fixed for furnishing stamp papers. No rule has been shown requiring the court to call upon or give any time for furnishing of stamp paper. A party by his own act of not furnishing stamp paper cannot stop the running of period of limitation. None can take advantage of his own wrong. The proposition that period of limitation would remain suspended till stamp paper is furnished and decree engrossed thereupon and only thereafter the period of twelve years will begin to run would lead to absurdity.

Rules of limitation are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. There is no statutory provision prescribing a time limit for furnishing of the stamp paper for engrossing the decree or time limit for engrossment of the decree on stamp paper and there is no statutory obligation on the Court passing the decree to direct the parties to furnish the stamp paper for engrossing the decree. In the present case the Court has not passed an order directing the parties to furnish the stamp papers for the purpose of engrossing the decree. Merely because there is no direction by the Court to furnish the stamp papers for engrossing of the decree or there is no time limit fixed by law, does not mean that the party can furnish stamp papers at its sweet will and claim that the period of limitation provided under Article 136 of the Act would start only thereafter as and when the decree is engrossed thereupon. The starting of period of limitation for execution of a decree cannot be made contingent upon the engrossment of the decree on stamp paper. The engrossment of the decree on stamp paper would relate back to the date of the decree.

CONDONATION OF DELAY

STATE (NCT OF DELHI) VS AHMED JAAN. AUGUST 12, 2008

Limitation Act, 1963: s. 5 - Condonation of delay - "sufficient cause" –

HELD: It is sufficiency of the cause which counts, and not length of delay - Expression "sufficient cause" should receive a liberal construction - As regards delay on the part of State, certain amount of latitude is not impermissible - Expression "sufficient cause" should be considered with pragmatism in justice oriented

approach rather than technical detection of sufficient cause for explaining every day's delay - Matter remitted to High Court to decide the criminal revision on merits - Suggestions made to prevent delay in State litigation - Administration of justice –

Allowing the appeal, the Supreme Court HELD:

The proof by sufficient cause is a condition precedent for exercise of the extraordinary discretion vested in the court. What counts is not the length of the delay but the sufficiency of the cause; and shortness of the delay is one of the circumstances to be taken into account in using the discretion. What constitutes sufficient cause cannot be laid down by hard and fast rules. The expression "sufficient cause" should receive a liberal construction.

No separate standards to determine the cause laid by the State vis-a-vis private litigant could be laid to prove strict standards of sufficient cause. Equally, the State cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or application since he is a person legally injured while State is an impersonal machinery working through its officers or servants. It is axiomatic that decisions are taken by officers/agencies proverbially at slow pace encumbered with procedural red-tape in decision making process. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression "sufficient cause" should, therefore, be considered with pragmatism in justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of the governmental conditions would be cognizant to and require adoption of pragmatic approach in justice-oriented process. The court should decide the matters on merits unless the case is hopelessly without merit.

The Government at appropriate level should constitute legal cells to examine the cases whether any legal principles are involved for decision by the courts or whether cases require adjustment; and should authorise the officers to take a decision or give appropriate permission for settlement. In the event of decision to file appeal, needed prompt action should be pursued by the officer concerned and he should be made personally responsible for lapses, if any.

In N. Balakrishnan v. M. Krishnamurthy (AIR 1998 SC 3222) it was held by Supreme Court that Section 5 is to be construed liberally so as to do substantial justice to the parties. The provision contemplates that the Court has to go in the position of the person concerned and to find out if the delay can be said to have been resulted from the cause which he had adduced and whether the cause can be recorded in the peculiar circumstances of the case is sufficient. Although no special indulgence can be shown to the Government which, in similar circumstances, is not shown to an individual suitor, one cannot but take a practical view of the working of the Government without being unduly indulgent to the slow motion of its wheels.

What constitutes sufficient cause cannot be laid down by hard and fast rules. In New India Insurance Co. Ltd. v. Shanti Misra (1975 (2) SCC 840) Supreme Court held that discretion given by Section 5 should not be defined or crystallised so as to convert a discretionary matter into a rigid rule of law. The expression "sufficient cause" should receive a liberal construction. In Brij Indar Singh v. Kanshi Ram (ILR (1918) 45 Cal 94 (PC) it was observed that true guide for a court to exercise the discretion under Section 5 is whether the appellant acted with reasonable diligence in prosecuting the appeal. In Shakuntala Devi Jain v. Kuntal Kumari (AIR 1969 SC 575) a Bench of three Judges had held that unless want of bona fides of such inaction or negligence as would deprive a party of the protection of Section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned.

In Concord of India Insurance Co. Ltd. v. Nirmala Devi (1979 (4) SCC 365) which is a case of negligence of the counsel which misled a litigant into delayed pursuit of his remedy, the default in delay was condoned. In Lala Mata Din v. A. Narayanan (1969 (2) SCC 770), Supreme Court had held that there is no general proposition that mistake of counsel by itself is always sufficient cause for condonation of delay. It is always a question whether the mistake was bona fide or was merely a device to cover an ulterior purpose. In that case it was held that the mistake committed by the counsel was bona fide and it was not tainted by any mala fide motive. In State of Kerala v. E. K. Kuriyipe (1981 Supp SCC 72), it was held that whether or not there is sufficient cause for condonation of delay is a question of fact dependant upon the facts and circumstances of the particular case. In Milavi Devi v. Dina Nath (1982 (3) SCC 366), it was held that the appellant had sufficient cause for not filing the appeal within the period of limitation.

In O. P. Kathpalia v. Lakhmir Singh (1984 (4) SCC 66), a Bench of three Judges had held that if the refusal to condone the delay results in grave miscarriage of justice, it would be a ground to condone the delay. Delay was accordingly condoned. In Collector Land Acquisition v. Katiji (1987 (2) SCC 107), a Bench of two Judges considered the question of the limitation in an appeal filed by the State and held that Section 5 was enacted in order to enable the court to do substantial justice to the parties by disposing of matters on merits. The expression "sufficient cause" is adequately elastic to enable the court to apply the law in a meaningful manner which subserves the ends of justice - that being the life-purpose for the existence of the institution 9 of courts. It is common knowledge that Supreme Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. This Court reiterated that the expression "every day's delay must be explained" does not mean that a pedantic approach should be made. The doctrine must be applied in a rational common sense

pragmatic manner. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. Judiciary is not respected on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the State which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a step-motherly treatment when the State is the applicant. The delay was accordingly condoned.

In G. Ramegowda, Major v. Spl. Land Acquisition Officer (1988 (2) SCC 142), it was held that no general principle saving the party from all mistakes of its counsel could be laid. The expression "sufficient cause" must receive a liberal construction so as to advance substantial justice and generally delays in preferring the appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of delay. In litigations to which Government is a party, there is yet another aspect which, perhaps, cannot be ignored. If appeals brought by Government are lost for such defaults, no person is individually affected, but what, in the ultimate analysis, suffers is public interest. The decisions of Government are collective and institutional decisions and do not share the characteristics of decisions of private individuals. The law of limitation is, no doubt, the same for a private citizen as for governmental authorities. Government, like any other litigant must take responsibility for the acts, omissions of its officers. But a somewhat different complexion is imparted to the matter where Government makes out a case where public interest was shown to have suffered owing to acts of fraud or bad faith on the part of its officers or agents and where the officers were clearly at cross-purposes with it. It was, therefore, held that in assessing what constitutes sufficient cause for purposes of Section 5, it might, perhaps, be somewhat unrealistic to exclude from the consideration that go into the judicial verdict, these factors which are peculiar to and characteristic of the functioning of the Government. Government decisions are proverbially slow encumbered, as they are, by a considerable degree of procedural red-tape in the process of their making. A certain amount of latitude is, therefore, not impermissible. It is rightly said that those who bear responsibility of Government must have "a little play at the joints". Due recognition of these limitations on governmental functioning - of course, within reasonable limits - is necessary if the judicial approach is not to be rendered unrealistic. It would, perhaps, be unfair and unrealistic to put Government and private parties on the same footing in all respects in such matters. Implicit in the very nature of Governmental functioning is procedural delay incidental to the decision-making process. The delay of over one year was accordingly condoned.

The expression "sufficient cause" should, therefore, be considered with pragmatism in justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of the governmental conditions would be cognizant to and requires adoption of pragmatic approach in justice-oriented process. The court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-a-vis private litigant could be laid to prove strict standards of sufficient cause. The Government at appropriate level should constitute legal cells to examine the cases whether any legal principles are involved for decision by the courts or whether cases require adjustment and should authorise the officers to take a decision or give appropriate permission for settlement. In the event of decision to file appeal needed prompt action should be pursued by the officer responsible to file the appeal and he should be made personally responsible for lapses, if any. Equally, the State cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or application since he is a person legally injured while State is an impersonal machinery working through its officers or servants. It was noted that adoption of strict standard of proof sometimes fail to protract public justice, and it would result in public mischief by skilful management of delay in the process of filing an appeal.

ADVERSE POSSESSION

In Saroop Singh v. Banto & Ors. [(2005) 8 SCC 330], in which one of us was a member, this Court held : In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendants possession becomes adverse.

Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. T. Anjanappa & Ors. v. Somalingappa & Anr. [(2006) 7 SCC 570], stating : “It is well-recognised proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true

owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the formers hostile action."

Yet recently, in P.T. Munichikkanna Reddy & Ors. v. Revamma & Ors. [(2007) 6 SCC 59], this Court noticed the recent development of law in other jurisdiction in the context of property as a human right to opine : "Therefore, it will have to be kept in mind the courts around the world are taking an unkind view towards statutes of limitation overriding property rights."

We may also notice that this Court in **M. Durai v. Muthu & Ors. [(2007) 3 SCC 114],** noticed the changes brought about by Limitation Act, 1963, vis-a-vis, old Limitation Act, holding : "The change in the position in law as regards the burden of proof as was obtaining in the Limitation Act, 1908 vis-a-vis the Limitation Act, 1963 is evident. Whereas in terms of Articles 142 and 144 of the old Limitation Act, the plaintiff was bound to prove his title as also possession within twelve years preceding the date of institution of the suit under the Limitation Act, 1963, once the plaintiff proves his title, the burden shifts to the defendant to establish that he has perfected his title by adverse possession."

AIR 2008 SC 346 Annakili vs A. Vedanayagam & Ors
Claim by adverse possession has two elements : (1) the possession of the defendant should become adverse to the plaintiff; and (2) the defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi as is well known is a requisite ingredient of adverse possession. It is now a well settled principle of law that mere possession of the land would not ripen into possessory title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in said capacity for the period prescribed under the Limitation Act. Mere long possession for a period of more than 12 years without anything more do not ripen into a title.

AIR 2007 SC 1753 P.T. Munichikkanna Reddy & Ors VS Revamma and Ors
CHARACTERIZING ADVERSE POSSESSION Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor or on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile.

Adverse Possession is a right which comes into play not just because someone loses high right to reclaim the property out of continuous and willful neglect but also on account of possessor's positive intent to dispossess. Therefore, it is important to take into account before stripping somebody of his lawful title, whether there is an adverse possessor worthy and exhibiting more urgent and genuine desire to dispossess and step into the shoes of the paper owner of the property.

Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the court expires through effluxion of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or color of title.

In similar circumstances, in the case of Thakur Kishan Singh (dead) v. Arvind Kumar [(1994) 6 SCC 591] this Supreme court held: "As regards adverse possession, it was not disputed even by the trial court that the appellant entered into possession over the land in dispute under a licence from the respondent for purposes of brick-kiln. The possession thus initially being permissive, the burden was heavy on the appellant to establish that it became adverse. A possession of a co-owner or of a licencee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for howsoever length of time does not result in converting the permissible possession into adverse possession. Apart from it, the Appellate Court has gone into detail and after considering the evidence on record found it as a fact that the possession of the appellant was not adverse."

A peaceful, open and continuous possession as engraved in the maxim nec vi, nec clam, nec precario has been noticed by Supreme Court in Karnataka Board of Wakf v. Government of India and Others [(2004) 10 SCC 779] in the following terms: "Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show:
(a) on what date he came into possession,

(b) what was the nature of his possession,
(c) whether the factum of possession was known to the other party,
(d) how long his possession has continued, and
(e) his possession was open and undisturbed.

A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession"

In Narne Rama Murthy v. Ravula Somasundaram and Others [(2005) 6 SCC 614], Supreme Court held: "However, in cases where the question of limitation is a mixed question of fact and law and the suit does not appear to be barred by limitation on the face of it, then the facts necessary to prove limitation must be pleaded, an issue raised and then proved. In this case the question of limitation is intricately linked with the question whether the agreement to sell was entered into on behalf of all and whether possession was on behalf of all. It is also linked with the plea of adverse possession. Once on facts it has been found that the purchase was on behalf of all and that the possession was on behalf of all, then, in the absence of any open, hostile and overt act, there can be no adverse possession and the suit would also not be barred by limitation. The only hostile act which could be shown was the advertisement issued in 1989. The suit filed almost immediately thereafter."

In Karnataka Wakf Board, the law was stated, thus: "In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well- settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

An observation has been made in this regard in **S.M. Karim v. Mst. Bibi Sakina [AIR 1964 SC 1254]:** "Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea."

Anjanappa and Others v. Somalingappa and Another [(2006) 7 SCC 570], wherein it was opined : "The High Court has erred in holding that even if the defendants claim adverse possession, they do not have to prove who is the true owner and even if they had believed that the Government was the true owner and not the plaintiffs, the same was inconsequential. Obviously, the requirements of proving adverse possession have not been established. If the defendants are not sure who is the true owner the question of their being in hostile possession and the question of denying title of the true owner do not arise. Above being the position the High Court's judgment is clearly unsustainable"

In Sardar Singh vs Krishna Devi (Smt.) and Another [(1994) 4 SCC 18], it was held : "The house being divisible and the appellant being not a consenting party to the contract, equity and justice demand partial enforcement of the contract, instead of refusing specific performance in its entirety, which would meet the ends of justice"

In Rachakonda Narayana vs. Ponthala Parvathamma and Another [(2001) 8 SCC 173], Khare, J., the learned Chief Justice as he then was, observed : "Thus, the ingredients which would attract specific performance of the part of the contract, are: (i) if a party to an agreement is unable to perform a part of the contract, he is to be treated as defaulting party to that extent, and (ii) the other party to an agreement must, in a suit for such specific performance, either pay or has paid the whole of the agreed amount, for that part of the contract which is capable of being performed by the defaulting party and also relinquish his claim in respect of the other part of the contract which the defaulting party is not capable to perform and relinquishes the claim of compensation in respect of loss sustained by him. If such ingredients are satisfied, the discretionary relief of specific performance is ordinarily granted unless there is delay or laches or any other disability on the part of the other party."

SALE AGREEMENT CONDITIONS FOR PROFESSIONAL USE

(i) to satisfy the purchaser about their title in respect of the property and also clear any encumbrance certificate, if found on verification;
(ii) ascertain the extent of the property by measuring it and if there was any deficiency, agree for deduction of proportionate consideration;
(iii) put up a wall separating the boundary at the entrance,
(iv) change the names and enter new names in revenue records;
(v) comply with all formalities which they were required to do under the law;
(vi) obtain guardian and ward certificate, clearance certificate, permission of Town Planning Authority etc.;
(vii) secure the amount of consideration payable to the minor in terms of the guardian and ward certificate which was to be obtained on application filed by Respondent No.5;
(viii) receive the balance consideration and on the date specified by the Appellant, appear before the Sub-Registrar and register the deed of sale.

PUBLIC PURPOSE

"Public purpose" will include a purpose in which the general interest of the community as opposed to the interest of an individual is directly or indirectly involved. Individual interest must give way to public interest as far as "public purpose" in respect of acquisition of land is concerned.

"Public purpose" is bound to vary with times and prevailing conditions in the community or locality and, therefore, the legislature has left it to the State (Government) to decide what "public purpose" is and also to declare the need of a given land for the purpose. The legislature has left the discretion to the Government regarding "public purpose". The Government has the sole and absolute discretion in the matter.

"Public purpose" is bound to change with the items and the prevailing conditions in a given area and, therefore, it would not be a practical proposition even to attempt an extensive definition of it. It is because of this that the legislature had left it to the Government to say what a "public purpose" is and also to declare the need of a given land for a "public purpose

Broadly speaking the expression `public purpose' would, however, include a purpose in which the general interest of the community as opposed to the particular interest of the individuals is directly and virtually concerned.

The right of eminent domain is the right of the State to reassert either temporarily or permanently its dominion over any piece of land on account of public exigency and for public good.

The power of compulsory acquisition as described by the term `eminent domain' can be exercised only in the interest and for the welfare of the people. The concept of `public purpose' should include the matters, such as, safety, security, health, welfare and prosperity of the community at large.

In State of Bihar v. Kameshwar Singh reported in AIR 1952 SC 252 at page 259, a Constitution Bench of Supreme Court considered the expression 'public purpose'. Mahajan, J. explained the expression 'public purpose' in the following manner: "The expression "public purpose" is not capable of a precise definition and has not a rigid meaning. It can only be defined by a process of judicial inclusion and exclusion. In other words, the definition of the expression is elastic and takes its colour from the statute in which it occurs, the concept varying with the time and state of society and its needs. The point to be determined in each case is whether the acquisition is in the general interest of the community as distinguished from the private interest of an individual."

In that case, S. R. Das, J. observed as under: "We must regard as public purpose all that will be calculated to promote the welfare of the people as envisaged in the Directive Principles of State policy whatever else that expression may mean." Almost a century ago, in Hamabai v. Secretary of State reported in (1911) 13 Bom LR 1097, Batchelor, J. observed: "General definitions are, I think, rather to be avoided where the avoidance is possible, and I make no attempt to define precisely the extent of the phrase 'public purpose' in the lease; it is enough to say that, in my opinion, the phrase, whatever else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned" received the approval of the Privy Council". The definition of public purpose has been relied in number of subsequent decisions including the Constitution Bench judgment of this Court.

The concept of public purpose was dealt in great detail in a leading American case Munn v. Illinois reported in (1877) 94 US 113: 24 L. Ed 77 and in some other cases. The doctrine declared is that property becomes clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large and from such clothing the right of the legislature is deduced to control the use of the property and to determine the compensation which the owner may receive for it.

Field, J. observed as follows: "The declaration of the Constitution of 1870, that private buildings used for private purposes shall be deemed public institutions, does not make them so. The receipt and storage of grain in a building erected by private means for that purpose does not constitute the building a public warehouse.

There is no magic in the language, though used in a constitutional convention, which can change a private business into a public one, or alter the character of the building in which the business is transacted."

In United Community Services v. Omaha Nat. Bank 77 N.W.2d 576, 585, 162 Neb. 786, the Court observed that a public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants.

In People ex rel. Adamowski v. Chicago R.R. Terminal Authority, 151 N.E.2d 311, 314, 14 III.2d 230 the Court observed that public purpose is not static concept, but is flexible, and is capable of expansion to meet conditions of complex society that were not within contemplation of framers of Constitution.

In Green v. Frazier, 176 N.W. 11, 17, 44 N.D. 395, the Court observed that a public purpose or public business has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within a given political division, as, for example, a state, the sovereign powers of which are exercised to promote such public purpose or public business.

In the words of Lord Atkinson in Central Control Board v. Cannon Brewery Co. Ltd. (1919) A.C. 744, the power to take compulsorily raises by implication a right to payment. The power of compulsory acquisition is described by the term

"eminent domain". This term seems to have been originated in 1525 by Hugo Grotius, who wrote of this power in his work "De Jure Belli et Pacis" as follows : "The property of subjects is under the eminent domain of the State, so that the State or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the State is bound to make good the loss to those who lose their property." The Court observed that the requirement of public purpose is implicit in compulsory acquisition of property by the State or, what is called, the exercise of its power of 'Eminent Domain'.

The Court further observed that the principle of compulsory acquisition of property, says Cooley (in Vol. II at p. 113, Constitutional Limitations) is founded on the superior claims of the whole community over an individual citizen but is applicable only in those cases where private property is wanted that public use, or demanded by the public welfare and that no instance is known in which it has been taken for the mere purpose of raising a revenue by sale or otherwise and the exercise of such a power is utterly destructive of individual right.

In The State of Bombay v. R.S. Nanji (1956) SCR 18, the Court observed that it is impossible to precisely define the expression 'public purpose'. In each case all the facts and circumstances will require to be closely examined in order to determine whether a public purpose has been established. Prima facie, the Government is the best judge as to whether public purpose is served by issuing a requisition order, but it is not the sole judge. The courts have the jurisdiction and it is their duty to determine the matter whenever a question is raised whether a requisition order is or is not for a public purpose. In the said case, the Court observed that the phrase 'public purpose' includes a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals is directly and vitally concerned. It is impossible to define precisely the expression 'public purpose'.

In each case all the facts and circumstances will require to be closely examined to determine whether a public purpose has been established. In that case, the Court also referred to the following cases: The State of Bombay v. Bhanji Munji & Another (1955) 1 SCR 777 and The State of Bombay v. Ali Gulshan (1955) 2 SCR 867. In Somawanti v. State of Punjab (1963) 2 SCR 774, the Court observed that public purpose must include an object in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned. Public purpose is bound to change with the times and the prevailing conditions in a given area and, therefore, it would not be a practical proposition even to attempt an extensive definition of it. It is because of this that the legislature has left it to the Government to say what is a public purpose and also to declare the need of a given land for a public purpose.

The Constitution Bench of Supreme Court in Somawanti case observed that whether in a particular case the purpose for which land was needed was a public purpose or not was for the Government to be satisfied about and the declaration of the Government would be final subject to one exception, namely that where there was a colourable exercise of the power the declarations would be open to challenge at the instance of the aggrieved party.

In Babu Barkya Thakur v. The State of Bombay & Others (1961) 1 SCR 128, the Court observed as under: "It will thus be noticed that the expression 'public purpose' has been used in its generic sense of including any purpose in which even a fraction of the community may be interested or by which it may be benefited."

The Constitution Bench in Satya Narain Singh v. District Engineer, P.W.D., Ballia and Anr. reported in AIR 1962 SC 1161 while describing public service observed :- "It is undoubtedly not easy to define what is "public service" and each activity has to be considered by itself for deciding whether it is carried on as a public service or not. Certain activities will undoubtedly be regarded as public services, as for instance, those

undertaken in the exercise of the sovereign power of the State or of governmental functions. About these there can be no doubt. Similarly a pure business undertaking though run by the Government cannot be classified as public service. But where a particular activity concerns a public utility a question may arise whether it falls in the first or the second category. The mere fact that that activity may be useful to the public would not necessarily render it public service. An activity however beneficial to the people and however useful cannot, in our opinion, be reasonably regarded as public service if it is of a type which may be carried on by private individuals and is carried on by government with a distinct profit motive. It may be that plying stage carriage buses even though for hire is an activity undertaken by the Government for ensuring the people a cheap, regular and reliable mode of transport and is in that sense beneficial to the public".

In Arnold Rodricks v. State of Maharashtra, reported in (1966) 3 SCR 885, while Justice Wanchoo and Justice Shah dissenting from judgment observed that there can be no doubt that the phrase 'public purpose' has not a static connotation, which is fixed for all times. There can also be no doubt that it is not possible to lay down a definition of what public purpose is, particularly as the concept of public purpose may change from time to time. There is no doubt however that public purpose involves in it an element of general interest of the community and whatever furthers the general interest must be regarded as a public purpose.

In Bhim Singhji v. Union of India (1981) 1 SCC 166, as per Sen, J., the concept of public purpose necessarily implies that it should be a law for the acquisition or requisition of property in the interest of the general public, and the purpose of such a law directly and vitally subserve public interest. Broadly speaking the expression 'public purpose' would however include a purpose in which the general interest of the community as opposed to the particular interest of the individuals is directly and virtually concerned.

In Laxman Rao Bapurao Jadhav v. State of Maharashtra reported in (1997) 3 SCC 493, this Court observed that "it is for the State Government to decide whether the land is needed or is likely to be needed for a public purpose and whether it is suitable or adaptable for the purpose for which the acquisition was sought to be made. The mere fact that the authorized officer was empowered to inspect and find out whether the land would be adaptable for the public purpose, it is needed or is likely to be needed, does not take away the power of the Government to take a decision ultimately".

In Scindia Employees' Union v. State of Maharashtra & Others reported in (1996) 10 SCC 150, this Court observed as under: "The very object of compulsory acquisition is in exercise of the power of eminent domain by the State against the wishes or willingness of the owner or person interested in the land. Therefore, so long as the public purpose subsists the exercise of the power of eminent domain cannot be questioned. Publication of declaration under Section 6 is conclusive evidence of public purpose. In view of the finding that it is a question of expansion of dockyard for defence purpose, it is a public purpose."

The right of eminent domain is the right of the State to reassert either temporarily or permanently its dominion over any piece of land on account of public exigency and for public good. In the case of Coffee Board v. Commissioner of Commercial Taxes reported in (1988) 3 SCC 263, the Court observed that the eminent domain is an essential attribute of sovereignty of every State and authorities are universal in support of the definition of eminent domain as the power of the sovereign to take property for public use without the owner's consent upon making just compensation.

A seven-Judge Bench of this Court in The State of Karnataka & Another v. Shri Ranganatha Reddy & Another reported in (1977) 4 SCC 471, explained the expression 'public purpose' in the following words: "It is indisputable and beyond the pale of any controversy now as held by this Court in several decisions including the decision in the case of His Holiness Kesavananda Bharati Sripadagalaveru v. State of Kerala [1973] Supp. 1 S.C.R. 1 - popularly known as Fundamental Rights case - that any law providing for acquisition of property must be for a public purpose. Whether the law of acquisition is for public purpose or not is a justifiable issue. But the decision in that regard is not to be given by any detailed inquiry or investigation of facts. The intention of the legislature has to be gathered mainly from the Statement of Objects and Reasons of the Act and its Preamble. The matter has to be examined with reference to the various provisions of the Act, its context and set up, the purpose of acquisition has to be culled out therefrom and then it has to be judged whether the acquisition is for a public purpose within the meaning of Article 31(2) and the law providing for such acquisition. ……..The concept of public purpose should include the matters, such as, safety, security, health, welfare and prosperity of the community or public at large. The concept of 'eminent domain' is an essential attribute of every State. This concept is based on the fundamental principle that the interest and claim of the whole community is always superior to the interest of an individual.

COW SLAUGHTER CASE

AIR 2006 SC 212 , STATE OF GUJARAT VS MIRZAPUR MOTI KURESHI KASSAB JAMAT & ORS. DATE OF JUDGMENT: 26/10/2005 BENCH: R.C. LAHOTI CJI & B.N. AGRAWAL & ARUN KUMAR & G.P. MATHUR & A.K. MATHUR & C.K. THAKKER & P.K. BALASUBRAMANYAN

Constitution of India, 1950: Articles 19(1)(g), (6), 48, 48-A and 51-A-Constitutional validity of the Bombay Animal Preservation (Gujarat Amendment) Act, 1994-Putting a total ban on slaughter of bulls and bullocks

irrespective of any age-Held, per majority (A.K. Mathur, J. dissenting), the Act is intra vires the Constitution. . The amendment was challenged by butchers known as Kureshis and by their representative bodies. The High Court struck down the amendment as ultra vires the Constitution holding that the Amendment Act imposed an unreasonable restriction on the fundamental rights. Aggrieved, the State of Gujarat and a few other organizations (NGOs) filed the present appeals. In view of the earlier decisions of this Court, particularly the Constitution Bench decision in Mohd. Hanif Quareshi and Ors. v. State of Bihar and Ors., [1959] SCR 629, holding that a total ban on slaughter of the buffaloes, bulls and bullocks after they ceased to be capable of yielding milk or breeding or working as draught animals could not be supported as reasonable in the interest of general public and was invalid, and thereafter insertion of Articles 48-A and 51-A in the Constitution, the appeals were referred to the present seven Judge Bench.

ALLOWING THE APPEALS, THE COURT HELD: PER LAHOTI CJ (FOR HIMSELF AND FOR AGRAWAL, ARUN KUMAR, G.P. MATHUR, THAKKER AND BALASUBRAMANYAN, JJ.)

In the context of `restriction' three propositions are well settled:- (i) `restriction' includes cases of `prohibition'; (ii) the standard for judging reasonability of restriction or restriction amounting to prohibition remains the same, excepting that a total prohibition must also satisfy the test that a lesser alternative would be inadequate; and (iii) whether a restriction in effect amounts to a total prohibition is a question of fact which shall have to be determined with regard to the facts and circumstances of each case, the ambit of the right and the effect of the restriction upon the exercise of that right.

`Restriction' as employed in Article 19(6) includes `prohibition'. Though it is permissible to place a total ban amounting to prohibition on any profession, occupation, trade or business subject to satisfying the test of being reasonable in the interest of the general public, yet, in the instant case banning slaughter of cow and her progeny is not a prohibition but only a restriction. Though the ban is total with regard to the slaughter of one particular class of cattle, i.e., cow and her progeny, the ban is not on the total activity of butchers. They are not prohibited from slaughtering animals other than those specified in the Act. In so far as trade in hides, skins and other allied things (which are derived from body of dead animal) are concerned, these would be available for trade and industrial activity after natural death of the animal. Even if the ban results in slight inconvenience, it is liable to be ignored if it is found to be in the interest of economy and social needs of the country.

Further, Article 48 of the Constitution has also been assigned a higher weightage and wider expanse by the Supreme Court post Quareshi-I. Article 48 consists of two parts. The first part enjoins the State to "endeavour to organize agricultural and animal husbandry" and that too "on modern and scientific lines". The emphasis is not only on `organization' but also on `modern and scientific lines'. The subject is `agriculture and animal husbandry'. The second part of Article 48 enjoins the State, de hors the generality of the mandate contained in its first part, to take steps, in particular, "for preserving and improving the breeds and prohibiting the slaughter of cows and calves and other milch and draught cattle".

Article 48-A deals with "environment, forests and wild life". Protection and improvement of environment is necessary for safeguarding forests and wild life, which in turn protects and improves the environment. Cow progeny excreta is scientifically recognized as a source of rich organic manure. This helps in improving the quality of earth and the environment. The impugned enactment enables the State in its endeavour to protect and improve the environment within the meaning of Article 48A of the Constitution.

By enacting clause (g) in Article 51-A and giving it the status of a fundamental duty, one of the objects sought to be achieved by the Parliament is to ensure that the spirit and message of Articles 48 and 48A is honoured as a fundamental duty of every citizen. While Article 48 provides for "cows and calves and other milch and draught cattle", Article 51-A(g) enjoins it as a fundamental duty of every citizen "to have compassion for living creatures", which in its wider fold embraces the category of cattle spoken of specifically in Article 48.

Faced with the question of testing the constitutional validity of any statutory provision or an executive act, or for testing the reasonableness of any restriction cast by law on the exercise of any fundamental right by way of regulation, control or prohibition, the Directive Principles of State Policy and Fundamental Duties as enshrined in Article 51-A of the Constitution play a significant role. The decision in Quareshi-I in which the relevant provisions of the three impugned legislations were struck down on the singular ground of lack of reasonability, would have decided otherwise if only Article 48 was assigned its full and correct meaning and due weightage was given thereto and Articles 48-A and 51-A(g) were available in the body of the Constitution.

Protection is needed by bulls and bullocks at a point of time when their utility has been reduced or has become nil as they near the end of their life. That is what Article 48, in fact, protects. The expression `milch or draught cattle' as employed in Article 48 of the Constitution is a description of a classification or species of cattle as distinct from cattle which by their nature are not milch or draught; and the said words do not exclude milch or draught cattle, which on account of age or disability, cease to be functional for those purposes either temporarily or permanently. The said words take colour from the preceding words "cows or calves". A specie of cattle which is milch or draught for a number of years during its span of life is to be included within the said expression. On ceasing to be milch or draught it cannot be pulled out from the category of "other milch and draught cattle."

The underlying logic of the doctrine of stare decisis is to maintain consistency and avoid uncertainty. The guiding philosophy is that a view which has held the field for a long time should not be disturbed only because another view is possible. However, the trend of judicial opinion is that stare decisis is not a dogmatic rule allergic to logic and reason; it is a flexible principle of law operating in the province of precedents providing room to collaborate with the demands of changing times dictated by social needs, State policy and judicial conscience. The doctrine of stare decisis is generally to be adhered to, because well settled principles of law founded on a series of authoritative pronouncements ought to be followed. Yet, the demands of the changed facts and circumstances dictated by forceful factors supported by logic, amply justify the need for a fresh look.

Salmond on Jurisprudence, Twelfth Edition, at p.187; The Province and Function of Law, Julius Stone, at pp.588, Precedent in Indian Law, A. Laxminath, Second Edition 2005; Essays on Jurisprudence from the Columbia Law Review, 1964, referred to. 4.1. Reference to the Statement of Objects and Reasons is permissible for understanding the background, antecedent state of affairs in relation to the statute, and the evil which the statute was sought to remedy. The facts stated in the Preamble and the Statement of Objects and Reasons appended to any legislation are evidence of legislative judgment and, therefore, constitute important factors which amongst others will be taken into consideration by the court in judging the reasonableness of any restriction imposed on the Fundamental Rights of the individuals. The Court would begin with a presumption of reasonability of the restriction, more so when the facts stated in the Statement of Objects and Reasons and the Preamble are taken to be correct and they justify the enactment of law for the purpose sought to be achieved.

Since Quareshi-I times have changed; so have changed the social and economic needs. The Legislature has correctly appreciated the needs of its own people and recorded the same in the Preamble of the impugned enactment and the Statement of Objects and Reasons appended to it. In the light of the material available in abundance before the Court, there is no escape from the conclusion that the protection conferred by impugned enactment on cow progeny is needed in the interest of Nation's economy. Merely because it may cause `inconvenience' or some `dislocation' to the butchers, restriction imposed by the impugned enactment does not cease to be in the interest of the general public. The former must yield to the latter.

However, country's economy continues to be based on agriculture. Majority of agricultural holdings are small units. The country needs bulls and bullocks. Bulls and bullocks do not become useless merely by crossing a particular age. The Statement of Objects and Reasons, apart from other evidence available, clearly conveys that cow and her progeny constitute the backbone of Indian agriculture and economy. The increasing adoption of non-conventional energy sources like Bio-gas plants justify the need for bulls and bullocks to live their full life in spite of their having become `less useful' for agricultural operations, carting and other work and having ceased to be useful for the purpose of breeding. This Statement of Objects and Reasons tilts the balance in favour of the constitutional validity of the impugned enactment.

Cattle belonging to the category of cow progeny would not be rendered without shelter and feed by the owner to whom it had served throughout its life. Adequate fodder is available for the entire cattle population. Some of the States such as Gujarat have achieved self-sufficiency in cattle feed and fodder. Besides, "farmers love their cattle". The interest exhibited by the NGOs seeking intervention in the High Court and filing appeals in this Court also indicates that the NGOs will be willing to take up the task of caring for aged bulls and bullocks.

Desirable diet and nutrition are not necessarily associated with non-vegetarian diet and that too originating from slaughtering cow progeny. Beef contributes only 1.3% of the total meat consumption pattern of the Indian society. Consequently a prohibition on the slaughter of cattle would not substantially affect the food consumption of the people.

There is no apparent inconsistency between the Directive Principles which persuaded the State to pass the law and the Fundamental Rights canvassed before the High Court by the writ petitioners. Besides, the legislative competence of the State Legislature to enact the law was not disputed either in the High Court or before the Supreme Court.

The challenge to the constitutional validity of the three legislations was founded on the following three grounds, as was dealt with in the judgment : (i) that the total ban offended the religion of the Muslims as the sacrifice of a cow on a particular day is enjoined or sanctioned by Islam; (ii) that such ban offended the fundamental right guaranteed to the Kasais (Butchers) under Article 19(1)(g) and was not a reasonable and valid restriction on their right; and (iii) that a total ban was not in the interest of the general public.

On behalf of the States, heavy reliance was placed on Article 48 of the Constitution to which the writ petitioners responded that under Article 37 the Directive Principles were not enforceable by any court of law and, therefore, Article 48 had no relevance for the purpose of determining the constitutional validity of the impugned legislations which were alleged to be violative of the fundamental rights of the writ petitioners. Dealing with the challenge to the constitutional validity of the legislations, their Lordships reiterated the well accepted proposition based on several pronouncements of this Court that there is always a presumption in favour of the constitutionality of an enactment and that the burden lies upon him who attacks it to show that there has been a clear violation of the constitutional principles. The legislative wisdom as expressed in the

impugned enactment can be pressed into service to support the presumption. Chief Justice S.R. Das spoke for the Constitution Bench and held :- (i) that a total ban on the slaughter of cows of all ages and calves of cows and calves of she-buffaloes, male or female, was quite reasonable and valid and is in consonance with the Directive Principles laid down in Article 48; (ii) that a total ban on the slaughter of she-buffaloes or breeding bulls or working bullocks (cattle as well as buffaloes) as long as they are capable of being used as milch or draught cattle was also reasonable and valid; and (iii) that a total ban on slaughter of she-buffaloes, bulls and bullocks (cattle or buffalo) after they ceased to be capable of yielding milk or of breeding or working as draught animals could not be supported as reasonable in the interests of the general public and was invalid. The first ground of challenge was simply turned down due to the meagre materials placed before their Lordships and the bald allegations and denials made by the parties.

No one specially competent to expound the religious tenets of Islam filed any affidavit and no reference was made to any particular Surah of the Holy Quran which, in terms, requires the sacrifice of a cow. It was noticed that many Muslims do not sacrifice cow on the BakrI'd day. Their Lordships in Constitution Bench stated, inter alia :- "It is part of the known history of India that the Moghul Emperor Babar saw the wisdom of prohibiting the slaughter of cows as and by way of religious sacrifice and directed his son Humayun to follow this example. Similarly Emperors Akbar, Jehangir, and Ahmad Shah, it is said, prohibited cow slaughter. Nawab Hyder Ali of Mysore made cow slaughter an offence punishable with the cutting of the hands of the offenders.

Three of the members of the Gosamvardhan Enquiry Committee set up by the Uttar Pradesh Government in 1953 were Muslims and concurred in the unanimous recommendation for total ban on slaughter of cows. We have, however, no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day is an obligatory overt act for a Mussalman to exhibit his religious belief and idea. In the premises, it is not possible for us to uphold this claim of the petitioners."

In State of West Bengal and Ors. v. Ashutosh Lahiri, (1995) 1 SCC 189, this Court has noted that sacrifice of any animal by muslims for the religious purpose on BakrI'd does not include slaughtering of cow as the only way of carrying out that sacrifice. Slaughtering of cow on BakrI'd is neither essential to nor necessarily required as part of the religious ceremony. An optional religious practice is not covered by Article 25(1). On the contrary, it is common knowledge that cow and its progeny, i.e., bull, bullocks and calves are worshipped by Hindus on specified days during Diwali and other festivals like Makr- Sankranti and Gopashtmi. A good number of temples are to be found where the statue of 'Nandi' or 'Bull' is regularly worshipped. However, we do not propose to delve further into the question as we must state, in all fairness to the learned counsel for the parties, that no one has tried to build any argument either in defence or in opposition to the judgment appealed against by placing reliance on religion or Article 25 of the Constitution. Dealing with the challenge founded on Article 14 of the Constitution, their Lordships reiterated the twin tests on the anvil of which the reasonability of classification for the purpose of legislation has to be tested, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that such differentia must have a rational relation to the object sought to be achieved by the statute in question . Applying the twin tests to the facts of the cases before them, their Lordships held that it was quite clear that the objects sought to be achieved by the impugned Acts were the preservation, protection and improvement of livestocks. Cows, bulls, bullocks and calves of cows are no doubt the most important cattle for the agricultural economy of this country. Female buffaloes yield a large quantity of milk and are, therefore, well looked after and do not need as much protection as cows yielding a small quantity of milk require. As draught cattle, male buffaloes are not half as useful as bullocks. Sheep and goat give very little milk compared to the cows and the female buffaloes and have practically no utility as draught animals. These different categories of animals being susceptible of classification into separate groups on the basis of their usefulness to society, the butchers who kill each category may also be placed in distinct classes according to the effect produced on society by the carrying on of their respective occupations . Their Lordships added :- "The attainment of these objectives may well necessitate that the slaughterers of cattle should be dealt with more stringently than the slaughterers of, say, goats and sheep. The impugned Acts, therefore, have adopted a classification on sound and intelligible basis and can quite clearly stand the test laid down in the decisions of this Court. Whatever objections there may be against the validity of the impugned Acts the denial of equal protection of the laws does not, prima facie, appear to us to be one of them. In any case, bearing in mind the presumption of constitutionality attaching to all enactments founded on the recognition by the court of the fact that the legislature correctly appreciates the needs of its own people there appears to be no escape from the conclusion that the petitioners have not discharged the onus that was on them and the challenge under Article 14 cannot, therefore, prevail."

The challenge to the constitutional validity founded under Article 14 was clearly and in no unmistaken terms turned down. The third contention, that is, whether the "total prohibition" could be sustained as a reasonable restriction on the fundamental right of the butchers to slaughter animals of their liking or in which they were trading, was dealt with in great detail. This is the aspect of the decision of the Constitution Bench in Quareshi-I which, in the submission of the learned senior counsel for the appellants, was not correctly decided and, therefore, calls for reconsideration. The question was dealt with by their Lordships from very many angles. Whether the restrictions permissible under clause (6) of Article 19 may extend to "total prohibition" ___ was treated by their Lordships as a vexed question and was left open without expressing any final opinion as their Lordships chose to concentrate on the issue as to whether the restriction was at all reasonable in the interests of the general public, de hors the fact whether it could be held to be partial or total. Their Lordships referred to a lot of documentary evidence which was produced before them, such as (i) the figures of 1951 Animals'

Census; (ii) Report on the Marketing of Cattle in India issued by the Directorate of Marketing and Inspection, Ministry of Goods and Agriculture, Government of India, 1956; and (iii) the figures given in the First and Second Five Years Plans and so on. Their Lordships concluded that if the purpose of sustaining the health of the nation by the usefulness of the cow and her progeny was achieved by the impugned enactments the restriction imposed thereby could be held to be reasonable in the interest of the general public. Their Lordships referred to other documents as well. The findings of fact arrived at, based on such evidence may briefly be summed up.

In the opinion of their Lordships, cow progeny ceased to be useful as a draught cattle after a certain age and they, although useful otherwise, became a burden on the limited fodder available which, but for the so-called useless animals, would be available for consumption by milch and draught animals. The response of the States in setting up Gosadans (protection home for cow and cow progeny) was very poor. It was on appreciation of the documentary evidence and the deduction drawn therefrom which led their Lordships to conclude that in spite of there being a presumption in favour of the validity of the legislation and respect for the opinion of the legislatures as expressed by the three impugned enactments, they were inclined to hold that a total ban of the nature imposed could not be supported as reasonable in the interests of the general public. While dealing with the submissions made by the learned senior counsel before us, we would once again revert to this judgment. It would suffice to observe here that, excepting for one limited ground, all other grounds of challenge to the constitutional validity of the impugned enactments had failed.

In Abdul Hakim Quraishi & Ors. v. State of Bihar, (1961) 2 SCR 610 (hereinafter referred to as Quraishi-II) once again certain amendments made by the Legislatures of the States of Bihar, Madhya Pradesh and Uttar Pradesh were put in issue. The ground of challenge was confined to Article 19(1)(g) read with Article 19(6). The ban as imposed by the impugned Act was once again held to be 'total' and hence an unreasonable restriction. The Constitution Bench, by and large, chose to follow the dictum of this Court in Quareshi-I. In Mohammed Faruk v. State of Madhya Pradesh & Ors., (1969) 1 SCC 853, the State Government issued a notification whereby the earlier notification issued by the Jabalpur Municipality which permitted the slaughter of bulls and bullocks along with other animals was recalled. Para 6 of the judgment notes the anguish of the Constitution Bench, as in the opinion of their Lordships, the case was apparently another attempt, though on a restricted scale, to circumvent the judgment of this Court in Quareshi-I. Vide para 9, their Lordships have noticed the decision of this Court in Narendra Kumar & Ors. v. The Union of India and Ors., (1960) 2 SCR 375, which upholds the view that the term "restriction" in Articles 19(5) and 19(6) of the Constitution includes cases of "prohibition" also.

Their Lordships drew a distinction between cases of "control" and "prohibition" and held that when the exercise of a fundamental right is prohibited, the burden of proving that a total ban on the exercise of the right alone would ensure the maintenance of the general public interest lies heavily upon the State. As the State failed in discharging that burden, the notification was held liable to be struck down as imposing an unreasonable restriction on the fundamental right of the petitioners.

In Haji Usmanbhai Hassanbhai Qureshi and Ors. v. State of Gujarat, (1986) 3 SCC 12 (hereinafter referred to as 'Qureshi-III') the constitutional validity of the Bombay Act as amended by Gujarat Act 16 of 1961 was challenged. The ban prohibited slaughter of bulls and bullocks below the age of 16 years. The petitioners pleaded that such a restriction on their right to carry on the trade or business in beef and allied articles was unreasonable. Yet another plea was urged that the total ban offended their religion as qurbani (sacrifice) at the time of BakrI'd or Id festival as enjoined and sanctioned by Islam. The High Court rejected the challenge on both the grounds. The writ petitioners came in appeal to this Court. The appeal was dismissed. While doing so, this Court took note of the material made available in the form of an affidavit filed by the Under Secretary to the Government of Gujarat, Agriculture, Forest and Cooperation Department wherein it was deposed that because of improvement and more scientific methods of cattle breeding and advancement in the science of looking after the health of cattle in the State of Gujarat, today a situation has been reached wherein the cattle remain useful for breeding, draught and other agricultural purposes above the age of 16 years as well. As the bulls and bullocks upto the 16 years of age continued to be useful, the prescription of the age of 16 years up to which they could not be slaughtered was held to be a reasonable restriction, keeping in mind the balance which has to be struck between public interest which requires useful animals to be preserved, and permitting the appellants (writ petitioners) to carry on their trade and profession. The test of reasonableness of the restriction on the fundamental right guaranteed by Article 19(1)(g) was held to have been satisfied. The challenge based on Article 14 of the Constitution alleging the impugned legislation to be discriminatory, as it was not uniform in respect of all cattle, was rejected. The Court also held that buffaloes and their progeny, on the one hand and cows and their progeny, on the other hand constitute two different classes and their being treated differently does not amount to hostile discrimination.

In Hashmattullah v. State of M.P. and Others, (1996) 4 SCC 391, vires of M.P. Krishik Pashu Parirakshan (Sanshodhan) Adhiniyam, 1991 imposing a total ban on the slaughter of bulls and bullocks in the State of Madhya Pradesh was challenged. The validity of the amending Act was upheld by the High Court. The writ petitioners came up in appeal to this Court which was allowed and the amending Act was struck down as ultra vires the Constitution.

In State of West Bengal and others v. Ashutosh Lahiri and Others, (1995) 1 SCC 189, the legislation impugned therein permitted slaughter of cows on the occasion of BakrI'd subject to an exemption in that regard being allowed by the State Government. The power to grant such an exemption was challenged. The

High Court allowed the writ petition and struck down the power of the State Government to grant such an exemption. There was a total ban imposed on the slaughter of healthy cows and other animals mentioned in the schedule under Section 2 of the Act. The State of West Bengal appealed. On a review of earlier decisions of this Court, the three-Judge Bench concluded that it was a settled legal position that there was no fundamental right of Muslims to insist on slaughter of healthy cows on the occasion of BakrI'd. The contention that not only an essential religious practice under Article 25(1) of Constitution, but even optional religious practice could be permitted, was discarded. The Court held "We, therefore, entirely concur with the view of the High Court that slaughtering of healthy cows on BakrI'd is not essential or required for religious purpose of Muslims or in other words it is not a part of religious requirement for a Muslim that a cow must be necessarily sacrificed for earning religious merit on BakrI'd."

The learned senior counsel for the appellants find following faults with the view taken by this Court in Quareshi-I, to the extent to which it goes against the appellants:-

(1) Quareshi-I holds Directive Principles of State Policy to be unenforceable and subservient to the Fundamental Rights and, therefore, refuses to assign any weight to the Directive Principle contained in Article 48 of the Constitution and refuses to hold that its implementation can be a valid ground for proving reasonability of the restriction imposed on the Fundamental Right guaranteed by Article 19(1)(g) of the Constitution a theory which stands discarded in a series of subsequent decisions of this Court.
(2) What has been noticed in Quareshi-I is Article 48 alone; Article 48A and Article 51A(g) were not noticed as they were not available then, as they were introduced in the Constitution by Forty-second Amendment with effect from 3.1.1977.
(3) The meaning assigned to "other milch and draught cattle" in Quareshi-I is not correct. Such a narrow view as has been taken in Quareshi-I does not fit into the scheme of the Constitution and, in particular, the spirit of Article 48.
(4) Quareshi-I does not assign the requisite weight to the facts contained in the Preamble and Statement of Objects and Reasons of the enactments impugned therein.
(5) 'Restriction' and 'Regulation' include 'Prohibition' and a partial restraint does not amount to total prohibition. Subsequent to the decision in Quareshi-I the trend of judicial decisions in this area indicates that regulation or restriction within the meaning of Articles 19(5) and 19(6) of the Constitution includes total prohibition - the question which was not answered and left open in Quareshi-I.
(6) In spite of having decided against the writ petitioners on all their principal pleas, the only ground on which the constitutional validity of the impugned enactments was struck down in Quareshi-I is founded on the finding of facts that cow progeny ceased to be useful after a particular age, that preservation of such 'useless cattle' by establishment of gosadan was not a practical and viable proposition, that a large percentage of the animals, not fit for slaughter, are slaughtered surreptitiously outside the municipal limits, that the quantum of available fodder for cattle added with the dislodgment of butchers from their traditional profession renders the total prohibition on slaughter not in public interest. The factual situation has undergone a drastic change since then and hence the factual foundation, on which the legal finding has been constructed, ceases to exist depriving the later of all its force. The learned senior counsel for the appellants further submitted that Quareshi-I forms the foundation for subsequent decisions and if the very basis of Quareshi-I crumbles, the edifice of subsequent decisions which have followed Quareshi-I would also collapse.

What meaning is to be assigned to the expression 'milch and draught cattle'? The question is whether when Article 48 precludes slaughter of cows and calves by description, the words 'milch and draught cattle' are described as a like species which should not be slaughtered or whether such species are protected only till they are 'milch or draught' and the protection ceases whenever, they cease to be 'milch or draught', either temporarily or permanently? According to their inherent genetic qualities, cattle breeds are broadly divided into 3 categories (i) Milch breed (ii) Draught breed, and (iii) Dual purpose breed. Milch breeds include all cattle breeds which have an inherent potential for milk production whereas draught breeds have an inherent potential for draught purposes like pulling, traction of loads etc. The dual purpose breeds have the potential to perform both the above functions. The term draught cattle indicates "the act of moving loads by drawing or pulling i.e. pull and traction etc. Chambers 20th Century Dictionary defines 'draught animal' as 'one used for drawing heavy loads'. Cows are milch cattle. Calves become draught or milch cattle on attaining a particular age. Having specifically spoken of cows and calves, the latter being a cow progeny, the framers of the Constitution chose not to catalogue the list of other milch and draught cattle and felt satisfied by employing a general expression "other milch and draught cattle" which in their opinion any reader of the Constitution would understand in the context of the previous words "cows and calves". "Milch and draught", the two words have been used as adjectives describing and determining the quality of the noun 'cattle'. The function of a descriptive or qualitative adjective is to describe the shape, colour, size, nature or merits or demerits of the noun which they precede and qualify. In a document like the Constitution, such an adjective cannot be said to have been employed by the framers of the Constitution for the purpose of describing only a passing feature, characteristic or quality of the cattle. The object of using these two adjectives is to enable classification of the noun 'cattle' which follows. Had it been intended otherwise, the framers of the Constitution would have chosen a different expression or setting of words. No doubt, cow ceases to be 'milch' after attaining a particular age. Yet, cow has been held to be entitled to protection against slaughter without regard to the fact that it has ceased to be 'milch'. This constitutional position is well settled. So is the case with calves. Calves have been held entitled to protection against slaughter without regard to their age and though they are not yet fit to be employed as 'draught cattle'. Following the same construction of the expression, it can be said that the words "calves and other milch and draught cattle" have also been used as a matter of description of a species and not with regard to age. Thus, 'milch and draught' used as adjectives simply enable

the classification or description of cattle by their quality, whether they belong to that species. This classification is with respect to the inherent qualities of the cattle to perform a particular type of function and is not dependant on their remaining functional for those purposes by virtue of the age of the animal. "Milch and draught cattle" is an expression employed in Article 48 of the Constitution so as to distinguish such cattle from other cattle which are neither milch nor draught. Any other meaning assigned to this expression is likely to result in absurdity. A milch cattle goes through a life cycle during which it is sometimes milch and sometimes it becomes dry. This does not mean that as soon as a milch cattle ceases to produce milk, for a short period as a part of its life cycle, it goes out of the purview of Article 48, and can be slaughtered. A draught cattle may lose its utility on account of injury or sickness and may be rendered useless as a draught cattle during that period. This would not mean that if a draught cattle ceases to be of utility for a short period on account of sickness or injury, it is excluded from the definition of 'draught cattle' and deprived of the benefit of Article 48.

This reasoning is further strengthened by Article 51A(g) of the Constitution. The State and every citizen of India must have compassion for living creatures. Compassion, according to Oxford Advanced Learners' Dictionary means "a strong feeling of sympathy for those who are suffering and a desire to help them". According to Chambers 20th Century Dictionary, compassion is "fellow feeling, or sorrow for the sufferings of another : pity". Compassion is suggestive of sentiments, a soft feeling, emotions arising out of sympathy, pity and kindness. The concept of compassion for living creatures enshrined in Article 51A (g) is based on the background of the rich cultural heritage of India the land of Mahatama Gandhi, Vinobha, Mahaveer, Budha, Nanak and others. No religion or holy book in any part of the world teaches or encourages cruelty. Indian society is a pluralistic society. It has unity in diversity. The religions, cultures and people may be diverse, yet all speak in one voice that cruelty to any living creature must be curbed and ceased. A cattle which has served human beings is entitled to compassion in its old age when it has ceased to be milch or draught and becomes so-called 'useless'. It will be an act of reprehensible ingratitude to condemn a cattle in its old age as useless and send it to a slaughter house taking away the little time from its natural life that it would have lived, forgetting its service for the major part of its life, for which it had remained milch or draught. We have to remember : the weak and meek need more of protection and compassion. In our opinion, the expression 'milch or draught cattle' as employed in Article 48 of the Constitution is a description of a classification or species of cattle as distinct from cattle which by their nature are not milch or draught and the said words do not include milch or draught cattle, which on account of age or disability, cease to be functional for those purposes either temporarily or permanently. The said words take colour from the preceding words "cows or calves". A specie of cattle which is milch or draught for a number of years during its span of life is to be included within the said expression. On ceasing to be milch or draught it cannot be pulled out from the category of "other milch and draught cattle."

In State of West Bengal v. Subodh Gopal Bose and Ors., 1954 SCR 587, the Constitution Bench was testing the constitutional validity of the legislation impugned therein. The Statement of Objects and Reasons was used by S.R. Das, J. for ascertaining the conditions prevalent at that time which led to the introduction of the Bill and the extent and urgency of the evil which was sought to be remedied, in addition to testing the reasonableness of the restrictions imposed by the impugned provision. In his opinion, it was indeed very unfortunate that the Statement of Objects and Reasons was not placed before the High Court which would have assisted the High Court in arriving at the right conclusion as to the reasonableness of the restriction imposed.

In Quareshi-I itself, which has been very strongly relied upon by the learned counsel for the respondents before us, Chief Justice S.R. Das has held:- "Pronouncements of this Court further establish, amongst other things, that there is always a presumption in favour of the constitutionality of an enactment and that the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. The courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation. The legislature is the best judge of what is good for the community, by whose suffrage it comes into existence....". This should be the proper approach for the court but the ultimate responsibility for determining the validity of the law must rest with the court."

In Sardar Inder Singh v. The State of Rajasthan, 1957 SCR 605, a Constitution Bench was testing the validity of certain provisions of the Ordinance impugned before and it found it to be repugnant to Article 14 of the Constitution and hence void. At page 620, Venkatarama Aiyar, J. speaking for the Constitution Bench referred to the recitals contained in the Preamble to the Ordinance and the object sought to be achieved by the Ordinance as flowing therefrom and held "that is a matter exclusively for the legislature to determine, and the propriety of that determination is not open to question in courts. We should add that the petitioners sought to dispute the correctness of the recitals in the Preamble. This they cannot clearly do".

'Regulation' or 'Restriction' includes Total Prohibition; Partial Restraint is not Total Prohibition

Article 19(1)(g) which deals with the fundamental right to 'practise any profession or to carry on any occupation, trade or business'. This right is subject to Article 19(6) which permits reasonable restrictions to

be imposed on it in the interests of the general public. This raises the question of what is the meaning of the word 'restriction'. Three propositions are well settled:- (i) 'restriction' includes cases of 'prohibition'; (ii) the standard for judging reasonability of restriction or restriction amounting to prohibition remains the same, excepting that a total prohibition must also satisfy the test that a lesser alternative would be inadequate; and (iii) whether a restriction in effect amounts to a total prohibition is a question of fact which shall have to be determined with regard to the facts and circumstances of each case, the ambit of the right and the effect of the restriction upon the exercise of that right.

In Madhya Bharat Cotton Association Ltd. v. Union of India (UOI) and Anr., AIR 1954 SC 634, a large section of traders were completely prohibited from carrying on their normal trade in forward contacts. The restriction was held to be reasonable as cotton, being a commodity essential to the life of the community, and therefore such a total prohibition was held to be permissible.

In Himmatbhai Narbheram Rao and Ors. (The State of Maharashtra v. Himmatbhai Narbheram Rao and Ors., (1969) 2 SCR 392,) trade in hides was completely prohibited and the owners of dead animals were required to compulsorily deposit carcasses in an appointed place without selling it. The constitutionality of such prohibition, though depriving the owner of his property, was upheld. The court also held that while striking a balance between rights of individuals and rights of citizenry as a whole the financial loss caused to individuals becomes insignificant if it serves the larger public interest.

In Sushila Saw Mill (Sushila Saw Mill v. State of Orissa & Ors., (1995) 5 SCC 615,), the impugned enactment imposed a total ban on saw mill business or sawing operations within reserved or protected forests. The ban was held to be justified as it was in public interest to which the individual interest must yield. Similar view is taken in the other cases referred to hereinabove.

In Krishna Kumar (1957), the Constitution Bench held that when the prohibition is only with respect to the exercise of the right referable only in a particular area of activity or relating to a particular matter, there was no total prohibition. In that case, the Constitution Bench was dealing with the case of Adatiyas operating in a market area. A certain field of activity was taken away from them, but they were yet allowed to function as Adatiyas. It was held that this amounts to a restriction on the exercise of writ petitioners' occupation as an Adatiya or a seller of grain but does not amount to a total ban.

In the present case, we find the issue relates to a total prohibition imposed on the slaughter of cow and her progeny. The ban is total with regard to the slaughter of one particular class of cattle. The ban is not on the total activity of butchers (kasais); they are left free to slaughter cattle other than those specified in the Act. It is not that the writ petitioner-respondents survive only by slaughtering cow progeny. They can slaughter animals other than cow progeny and carry on their business activity. In so far as trade in hides, skins and other allied things (which are derived from the body of dead animal) are concerned, it is not necessary that the animal must be slaughtered to avail these things. The animal, whose slaughter has been prohibited, would die a natural death even otherwise and in that case their hides, skins and other parts of body would be available for trade and industrial activity based thereon. We hold that though it is permissible to place a total ban amounting to prohibition on any profession, occupation, trade or business subject to satisfying the test of being reasonable in the interest of the general public, yet, in the present case banning slaughter of cow progeny is not a prohibition but only a restriction.

The facts contained in the Preamble and the Statement of Objects and Reasons in the impugned enactment highlight the following facts:- (i) it is established that cow and her progeny sustain the health of the nation; (ii) the working bullocks are indispensable for our agriculture for they supply power more than any other animal (the activities for which the bullocks are usefully employed are also set out); (iii) the dung of the animal is cheaper than the artificial manures and extremely useful of production of biogas; (iv) it is established that the backbone of Indian agriculture is the cow and her progeny and they have on their back the whole structure of the Indian agriculture and its economic system; (v) the economy of the State of Gujarat is still predominantly agricultural. In the agricultural sector use of animals for milch, draught, breeding or agricultural purposes has great importance. Preservation and protection of agricultural animals like bulls and bullocks needs emphasis. With the growing adoption of non-conventional energy sources like biogas plants, even waste material have come to assume considerable value. After the cattle cease to breed or are too old to work, they still continue to give dung for fuel, manure and biogas and, therefore, they cannot be said to be useless. Apart from the fact that we have to assume the above- stated facts as to be correct, there is also voluminous evidence available on record to support the above said facts.

We proceed to notice few such documents. Affidavits

(i) With the improved scientific animal husbandry services in the State, the average longivity of animals has considerably increased. In the year 1960, there were only 456 veterinary dispensaries and first aid veterinary centers etc, whereas in the year 1993, there are 946 veterinary dispensaries and first aid veterinary centers etc. There were no mobile veterinary dispensaries in 1960 while there are 31 mobile veterinary dispensaries in the State in 1993. In addition, there are around 467 centres for intensive cattle development where besides first aid veterinary treatment, other animal husbandry inputs of breeding, food or development etc. are also provided. In the year 1960, five lakh cattles were vaccinated whereas in the year 1992-93 around 200 lakh animals are vaccinated to provide life saving protection against various fatal diseases. There were no cattle

food compounding units preparing cattle food in the year 1960, while in the year 1993 there are ten cattle food factory producing 1545 MT of cattle food per day. As a result of improved animal husbandry services, highly contagious and fatal disease of Rinder Pest is controlled in the state and that the deadly disease has not appeared in the last three years.

(ii) Because of various scientific technologies namely, proper cattle feeding, better medical and animal husbandry services, the longevity of the cattle in the State has considerably increased.

(iii) The population of bullock is 27.59 lakhs. Over and above agricultural work, bullocks are useful for other purposes also. They produce dung which is the best organic measure and is cheaper than chemical manure. It is also useful for production of bio-gas.

(iv) It is estimated that daily production of manure by bullocks is about 27,300 tonnes and bio-gas production daily is about 13.60 cubic metres. It is also estimated that the production of bio-gas from bullock dung fulfil the daily requirement of 54.78 lakh persons of the State if whole dung production is utilized. At present, 1,91,467 bio-gas plants are in function in the State and about 3-4 lakhs persons are using bio-gas in the State produced by these plants.

(v) The population of farmers in the State is 31.45 lakhs. Out of which 7.37 lakhs are small farmers, 8 lakhs are marginal farmers, 3.05 lakhs are agricultural labourers and 13.03 lakhs are other farmers. The total land of Gujarat State is 196 lakh hectares and land under cultivation is 104.5 lakh hectares. There are 47,800 tractors by which 19.12 lakh hectares land is cultivated and the remaining 85.38 lakh hectares land is cultivated by using bullocks. It may be mentioned here that all the agricultural operations are not done using tractors. The bullocks are required for some of agricultural operations along with tractors. There are about 7,28,300 bullock carts and there are about 18,35,000 ploughs run by bullocks in the State.

(vi) The figure of slaughter of animals done in 38 recognised slaughter houses are as under: Year Bullock/Bull Buffalo Sheep Goat 1990-91 9,558 41,088 1,82,269 2,22,507 1991-92 9,751 41,882 2,11,245 2,20,518 1992-93 8,324 40,034 1,13,868 1,72,791 The above figures show that the slaughter of bullocks above the age of 16 years is done in the State in very small number. The animals other than bullocks are slaughtered in large number. Hence, the ban on the slaughter of cow and cow progeny will not affect the business of meat production significantly. Therefore, the persons engaged in this profession will not be affected adversely.

Further affidavits were filed

(i) there are about 31.45 lakhs land holders in Gujarat. The detailed classifications of the land holders are as under:- Sl. No. Details of land holders No. of land holders 1. 01 hectare 8.00 lakhs 2. 1-2 hectares 7.37 lakhs 3. 2 and above 16.08 lakhs

(ii) almost 50 per cent of the land holdings are less than 2 hectares; tractor keeping is not affordable to small farmers. For economic maintenance of tractors, one should have large holding of land. Such land holders are only around 10 per cent of the total land holders. Hence the farmers with small land holdings require bullocks as motive power for their agricultural operations and transport;

(iii) the total cultivable land area of Gujarat State is about 124 lakh hectares. Considering that a pair of bullocks is required for ploughing 10 acres of land the bullock requirement for ploughing purpose alone is 5.481 million and approximately equal number is required for carting. According to the livestock census 1988 of Gujarat State, the availability of indigenous bullocks is around 2.84 millions. Thus the availability of bullocks as a whole on percentage of requirement works out to be about 25 per cent. In this situation, the State has to preserve each single bull and bullock that is available to it;

(iv) it is estimated that bull or bullock at every stage of life supplies 3,500 kgs of dung and 2,000 litres of urine and whereas this quantity of dung can supply 5,000 cubic feet of biogas, 80 M.T. of organic fertilizer, the urine can supply 2,000 litres of pesticides and the use of these products in farming increases the yield very substantially. The value of above contribution can be placed at Rs.20,000/- per year to the owner;

(v) since production of various agricultural crops removes plant nutrients from the soil, they must be replenished with manures to maintain and improve fertility of soil. There are two types of manures which are (i) Organic manures, i.e. natural manures and (ii) Artificial or chemical fertilizer. Amongst the organic manures, farm yard manures is the most valuable organic manure applied to soil. It is the most commonly used organic manure in India. It consists of a mixture of cattle dung, the bedding used in the stable. Its crop increasing value has been recognized from time immemorial

(vi) the importance of organic manure as a source of humus and plant nutrients to increase the fertility level of soils has been well recognised. The organic matter content of cultivated soils of the tropics and sub-tropics is comparatively low due to high temperature and intense microbial activity. The crops remove annually large quantity of plant nutrients from soil. Moreover, Indian soils are poor in organic matter and in major plant nutrients. Therefore, soil humus has to be replenished through periodic addition of organic manure for maintaining soil productivity;

(vii) animals are the source of free availability of farmyard manure, which has all the three elements, i.e. Nitrogen, Phosphoric acid and Potash, needed in fertilizer and at the same time which preserve and enrich the fertility of the soil. In paucity of dung availability, the farmers have to depend upon chemical fertilizers. Investment in chemical fertilizers imposes heavy burden upon the economy. If there is availability of alternate source of organic manure from animals, it is required to be promoted;

(viii) the recent scenario of ultramodern technology of super ovulation, embryo transfer and cloning technique will be of very much use to propagate further even from the incapable or even old animals which are not capable of working or reproducing. These animals on a large scale can be used for research programmes as well as for production of non-conventional energy sources such as biogas and natural fertilizers. At present, there are 19,362 biogas plants installed in the State during 1995-97. On an average, each adult cattle produces 4.00 kg. of dung per day. Out of the total cattle strength of (1992 Census) 67,85,865, the estimated dung produced is 99,07,363 tonnes;

(ix) India has 74% of rural population, and in Gujarat out of 4.13 crores of human population, there are 1.40 crores of workers which comprises of 47,04,000 farmers and 32,31,000 workers are workers related to livestock and forestry. In Gujarat, there are 9.24 lakhs marginal farmers and 9.15 lakhs of small farmers,

according to the 1991-92 census. Animals are reared in few numbers per family and the feed is obtained from the supplementary crop on fodder/agricultural by-products or from grazing in the gaucher land. In Gujarat 8.48 lakh hectares of land is available as permanent pasture and grazing land. An individual cattle-owner does not consider one or two bullocks as an extra burden for his family, even when it is incapable of work or production. Sometimes the unproductive animals are sent to Panjarapoles and Gosadans. In Gujarat, there are 335 Gaushalas and 174 Panjarapoles which are run by non- governmental oranizations and trusts. Formerly farmers mostly kept few animals and, in fact, they are treated as part of their family and maintained till death. It cannot be treated to be a liability upon them or burden on the economy;
(x) butchers are doing their business since generations, but they are not doing only the slaughter of cow class of animals. They slaughter and trade the meat of other animals like buffaloes, sheep, goats, pig and even poultry. In Gujarat there are only 38 registered slaughter houses functioning under various Municipalities/Nagar Panchayats. Beef (meat of cattle) contributes only 1.3% of the total meat groups. Proportion of demand for beef is less in the context of demand for pig, mutton and poultry meat. Slaughtering of bulls and bullocks for the period between 1990-91 and 1993-94 was on an average 9,000; (xi) number of bullocks have decreased in a decade from 30,70,339 to 28,93,227 as in 1992. A statement showing the amount of dung production for the year 1983-84 to 1996-97 and a statement showing the nature of economy of the State of Gujarat is annexed. The number of bullocks slaughtered per day is negligible compared to other animals, and the business and/or trade of slaughtering bullocks would not affect the business of butchers. By prohibiting slaughter of bullocks the economy is likely to be benefited.

The three affidavits are supported by documents, statements or tables setting out statistics which we have no reason to disbelieve. Neither the High Court has expressed any doubt on the contents of the affidavit nor has the veracity of the affidavits and correctness of the facts stated therein been challenged by the learned counsel for the respondents before us.

(i) The details of various categories of animals slaughtered since 1997-1998 shows that slaughter of various categories of animals in regulated slaughter houses of Gujarat State has shown a tremendous decline. During the year way back in 1982-83 to 1996-97 the average number of animals slaughtered in regulated slaughter houses was 4,39,141. As against that (previous figure) average number of slaughter of animals in recent 8 years i.e. from 1997-98 to 2004-05 has come down to only 2,88,084. This clearly indicates that there has been a vast change in the meat eating style of people of Gujarat State. It is because of the awareness created among the public due to the threats of dangerous diseases like Bovine Spongiform Encephalopathy commonly known as "Mad Cow disease" B.S.E. which is a fatal disease of cattle meat origin not reported in India. Even at global level people have stopped eating the beef which is known as meat of cattle class animals. This has even affected the trade of meat particularly beef in the America & European countries since last 15 years. Therefore, there is international ban on export-import of beef from England, America & European countries;
(ii) there is reduction in slaughter of bulls & bullocks above the age of 16 years reported in the regulated slaughter houses of Gujarat State. As reported in the years from 1982-83 to 1996-97, the slaughter of bulls & bullocks above the age of 16 years was only 2.48% of the total animals of different categories slaughtered in the State. This percentage has gone down to the level of only 1.10% during last 8 years i.e. 1997-98 to 2004-05 which is very less significant to cause or affect the business of butcher communities; (iii) India is predominantly agrarian society with nearly >th of her population living in seven lakh rural hamlets and villages, possesses small fragmentary holding (54.6% below 1 hectare 18% with 1-2 hectares). Draft/pack animal contributes more than 5 crores horse power (H.P.) or 33,000 megawatt electric power and shares for/in 68% of agricultural operations, transport & other draft operations. In addition to draft power, 100 million tonnes dung per year improves the soil health and also used as raw material for biogas plant;
(iv) the cattle population in Gujarat in relation to human population has declined from 315 per 1000 humans in 1961 to 146 per 1,000 humans in 2001 indicating decline in real terms;
(v) in Gujarat 3.28 million draft animal (bullocks 85%) have multifaceted utilities viz. agricultural operations like ploughing, sowing, hoeing, planking, carting, hauling, water lifting, grinding, etc.; Gujarat State has a very rich cattle population of Kankrej & Gir breed, of which Kankrej bullocks are very well known for its draft power called "Savai Chal";
(vi) considering the utility of aged bullocks above 16 years as draft power a detailed combined study was carried out by Department of Animal Husbandry and Gujarat Agricultural University (Veterinary Colleges S.K. Nagar & Anand). The experiments were carried out within the age group of 16 to 25 years. The study covered different age groups of 156 (78 pairs) bullocks above the age of 16 years. The aged bullocks i.e. above 16 years age generated 0.68 horse power draft output per bullock while the prime bullock generated 0.83 horse power per bullock during carting/hauling draft work in a summer with about more than 42?C temp. The study proves that 93% of aged bullock above 16 years of age are still useful to farmers to perform light & medium draft works. The detailed report is on record;
(vii) by the end of year 2004-05 under the Dept. of Animal Husbandry, there are 14 Veterinary Polyclinics, 515 Vety. Dispensaries, 552 First Aid Vety. Centres and 795 Intensive Cattle Development Project Sub Centers. In all, 1876 institutions were made functional to cater various health care activities to livestock population of State of Gujarat. About two crores of livestock and poultry were vaccinated against various diseases. As a result, the total reported out break of infectious diseases was brought down to around 106 as against 222 in 1992-1993. This shows that State has created a healthy livestock and specifically the longevity of animals has been increased. This has also resulted into the increased milk production of the state, draft power and source of non-conventional energy in terms of increased quantity of dung and urine; (viii) the value of dung is much more than even the famous "Kohinoor" diamond. An old bullock gives 5 tonnes of dung and 343 pounds of urine in a year which can help in the manufacture of 20 carts load of composed manure. This would be sufficient for manure need of 4 acres of land for crop production. The right to life is a

fundamental right and it can be basically protected only with proper food and feeding and cheap and nutritious food grains required for feeding can be grown with the help of dung. Thus the most fundamental thing to the fundamental right of living for the human being is bovine dung. (Ref. Report of National Commission on Cattle, Vol.III, Page 1063-1064);
(ix) the dung cake as well as meat of bullock are both commercial commodities. If one bullock is slaughtered for its meat (Slaughtering activity) can sustain the butchers trade for only a day. For the next day's trade another bullock is to be slaughtered. But if the bullock is not slaughtered, about 5000-6000 dung cakes can be made out of its dung per year, and by the sale of such dung cake one person can be sustained for the whole year. If a bullock survives even for five years after becoming otherwise useless it can provide employment to a person for five years whereas to a butcher, bullock can provide employment only for a day or two.
(x) Even utility of urine has a great role in the field of pharmaceuticals as well as in the manufacturing of pesticides. The Goseva Ayog, Govt. of Gujarat had commissioned study for "Testing insecticides properties of cow urine against various insect pests". The study was carried out by Dr. G.M. Patel, Principal Investigator, Department of Entomology, C.P. College of Agriculture, S.D. Agricultural University, Sardar Krishi Nagar, Gujarat. The study has established that insecticides formulations prepared using cow urine emerged as the most reliable treatment for their effectiveness against sucking pest of cotton. The conclusion of study is dung & urine of even aged bullocks are also useful and have proved major effect of role in the Indian economy;
(xi) it is stated that availability of fodder is not a problem in the State or anywhere. During drought period deficit is compensated by grass-bank, silo and purchase of fodder from other States as last resources. The sugarcane tops, leaves of banana, baggase, wheat bhoosa and industrial byproducts etc. are available in plenty.

No response has been filed by any of the respondents controverting the facts stated in the affidavit and the accompanying report. We have no reason to doubt the correctness of the facts stated therein; more so, when it is supported by the affidavit of a responsible officer of the State Government.

Tenth Five Year Plan (2002-2007) Documents In the report of the Working Group on Animal Husbandry and Dairy Farming, the Tenth Five Year Plan (2002-2007) dealing with 'the draught breed relevance and improvement', published by the Government of India, Planning Commission in January, 2001, facts are stated in great detail pointing out the relevance of draught breeds and setting out options for improvement from the point of view of the Indian Economy. We extract and reproduce a few of the facts therefrom: "Relevance of draught breeds and options for improvement. In India 83.4 million holdings (78%) are less than 2 ha. where tractors and tillers are uneconomical and the use of animal power becomes inevitable since tractors and tillers are viable only for holdings above 5 ha.. In slushy and water logged fields tractor tiller is not suitable. In narrow terraced fields and hilly regions tractors cannot function. Animal drawn vehicle are suitable for rural areas under certain circumstances/conditions viz., uneven terrain, small loads (less than 3 tons), short distances and where time of loading and unloading is more than travel time or time is not a critical factor and number of collection points/distribution points are large as in case of milk, vegetable, water, oil, etc. In India the energy for ploughing two-thirds of the cultivated area comes from animal power and animal drawn vehicles haul two-thirds of rural transport. The role of cattle as the main source of motive power for agriculture and certain allied operations would continue to remain as important as meeting the requirement of milk in the country. It has been estimated that about 80 million bullocks will be needed. There is, therefore, a need for improving the working efficiency of the bullocks through improved breeding and feeding practices. Development of Draught Breeds Focused attention to draft breed will not be possible unless a new scheme is formulated for this purpose. In tracts where there are specialized draught breeds of cattle like Nagori in Rajasthan, Amritmahal and Hallikar in Karnataka, Khillar in Maharashtra etc., selection for improvement in draughtability should be undertaken on a large scale as the cattle breeders in these areas derive a large income by sale of good quality bullocks. Planned efforts should be made for improving the draught capacity and promoting greater uniformity in the type of the cattle population in the breeding tracts. There is need to intensify investigations to develop yardsticks for objective assessment of draught capacity of bullocks. Supplementation of fund-flow for cattle and Buffalo development. A number of organizations like NABARD, NDDB, NCDC etc. are also likely to be interested in funding activities relating to cattle and buffalo development in the form of term as loan provided timely return is ensured. Time has now come for exploring such avenues seriously at least on pilot basis in selected areas, where better prospects of recovery of cost of breeding inputs and services exists." Recognising the fact that the cow and its progeny has a significant role to play in the agricultural and rural economy of the country, the Government felt that it was necessary to formulate measures for their development in all possible ways. In view of the persistent demands for action to be taken to prevent their slaughter, the Government also felt and expressed the need to review the relevant laws of the land relating to protection, preservation, development and well-being of cattle and to take measures to secure the cattle wealth of India. Yet another document to which we are inclined to make a reference is Mid-Term Appraisal of 10th Five Year Plan (2002- 2007) released in June, 2005 by the Government of India (Planning Commission). Vide para 5.80 the report recommends that efforts should be made to increase the growth of bio- pesticides production from 2.5 to 5 per cent over the next five years. According to the report, Organic farming is a way of farming which excludes the use of chemical fertilizers, insecticides, etc. and is primarily based on the principles of use of natural organic inputs and biological plant protection measures. Properly managed organic farming reduces or eliminates water pollution and helps conserve water and soil on the farm and thereby enhances sustainability and agro-biodiversity. Organic farming has become popular in many western countries. There are two major driving forces behind this phenomenon; growing global market for organic agricultural produce due to increased health consciousness; and the premium price of organic produce fetched by the producers. India has a comparative advantage over many other countries. The Appraisal Report acknowledged the commencement of the biogas programme in India since 1981-82. Some 35,24,000 household plants have been installed against an assessed potential of

120,00,000 units. Biogas has traditionally been produced in India from cow dung (gobar gas). However, dung is not adequately and equitably available in villages. Technologies have now been developed for using tree-based organic substrates such as leaf litter, seed starch, seed cakes, vegetable wastes, kitchen wastes etc. for production of biogas. Besides cooking, biogas can also be used to produce electricity in dual fired diesel engines or in hundred per cent gas engines. Ministry of Non-conventional Energy Sources (MNES) is taking initiatives to integrate biogas programme in its Village Energy Security Program (VESP). Production of pesticides and biogas depend on the availability of cow-dung.

NATIONAL COMMISSION ON CATTLE

National Commission on Cattle Vide its Resolution dated 2nd August, 2001, the Government of India established a National Commission on Cattle, comprising of 17 members. The Commission was given the follow terms of reference:- a. To review the relevant laws of the land(Centre as well as States) which relate to protection, preservation, development and well being of cow and its progeny and suggest measures for their effective implementation, b. To study the existing provisions for the maintenance of Goshalas, Gosadans, Pinjarapoles and other organisations working for protection and development of cattle and suggest measures for making them economically viable, c. To study the contribution of cattle towards the Indian economy and to suggest ways and means of organising scientific research for maximum utilisation of cattle products and draught animal power in the field of nutrition and health, agriculture and energy, and to submit a comprehensive scheme in this regard to the Central Government, d. To review and suggest measures to improve the availability of feed and fodder to support the cattle population. The Committee after extensive research has given a list of recommendations. A few of them relevant in the present case are:- " 1.The Prohibition for slaughter of cow and its progeny, which would include bull, bullocks, etc., should be included in Fundamental Rights or as a Constitutional Mandate anywhere else, as an Article of Constitution. It should not be kept only in the Directive Principles or/Fundamental duties as neither of these are enforceable by the courts. 2. The amendment of the Constitution should also be made for empowering the Parliament to make a Central Law for the prohibition of slaughter of cow and its progeny and further for prohibition of their transport from one State to another. 3. The Parliament should then make a Central law, applicable to all States, prohibiting slaughter of cow and its progeny. Violation of the Law should be made a non-bailable and cognizable offence. xxx xxx xxx 14. The use and production of chemical fertilizers and chemical pesticides should be discouraged, subsidies on these items should be reduced or abolished altogether. The use of organic manure should be subsidized and promoted."

The Report of the National Commission on Cattle has analyzed the economic viability of cows after they stopped yielding milk and it also came to the conclusion that it shall not be correct to call such cows 'useless cattle' as they still continue to have a great deal of utility. Similar is the case with other cattle as well.

"Economic aspects: The cows are slaughtered in India because the owner of the cow finds it difficult to maintain her after she stops yielding milk. This is because it is generally believed that milk is the only commodity obtained from cows, which is useful and can be sold in exchange of cash. This notion is totally wrong. Cow yields products other than milk, which are valuable and saleable. Thus the dung as well as the urine of cow can be put to use by owner himself or sold to persons or organizations to process them. The Commission noticed that there are a good number of organizations (goshalas) which keep the cows rescued while being carried to slaughter houses. Very few of such cows are milk yielding. Such organizations use the urine and dung produced by these cows to prepare Vermi-compost or any other form of bio manure and urine for preparing pest repellents. The money collected by the sale of such products is normally sufficient to allow maintenance of the cows. In some cases, the urine and dung is used to prepare the medical formulations also. The organizations, which are engaged in such activities, are making profits also.

Commission examined the balance sheet of some such organizations. The expenditure and income of one such organization is displayed here. In order to make accounts simple the amounts are calculated as average per cow per day. It is obvious that expenditure per cow is Rs. 15-25 cow/day. While the income from sale is Rs. 25-35 cow-day. These averages make it clear that the belief that cows which do not yield milk are unprofitable and burden for the owner is totally false. In fact it can be said that products of cow are sufficient to maintain them even without milk. The milk in such cases is only a by product. It is obvious that all cow owners do not engage in productions of fertilizers or insect repellents. It can also be understood that such activity may not be feasible for owners of a single or a few cows. In such cases, the cow's urine and dung may be supplied to such organizations, which utilize these materials for producing finished products required for agricultural or medicinal purpose. Commission has noticed that some organizations which are engaged in production of agricultural and medical products from cow dung and urine do purchase raw materials from nearby cow owner at a price which is sufficient to maintain the cow."

Stare decisis is a Latin phrase which means "to stand by decided cases; to uphold precedents; to maintain former adjudication". This principle is expressed in the maxim "stare decisis et non quieta movere" which means to stand by decisions and not to disturb what is settled. This was aptly put by Lord Coke in his classic English version as "Those things which have been so often adjudged ought to rest in peace". However, according to Justice Frankfurter, the doctrine of stare decisis is not "an imprisonment of reason" (Advanced Law Lexicon, P. Ramanatha Aiyer, 3rd Edition 2005, Volume 4, p. 4456).

The underlying logic of the doctrine is to maintain consistency and avoid uncertainty. The guiding philosophy is that a view which has held the field for a long time should not be disturbed only because another view is possible. The trend of judicial opinion, in our view, is that stare decisis is not a dogmatic rule allergic to logic and reason; it is a flexible principle of law operating in the province of precedents providing room to collaborate with the demands of changing times dictated by social needs, State policy and judicial conscience. According to Professor Lloyd concepts are good servants but bad masters. Rules, which are originally designed to fit social needs, develop into concepts, which then proceed to take on a life of their own to the detriment of legal development. The resulting "jurisprudence of concepts" produces a slot-machine approach to law whereby new points posing questions of social policy are decided, not by reference to the underlying social situation, but by reference to the meaning and definition of the legal concepts involved. This formalistic a priori approach confines the law in a strait-jacket instead of permitting it to expand to meet the new needs and requirements of changing society (Salmond on Jurisprudence, Twelfth Edition, at p.187).

In such cases Courts should examine not only the existing laws and legal concepts, but also the broader underlying issues of policy. In fact presently, judges are seen to be paying increasing attention to the possible effects of their decision one way or the other. Such an approach is to be welcomed, but it also warrants two comments. First, judicial inquiry into the general effects of a proposed decision tends itself to be of a fairly speculative nature. Secondly, too much regard for policy and too little for legal consistency may result in a confusing and illogical complex of contrary decisions. In such a situation it would be difficult to identify and respond to generalized and determinable social needs. While it is true that "the life of the law has not been logic, it has been experience" and that we should not wish it otherwise, nevertheless we should remember that "no system of law can be workable if it has not got logic at the root of it" (Salmond, ibid, pp.187-188).

Consequently, cases involving novel points of law, have to be decided by reference to several factors. The judge must look at existing laws, the practical social results of any decision he makes, and the requirements of fairness and justice. Sometimes these will all point to the same conclusion. At other times each will pull in a different direction; and here the judge is required to weigh one factor against another and decide between them. The rationality of the judicial process in such cases consists of explicitly and consciously weighing the pros and cons in order to arrive at a conclusion. (Salmond, ibid, pp. 188).

In case of modern economic issues which are posed for resolution in advancing society or developing country, the court cannot afford to be static by simplistically taking shelter behind principles such as stare decisis, and refuse to examine the issues in the light of present facts and circumstances and thereby adopt the course of judicial "hands off". Novelty unsettles existing attitudes and arrangements leading to conflict situations which require judicial resolution. If necessary adjustments in social controls are not put in place then it could result in the collapse of social systems. Such novelty and consequent conflict resolution and "patterning" is necessary for full human development. (See - The Province and Function of Law, Julius Stone, at pp.588, 761and 762)

Stare decisis is not an inexorable command of the Constitution or jurisprudence. A careful study of our legal system will discern that any deviation from the straight path of stare decisis in our past history has occurred for articulable reasons, and only when the Supreme Court has felt obliged to bring its opinions in line with new ascertained fact, circumstances and experiences. (Precedent in Indian Law, A. Laxminath, Second Edition 2005, p. 8).

"It is revolting", wrote Mr. Justice Holmes in characteristically forthright language, "to have no better reason for a rule of law than it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past". It is the readiness of the judges to discard that which does not serve the public, which has contributed to the growth and development of law. The doctrine of stare decisis is generally to be adhered to, because well settled principles of law founded on a series of authoritative pronouncements ought to be followed. Yet, the demands of the changed facts and circumstances dictated by forceful factors supported by logic, amply justify the need for a fresh look.

QURESHI-I CASE : Para-phrased, the findings are as follows:

(1) The country is in short supply of milch cattle, breeding bulls and working bullocks, essential to maintain the health and nourishment of the nation. The cattle population fit for breeding and work must be properly fed by making available to the useful cattle in presenti in futuro. The maintenance of useless cattle involves a wasteful drain on the nation's cattle feed.
(2) Total ban on the slaughter of cattle would bring a serious dislocation, though not a complete stoppage, of the business of a considerable section of the people who are by occupation Butchers (Kasai), hide merchant and so on.
(3) Such a ban will deprive a large section of the people of what may be their staple food or protein diet.
(4) Preservation of useful cattle by establishment of gosadan is not a practical proposition, as they are like concentration camps where cattle are left to die a slow death.
(5) The breeding bulls and working bullocks (cattle and buffaloes) do not require as much protection as cows and calves do.

These findings were recorded in the judgment delivered on 23rd April, 1958. Independent India, having got rid of the shackles of foreign rule, was not even 11 years old then. Since then, the Indian economy has made

much headway and gained a foothold internationally. Constitutional jurisprudence has indeed changed from what it was in 1958, as pointed out earlier. Our socio-economic scenario has progressed from being gloomy to a shining one, full of hopes and expectations and determinations for present and future. Our economy is steadily moving towards prosperity in a planned way through five year plans, nine of which have been accomplished and tenth is under way.

The finding suffers from two infirmities.

First, Quareshi-I has not felt the necessity of finding whether a 'total prohibition' is also included within 'restriction' as employed in Article 19(6). It is now well-settled that 'restriction' includes 'prohibition'. Second and the real fallacy in Quareshi-I is that the ban limited to slaughtering of cow progeny has been held at one place to be a 'total prohibition', while in our opinion, is not so. At another place, the effect of ban has been described as causing 'a serious dislocation, though not a complete stoppage of the business of a considerable section of the people'. If that is so, it is not a 'total prohibition'. The documentary evidence available on record shows that beef contributes only 1.3% of the total meat consumption pattern of the Indian society. Butchers are not prohibited from slaughtering animals other than the cattle belonging to cow progeny. Consequently, only a part of their activity has been prohibited. They can continue with their activity of slaughtering other animals. Even if it results in slight inconvenience, it is liable to be ignored if the prohibition is found to be in the interest of economy and social needs of the country.

In the first and second Five Year Plans (Quareshi-I era), there was scarcity of food which reflected India's panic. The concept of food security has since then undergone considerable change. 47 years since, it is futile to think that meat originating from cow progeny can be the only staple food or protein diet for the poor population of the country. 'India Vision 2020' (ibid, Chapter 3) deals with 'Food Security and Nutrition : Vision 2020'. We cull out a few relevant findings and observations therefrom and set out in brief in the succeeding paragraphs. Food availability and stability were considered good measures of food security till the Seventies and the achievement of self-sufficiency was accorded high priority in the food policies. Though India was successful in achieving self-sufficiency by increasing its food production, it could not solve the problem of chronic household food insecurity. This necessitated a change in approach and as a result food energy intake at household level is now given prominence in assessing food security. India is one of the few countries which have experimented with a broad spectrum of programmes for improving food security. It has already made substantial progress in terms of overcoming transient food insecurity by giving priority to self-sufficiency in foodgrains, employment programmes, etc. The real problem, facing India, is not the availability of food, staple food and protein rich diet; the real problem is its unequal distribution. The real challenge comes from the slow growth of purchasing power of the people and lack of adequate employment opportunities. Another reason for lack of food and nutrient intake through cereal consumption is attributable to changes in consumer tastes and preferences towards superior food items as the incomes of the household increases. Empirical evidence tends to suggest a positive association between the calorie intake and nutritional status. The responsiveness is likely to be affected by the factors relating to health and environment. It is unclear as to how much of the malnutrition is due to an inadequate diet and how much due to the environment. India achieved near self-sufficiency in the availability of foodgrains by the mid-Seventies. The trend rate of foodgrain production improved 2.3 per cent during the 1960s and 1970s to 2.9 per cent in the Eighties. The recent economic survey of 2005 has also pointed out that the per capita availability of the milk has doubled since independence from 124 gms/day in the year 1950-51 to 229 gms/day in the year 2001-02. (Report of National Commission on Cattle. Vol. II, p. 84.)

A complete reading of the research paper on Food Security and Nutrition (Chapter 3 in India Vision 2020) is a clear pointer to the fact that desirable diet and nutrition are not necessarily associated with non-vegetarian diet and that too originating from slaughtering cow progeny. Beef contributes only 1.3% of the total meat consumption pattern of the Indian society. Consequently a prohibition on the slaughter of cattle would not substantially affect the food consumption of the people.

"Even though the question of desirable diet from nutritional perspective is still controversial, we can make certain policy options to overcome the nutritional deficiencies. The most important problem to be attended is to increase the energy intake of the bottom 30 per cent of the expenditure class. The deficiency of energy intake of the bottom 30 per cent can be rectified by increasing agricultural productivity in rain fed areas, making available food at an affordable price through the Public distribution system (PDS), and other poverty alleviation programmes. The micro-nutrient deficiency can be cost- effectively rectified by supplementary nutritional programmes to the children and the expectant and lactating mothers."

The main source of staple food which is consumed both by vegetarians and non-vegetarians is supplied by vegetables. Synthetic staple food has also been made available by scientific researches. It will, therefore, not be correct to say that poor will suffer in availing staple food and nutritional diet only because slaughter of cow progeny was prohibited.

Quareshi-I itself reveals a very general opinion formed by the Court as to the failure of gosadans and their inability to preserve cattle. The statistics made available before us are a positive indicator to the contrary that gosadans and goshalas are being maintained and encouraged so as to take up both useful and so-called useless cattle, if the owner is not willing to continue to maintain them. Quareshi-I relied on a Report of an Expert Committee, which has certainly become an outdated document by the lapse of 47 years since then. Moreover, independent of all the evidence, we have in this judgment already noticed that cattle belonging to

the category of cow progeny would not be rendered without shelter and feed by the owner to whom it had served throughout its life. We find support from the affidavits and reports filed on behalf of the State of Gujarat which state inter alia "farmers love their cattle". National Commission on Cattle in its Report (ibid) has incorporated as many as 17 recommendations for strengthening of goshalas (para 20 at pages 120-122) We have already noticed in the affidavits filed on behalf of the State of Gujarat that, in the State of Gujarat adequate provisions have been made for the maintenance of gosadans and goshalas. Adequate fodder is available for the entire cattle population. The interest exhibited by the NGOs seeking intervention in the High Court and filing appeals in this Court also indicates that the NGOs will be willing to take up the task of caring for aged bulls and bullocks.

In Quareshi-I, vide para 42, the Constitution Bench chose to draw a distinction between breeding bulls and working bullocks, on the one hand and cows and calves, on the other hand, by holding that the farmers would not easily part with the breeding bulls and working bullocks to the butchers as they are useful to the farmers. It would suffice to observe that the protection is needed by the bulls and bullocks at a point of time when their utility has been reduced or has become nil as they near the end of their life. That is what Article 48, in fact, protects, as interpreted in this judgment. India, as a nation and its population, its economy and its prosperity as of today are not suffering the conditions as were prevalent in 50s and 60s. The country has achieved self- sufficiency in food production. Some of the states such as State of Gujarat have achieved self-sufficiency in cattle-feed and fodder as well. Amongst the people there is an increasing awareness of the need for protein rich food and nutrient diet. Plenty of such food is available from sources other than cow/cow progeny meat. Advancements in the field of Science, including Veterinary Science, have strengthened the health and longetivity of cattle (including cow progeny). But the country's economy continues to be based on agriculture. The majority of the agricultural holdings are small units. The country needs bulls and bullocks. For multiple reasons which we have stated in very many details of the judgment, we have found that bulls and bullocks do not become useless merely by crossing a particular age. The Statement of Objects and Reasons, apart from other evidence available, clearly conveys that cow and her progeny constitute the backbone of Indian agriculture and economy. The increasing adoption of non-conventional energy sources like Bio-gas plants justify the need for bulls and bullocks to live their full life in spite of their having ceased to be useful for the purpose of breeding and draught. This Statement of Objects and Reasons tilts the balance in favour of the constitutional validity of the impugned enactment. In Quareshi-I the Constitution Bench chose to bear it in mind, while upholding the constitutionality of the legislations impugned therein, insofar as the challenge by reference to Article 14 was concerned, that "the legislature correctly appreciates the needs of its own people". Times have changed; so have changed the social and economic needs. The Legislature has correctly appreciated the needs of its own people and recorded the same in the Preamble of the impugned enactment and the Statement of Objects and Reasons appended to it. In the light of the material available in abundance before us, there is no escape from the conclusion that the protection conferred by impugned enactment on cow progeny is needed in the interest of Nation's economy. Merely because it may cause 'inconvenience' or some 'dislocation' to the butchers, restriction imposed by the impugned enactment does not cease to be in the interest of the general public. The former must yield to the latter.

According to Shri M.S. Swaminathan, the eminent Farm Scientist, neglect of the farm sector would hit our economy hard. According to him "Today, global agriculture is witnessing two opposite trends. In many South Asian countries, farm size is becoming smaller and smaller and farmers suffer serious handicaps with reference to the cost-risk-return structure of agriculture. In contrast, the average farm size in most industrialized countries is over several hundred hectares and farmers are supported by heavy inputs of technology, capital and subsidy. The on-going Doha round of negotiations of the World Trade Organisation in the field of agriculture reflects the polarization that has taken place in the basic agrarian structure of industrialized and developing countries. Farming as a way of life is disappearing and is giving way to agribusiness."

"In India, nearly 600 million individuals are engaged in farming and over 80 per cent of them belong to the small and marginal farmer categories. Due to imperfect adaptation to local environments, insufficient provision of nutrients and water, and incomplete control of pests, diseases and weeds, the present average yields of major farming systems in India is just 40 per cent of what can be achieved even with the technologies currently on the shelf. There is considerable scope for further investment in land improvement through drainage, terracing, and control of acidification, in areas where these have not already been introduced."

The impugned judgment of the High Court is set aside. The Bombay Animal Preservation (Gujarat Amendment) Act, 1994 (Gujarat Act No. 4 of 1994) is held to be intra vires the Constitution. All the writ petitions filed in the High Court are directed to be dismissed.

Per A.K. Mathur, J. (Dissenting):

Despite the changing pattern of life it cannot be said that the decision delivered in the case of Mohd. Qureshi (Qureshi-I)* followed by subsequent decisions have outlived its ratio. The material which has been placed for taking a contrary view does not justify the reversal of earlier decisions. The situation which existed right from 1958 till this date there is no material change warranting reversal of the judgments bearing on the subject from 1958-96. ***Mohd. Hanif Qureshi's and Ors. v. State of Bihar and Ors., AIR (1958) SC 731;**

The datas produced by the appellant cannot change the reality that such an aged bull and bullocks produce huge quantity of the cow dung manure and urine which can alter a situation materially so as to reverse the earlier decisions of this court. Utility of the cow dung and urine was realized and appreciated in the earlier decision of this Court in Qureshi-I. Therefore, it cannot be said that the earlier decisions rendered by the Constitution Bench was oblivious of these facts. It is explicit from the affidavits filed in the case that the age of 16 years prescribed earlier was on a very reasonable basis after proper scientific study but de hors those scientific study the State Government brought this amendment removing the age limit for slaughtering of the bulls and bullocks and totally prohibited slaughtering of the same. This decision of the State Government does not advance the public interest.

Another significant disclosure in the affidavits on record is that slaughtering of bulls and bullocks has considerably reduced and it constitutes only 1.10% of the total slaughtering that takes place in the State. This legislation does not advance the cause of the public at the expense of the denial of Fundamental Right of butchers. On the basis of the material on record, the earlier decisions of this Court have not become irrelevant in the present context.

Therefore, in the background of the scenario, it will not be proper to reverse the view which has been held good for a long spell of time from 1958 to 1996. There is no material change in ground realities warranting reversal of earlier decisions.

It is true that Article 48A of the Constitution which was introduced by the 42nd Constitutional Amendment in 1976 with effect from 3.1.1977 and Article 51A i.e. fundamental duties, which was also brought about by the same amendment, were not in existence earlier but the effect of those Articles was indirectly considered in the Mohd. Hanif Qureshi's case in 1958. Therefore, it cannot be said that the Judges were not conscious about the usefulness and the sanctity with which the entire cow and its progeny has been held in our country. Though Article 48A and 51A were not there, but their Lordships were indirectly conscious of the implication. Articles 48(A) and 51(A) do not substantially change the ground realities which can persuade to change the views which have been held from 1958 to 1996.

It is true that law is a dynamic concept and it should change with the time. But at the same time it shall not be so fickle that it changes with change of guard. If the ground realities have not changed and it has not become irrelevant with the time then it should not be reviewed lightly. In the present case, the ground reality has not changed and the law laid down by this court holds good and relevant. Some advancement in technology and more and more use of the cow dung and urine is not such a substantial factor to change the ground realities so as to totally do away with the slaughtering of the aged bulls and bullocks.

The principle of stare decisis is based on a public policy. This policy is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e. that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law. If the courts start changing their views frequently then there will be a lack of certainty in the law and it is not good for the health of the nation.

The earlier decisions still hold good in the present context also. Therefore, there are no compelling reasons for reversal of the earlier decisions either on the basis of advancement of technology or reason, or logic, or economic consideration. Therefore, there is no need to reverse the earlier decisions. The view taken by the Division Bench of the Gujarat High Court is correct and there is no justification for reversing the view taken by the earlier Constitution Bench decision of this Court.

In Mohd. Hanif Qureshi's case this Court upheld a total prohibition of slaughter of the cows of all ages and calf of buffalows (male and female) & she-buffaloes, breeding bulls and working bullocks, without prescribing any test of requirement as to their age. But so far as bull & bullocks are concerned when they ceased to have draughtability prohibition of their slaughter was not upheld in public interest. Hon'ble S.R. Das, CJ speaking for the Court exhaustively dealt with all the aspects which practically covers all the arguments which have been raised before us, especially, the utility of the cow-dung for manure as well as the cow urine for its chemical qualities like Nitrogen Phosphates and Potash. His Lordship recognized that this enactment was made in discharge of State's obligation under Art. 48 of the Constitution to preserve our livestock. His Lordship has discussed the question of reasonable restriction under Article 19 (6) and after considering all material placed before the Court, and adverting to social, religious, utility point of view in most exhaustive manner finally concluded thus : "After giving our most careful and anxious consideration to the pros and cons of the problem as indicated and discussed above and keeping in view the presumption in favour of the validity of the legislation and without any the least disrespect to the opinions of the legislatures concerned we feel that in discharging the ultimate responsibility cast on us by the Constitution we must approach and analyze the problem in an objective and realistic manner and then make our pronouncement on the reasonableness of the restrictions imposed by the impugned enactments. So approaching and analyzing the problem, we have reached the conclusion (i) that a total ban on the slaughter of cows of all ages and calves of cows and calves of she-buffaloes, male and female, is quite reasonable and valid and is in consonance with the directive principles laid down in Art. 48; (ii) that a total ban on the slaughter of she-buffaloes, or breeding bulls or working bullocks (cattle as well as buffaloes) as long as they are as milch or draught cattle is also reasonable and valid and (iii) that a total ban on the slaughter of she-buffaloes, bulls and bullocks (cattle or buffalo) after they cease to be capable of yielding milk or of breeding or working as draught animals cannot be supported as reasonable in the interest of the general public." Therefore, their Lordships have summarized the whole concept of preservation of the cattle life in India with reservation that those cattle head which have

lost their utility can be slaughtered specially with regard to draught cattle, bulls, bullocks & buffaloes so as to preserve the other milching cattle for their better breed and their better produce.

Subsequently in another decision, in the case of Abdul Hakim vs. State of Bihar reported in AIR 1961 SC 448 the ban was imposed by the States of Bihar, Madhya Pradesh and U.P. which came up for consideration before this Court and in this context it was observed as under: "The test of reasonableness should be applied to each individual statute impugned and no abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict." Their Lordship also emphasized that the legislature is the best Judge of what is good for the community, by whose suffrage it comes into existence, the ultimate responsibility for determining the validity of the law must rest with the Court and the Court must not shirk that solemn duty cast on it by the Constitution. It was observed that the unanimous opinion of the experts is that after the age of 15, bulls, bullocks and buffaloes are no longer useful for breeding, draught and other purpose and whatever little use they may have then is greatly off-set by the economic disadvantage of feeding and maintaining unserviceable cattle. Section 3 of the Bihar Act in so far as it has increased the age limit to 25 in respect of bulls, bullocks and she-buffaloes, for the purpose of their slaughter imposes an unreasonable restriction on the fundamental right of the butchers to carry on their trade and profession. Moreover the restriction cannot be said to be in the interests of the general public, and to that extent it is void.

Then again in the case of Mohd. Faruk vs. State of Madhya Pradesh and Ors. reported in 1969 (1) SCC 853, Constitution Bench was called upon to decide the validity of the notification issued by the Madhya Pradesh Government under Municipal Corporation Act. Earlier, a notification was issued by the Jabalpur Municipality permitting the slaughter of bulls and bullocks alongwith the other animals. Later on State Government issued notification cancelling the notification permitting the slaughter of bulls and bullocks. This came up for a challenge directly under Art. 32 of the constitution before this Court, that this restriction amounts to breach of Art. 19(1)(g) of the constitution. In that context, their Lordship observed: "That the sentiments of a section of the people may be hurt by permitting slaughter of bulls and bullocks in premises maintained by a local authority. But a prohibition imposed on the exercise of a fundamental right to carry on an occupation, trade or business will not be regarded as reasonable if it is imposed not in the interest of the general public but merely to respect the susceptibilities and sentiments of a section of the people whose way of life belief or thought is not the same as that of the claimant. The notification issued must, therefore, be declared ultra virus as infringing Article 19(1)(g) of the Constitution."

Then again in the case of Haji Usmanbhai Hasanbhai Qureshi & Ors. vs. State of Gujarat reported in (1986) 3 SCC 12, the insertion of Section 5 (1-A) (c) and (d) was made under the Bombay Animal Preservation (Gujarat amendment) act 1979) came up for consideration. By virtue of this insertion by the Gujarat State, it was laid down that there will be ban of slaughter of bulls, bullocks below the age of 16 years. It was contented that this prohibition is unreasonable and violative of Art. 19(1)(g). Their Lordships upheld the restriction under Art. 19(6) with reference to Art. 48 of the constitution. Their Lordships upheld the contention of the State of Gujarat that with the improvement of scientific methods cattle up to the age of 16 years are used for the purpose of breeding and other agricultural operation. But by this Act of 1994 this age restriction has now been totally taken away by the Act of 1994 (which is subject matter of challenge in these petitions).

Then again the matter came up before this Court in the case of Hashmattullah vs. State of M.P. and Ors. reported in 1996 (4) SCC 391. This time the provisions of the M.P. Agricultural Cattle Preservation Act, 1959 came up for consideration. This Act was amended by Amending Act of 1991 and a total ban on slaughter of bulls and bullocks came to be imposed. And this was challenged being violative of Art. 19 (1)(g) of the constitution. Their Lordships after reviewing all earlier cases on the subject and taking into consideration the uselessness of these bulls and bullocks after they have attained a particular age for agriculture operation like manure as well as bio-gas and ecology, observed in para 18 as under: "We are pained to notice the successive attempts made by the State of Madhya Pradesh to nullify the effect of this Court's decisions beginning with Mohd. Hanif's case and ending with Mohd. Faruk's case, each time on flimsy grounds. In this last such attempt, the objects and reasons show how insignificant and unsupportable the ground for bringing the legislation was. The main thrust of the objects and reasons for the legislation seems to be that even animals which have ceased to be capable of yielding milk or breeding or working as draught animals can be useful as they would produce dung which could be used to generate non-conventional sources of energy like bio-gas without so much as being aware of the cost of maintaining such animals for the mere purpose of dung. Even the supportive articles relied upon do not bear on this point. It is obvious that successive attempts are being made in the hope that some day it will succeed as indeed it did with the High Court which got carried away by research papers published only two or three years before without realizing that they dealt with the aspect of utility of dung but had nothing to do with the question of the utility of animals which have ceased to be reproductive of capable of being used as draught animals. Besides, they do not even reflect on the economical aspect of; maintaining such animals for the sole purpose of dung. Prim facie it seems farfetched and yet the State Government thought it as sufficient to amend the law."

Mr. J.S.Parikh, Deputy Secretary, Agricultural Cooperative and Rural Development Department of the State of Gujarat has in his affidavit stated that almost in 50% of the agricultural operation by tractor is not

possible because of small holdings in the State of Gujarat. Therefore, for such small holdings the draught animals are best used for cultivation purposes. It was also stated that the total cultivated area of Gujarat State is about 124 lakh hectares and a pair of bullocks is required for ploughing 10 hectares of land. Therefore, 5.481million and approximately equal number is required for carting of whole land. In accordance with livestock census, the Gujarat State has availability of indigenous bullocks around 2.84 millions that means that a State has only 25% of their requirement and it is also stated that each bull is required for this purpose. He has also stated that bull or bullocks at every stage of life supplies 3500 kg. of dung and 2000 ltrs. of urine and this quantity of dung can supply 5000 cubic feet of biogas, 80 M.T. of organic fertilizer and the urine can supply 2000 ltrs of pesticides and the use of it in farming increases the yield very substantially. That in recent advancement of technology use of biogas has become very useful source of energy and the biogas can be prepared out of the cow dung and other inputs. It was pointed out that there are 19362 biogas plants installed in the State during 1995-97. Similarly, an additional affidavit was filed by Mr. D.P. Amin, Joint Director of Animal Husbandry, Gujarat State. He has mentioned that the number of the slaughter houses have declined during the year 1982-83 to 1996-97. The average number of animals slaughtered in regulated slaughter houses was 4,39,141. It is also stated that there is a reduction in slaughter of the bull and bullocks above the age of 16 years. Almost 50 per cent of the land holdings are less than 2 hectares; tractor operation is not affordable to small farmers. For tractors operation one should have large holding of land. Such land holders are only around 10 per cent of the total land holders. Hence the farmers with small land holdings require bullocks for their agricultural operations and transport. There is reduction in slaughter of bulls and bullocks above the age of 16 years reported in the regulated slaughter houses of Gujarat State. As reported in the years from 1982-83 to 1996-97, the slaughter of bulls and bullocks above the age of 16 years was only 2.48% of the total animals of different categories slaughtered in the State. This percentage has gone down to the level of only 1.10% during last 8 years i.e. 1997-98 to 2004-05 which is very less significant to cause or affect the business of butcher communities. He has also stated that the bullock above the age of 16 years can generate 0.68 horse power draught output while the prime bullock generates 0.83 horse power per bullock during carting/hauling draught work. Considering the utility of bullocks above 16 years of age as draught power a detailed combined study was carried out by Department of Animal Husbandry and Gujarat Agricultural University (Veterinary Colleges S.K. Nagar & Anand). The study covered different age groups of 156 (78 pairs) bullocks above the age of 16 years age generated 0.68 horse power draught output per bullock while the prime bullock generated 0.83 horse power per bullock during carting/hauling draught work in a summer with about more than 42: F temp. The study proves that 93% of aged bullock above 16 years of age are still useful to farmers to perform light and medium draught works. The importance of organic manure as a source of humus and plant nutrients to increase the fertility level of soils has been well recognized. The organic matter content of cultivated soils of the tropics and sub-tropics is comparatively low due to high temperature and intense microbial activity. The crops remove annually large quantity of plant nutrients from soil. Moreover, Indian soils are poor in organic matter and in major plant nutrients. Therefore, soil humus has to be replenished through periodic addition of organic manure for maintaining soil productivity. It was mentioned that there is number of bio-gas plants operating in the State of Gujarat.

Apart from these affidavits many more published documents have been placed on record which has been reproduced by the Hon'ble Chief Justice of India in his opinion. But all these are general datas which only provide the usefulness of cow dung for the purposes of manure as well as for biogas and likewise the urine of the cows for pesticides and ayurvedic purposes. But all those datas cannot change the reality that such an aged bull and bullocks produce huge quantity of the cow dung manure and urine which can alter a situation materially so as to reverse the earlier decisions of this court. Utility of the cow dung and urine was realized and appreciated in the earlier decision of this Court in Mohd. Hanif Qureshi's and Ors. vs State of Bihar and Ors. (AIR 1958 SC 731) The then Chief Justice has quoted from various scriptures emphasizing the importance of the cattle life. Therefore it cannot be said that the earlier decisions rendered by the Constitution Bench was oblivious of these facts. However, so far as the affidavits filed on behalf of State of Gujarat about the use of biogas and the usefulness of the draught animals has to be taken with pinch of salt, in both the affidavits it has been admitted that urine and the cow dung of the aged bull and bullocks beyond 16 years is reduced considerably and likewise their draughtability. Therefore, it is admitted that the bullocks which have crossed the age of 16 years their output for the urine, cow dung and draughtability is substantially reduced. Therefore it is explicit from their affidavits that the age of 16 years prescribed earlier was on a very reasonable basis after proper scientific study but de hors those scientific study the State Government brought this amendment removing the age limit for slaughtering of the bulls and bullocks and totally prohibited slaughtering of the same. This decision of the State Government does not advance the public interest. Another significant disclosure in both these affidavits is that slaughtering of these bulls and bullocks has considerably reduced in the year 1997-98 to 2004-2005. The slaughtering of bulls and bullocks beyond the age of 16 years was only 2.48 % of the total animals of different categories slain in the State prior to this period. This percentage has gone down to the level of only 1.10 % during the last 8 years i.e. 1997-98 to 2004-2005. These details reveal that in fact the slaughtering of these bulls and bullocks beyond the age of 16 years constituted only 1.10% of the total slaughtering takes place in the State. If this is the ratio of the slaughtering, I fail to understand how this legislation can advance the cause of the public at the expense of the denial of Fundamental Right of this class of persons (butchers). In view of facts disclosed in the affidavit filed by the two senior officer of the State of Gujarat speaks volume that for small percentage of 1.10% can the fundamental right of this class of persons should be sacrificed and earlier decisions be reversed. I fail to understand how it would advance the cause of the public at large so as to deprive the handful of persons of their rights to profession. On the basis of this material, I am of the opinion that the earlier decisions of this Court have not become irrelevant in the present context. The tall claim made by State looks attractive in a print but in reality it is not so.

I fail to understand that how can an animal whose average age is said to be 12-16 years can at the age of 16 years reproduce the cow-dung or urine which can off set the requirement of the chemical fertilizer. In this connection reference be made to text book where average age is 12 years. It is a common experience that the use of the chemical fertilizer has increased all over the country and the first priority of the farmer is the chemical fertilizer, as a result of which the production in food grain in the country has gone up and today the country has become surplus. This is because of the use of the chemical fertilizer only and not the organic manure. It was observed in Mohd. Hanif's case that India has a largest cattle head but a lower in the production of milk. It is only because of the scientific methods employed by veterinarian which has increased the milk production in the country not because of the poor breed of the bulls. It is common experience that aged bulls are not used for purposes of covering the cows for better quality of the breed. Only well-built young bulls are used for the purpose of improving the breeding and not the aged bulls. If the aged and weak bulls are allowed for mating purposes, the off- spring will be of poor health and that will not be in the interest of the country. So far as the use of biogas is concerned, that has also been substantially reduced after the advent of L.P.G. Therefore in my opinion, in the background of this scenario, I do not think that it will be proper to reverse the view which has been held good for a long spell of time from 1958 to 1996.

There is no material change in ground realities warranting reversal of earlier decisions. One of the other reasons which has been advanced for reversal of earlier judgments was that at the time when these earlier judgments were delivered Article 48(A) and 51(A) were not there and impact of both these Articles were not considered. It is true that Article 48(A) which was introduced by the 42nd Constitutional Amendment in 1976 with effect from 3.1.1977 and Article 51(A) i.e. fundamental duties were also brought about by the same amendment. Though, these Articles were not in existence at that time but the effect of those Articles were indirectly considered in the Mohd. Hanif Qureshi's case in 1958. It was mentioned that cow dung can be used for the purposes of manure as well as for the purpose of fuel that will be more echo-friendly. Similarly, in Mohd. Hanif Qureshi's case their Lordships have quoted from the scriptures to show that we should have a proper consideration for our cattle wealth and in that context their Lordships quoted in para 22 which reads as under:

"The avowed object of each of the impugned Acts is to ensure the preservation, protection, and improvement of the cow and her progeny. This solicitude arises out of the appreciation of the usefulness of cattle in a predominantly agricultural society. Early Aryans recognized its importance as one of the most indispensable adjuncts of agriculture. It would appear that in Vedic times animal flesh formed the staple food of the people. This is attributable to the fact that the climate in that distant past was extremely cold and the Vedic Aryans had been a pastoral people before they settled down as agriculturists. In Rg. Vedic times goats, sheep, cows, buffaloes and even horses were slaughtered for food and for religious sacrifice and their flesh used to be offered to the Gods. Agni is called the "eater of ox or cow"

Though the custom of slaughtering of cows and bulls prevailed during the vedic period, nevertheless, even in the Rg. Vedic times there seems to have grown up a revulsion of feeling against the custom. The cow gradually came to acquire a special sanctity and was called "Aghnya" (not to be slain). There was a school of thinkers amongst the Risis, who set their face against the custom of killing such useful animals as the cow and the bull. High praise was bestowed on the cow as will appear from the following verses from Rg.Veda, Book VI, Hymn XXVIII (Cows) attributed to the authorship of Sage Bhardavaja: "The kine have come and brought good fortune; let them rest in the cow-pen and be happy near us. Here let them stay prolific, many coloured, and yield through many morns their milk for Indra. O Cows, ye fatten e'n the worn and wasted, and make the unlovely beautiful to look on. Prosper my house, ye with auspicious voices, your power is glorified in our assemblies. Crop goodly pasturages and be prolific; drink pure sweet water at good drinking places. Never be thief or sinful man your master, and may the dart of Rudra still avoid you."

Verse 29 of hymn 1 in Book X of Atharva Veda forbids cow slaughter in the following words: "The slaughter of an innocent, O Kritya, is an awful deed, Slay not cow, horse, or man of ours." Hyman 10 in the same book is a rapturous glorification of the cow: "The cow is Heaven, the cow is Earth, the cow is Vishnu, Lord of life. The Sadhyas and the Vasus have drunk the outpourings of the cow. Both Gods and mortal men depend for life and being on the cow. She hath become this universe; all that the sun surveys is she.

"P.V. Kane argues that **in the times of the Rg.Veda** only barren cows, if at all, were killed for sacrifice or meat and cows yielding milk were held to be not fit for being killed. It is only in this way, according to him that one can explain and reconcile the apparent conflict between the custom of killing cows for food and the high praise bestowed on the cow in Rg.Vedic times. It would appear that the protest raised against the slaughter of cows greatly increased in volume till the custom was totally abolished in a later age. The change of climate perhaps also make the use of beef as food unnecessary and even injurious to health. Gradually cows became indicative of the wealth of the owner.

The Neolithic Aryans not having been acquainted with metals, there were no coins in current use in the earlier stages of their civilization, but as they were eminently a pastoral people almost every family possessed a sufficient number of cattle and some of them exchanged them for the necessaries of their life. The value of cattle (Pasu) was, therefore, very great with the early Rg.Vedic Aryans. The ancient Romans also used the word pecus or pecu (pasu) in the sense of wealth or money. The English words, "pecuniary" and "impecunious", are derived from the Latin root pecus or pecu, originally meaning cattle. The possession of

cattle in those days denoted wealth and a man was considered rich or poor according to the large or small number of cattle that he owned.

In the Ramayana king Janaka's wealth was described by reference to the large number of herds that he owned. It appears that the cow was gradually raised to the status of divinity. Kautilya's Arthasastra has a special chapter (Ch.XXIX) dealing with the "superintendent of cows" and the duties of the owner of cows are also referred to in Ch.XI of Hindu Law in its sources by Ganga Nath Jha. There can be no gainsaying the fact that the Hindus in general hold the cow in great reverence and the idea of the slaughter of cows for food is repugnant to their notions and this sentiment has in the past even led to communal riots. It is also a fact that after the recent partition of the country this agitation against the slaughter of cows has been further intensified. While we agree that the constitutional question before us cannot be decided on grounds of mere sentiment, however passionate it may be, we, nevertheless, think that it has to be taken into consideration, though only as one of many elements, in arriving at a judicial verdict as to the reasonableness of the restrictions." Therefore it cannot be said that the Judges were not conscious about the usefulness and the sanctity with which the entire cow and its progeny has been held in our country.

Reference was also made that for protection of top soil, the cow dung will be useful. No doubt the utility of the cow dung for protection of the top soil is necessary but one has to be pragmatic in its approach that whether the small yield of the cow dung and urine from aged bulls and bullocks can substantially change the top soil. In my opinion this argument was advanced only for the sake of argument but does not advance the case of the petitioners/appellants to reverse the decision of the earlier Benches which had stood the test of time. In this connection, it will be relevant to refer the principle of stare decisis. The expression of 'stare decisis' is a Latin phrase which means "to stand by decided cases; to uphold precedents; to maintain former adjudications". It is true that law is a dynamic concept and it should change with the time. But at the same time it shall not be so fickle that it changes with change of guard. If the ground realities have not changed and it has not become irrelevant with the time then it should not be reviewed lightly.

I have discussed above the reasons which have been given by the State of Gujarat for reconsideration of the earlier decisions on the subject, in my humble opinion the justification so pleaded is not sufficient to change or review the decision of the Constitution Bench by the present Bench of seven Judges. The principle of stare decisis is based on a public policy. This policy is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e. that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law. If the courts start changing their views frequently then there will be a lack of certainty in the law and it is not good for the health of the nation.

In N.K. Mohd. Sulaiman Sahib Vs. N.C. Mohd. Ismail Saheb and others [AIR 1966 SC 792], Supreme court in paragraph 14 observed as follows: - "Ordinarily the Court does not regard a decree binding upon a person who was not impleaded eo nomine in the action. But to that rule there are certain recognized exceptions. Where by the personal law governing the absent heir the heir impleaded represents his interest in the estate of the deceased, there is yet another exception which is evolved in the larger interest of administration of justice. If there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action where the plaintiff has after bona fide enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate. The Court will undoubtedly investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the Court. The Court will also enquire whether there was a real contest in the suit, and may for that purpose ascertain whether there was any special defence which the absent defendant could put forward, but which was not put forward. Where however on account of a bona fide error, the plaintiff seeking relief institutes his suit against a person who is not representing the estate of a deceased person against whom the plaintiff has a claim either at all or even partially, in the absence of fraud or collusion or other ground which taint the decree, a decree passed against the persons impleaded as heirs binds the estate, even though other persons interested in the estate are not brought on the record. This principle applies to all parties irrespective of their religious persuasion."

DIRECTIVE PRINCIPLES OF STATE POLICY

In The State of Madras v. Srimathi Champakam Dorairajan, 1951 SCR 525, it was held that the Directive Principles of State Policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights. The view was reiterated in Deep Chand and Anr. v. The State of Uttar Pradesh and Others, 1959 Supp. (2) SCR 8.

The Court went on to hold that disobedience to Directive Principles cannot affect the legislative power of the State. So was the view taken in In Re : The Kerala Education Bill, 1957 , 1959 SCR 995. With L.C. Golak Nath and others v. State of Punjab and Another, (1967) 2 SCR 762, the Supreme Court departed from the rigid rule of subordinating Directive Principles and entered the era of harmonious construction. The need for avoiding a conflict between Fundamental Rights and Directive Principles was emphasized, appealing to the legislature and the courts to strike a balance between the two as far as possible.

Having noticed Champakam even the Constitution Bench in Quareshi-I chose to make a headway and held that the Directive Principles nevertheless are fundamental in the governance of the country and it is the duty of the State to give effect to them. "A harmonious interpretation has to be placed upon the Constitution and so interpreted it means that the State should certainly implement the directive principles but it must do so in such a way that its laws do not take away or abridge the fundamental rights, for otherwise the protecting provisions of Part III will be a 'mere rope of sand'. "Thus, Quareshi-I did take note of the status of Directive Principles having been elevated from 'sub-ordinate' or 'sub-servient' to 'partner' of Fundamental Rights in guiding the nation.

His Holiness Kesavananda Bharati Sripadagalvaru and Anr. v. State of Kerala and Anr., (1973) 4 SCC 225, a thirteen-Judge Bench decision of this Court is a turning point in the history of Directive Principles jurisprudence. This decision clearly mandated the need for bearing in mind the Directive Principles of State Policy while judging the reasonableness of the restriction imposed on Fundamental Rights. Several opinions were recorded in Kesavananda Bharati and quoting from them would significantly increase the length of this judgment. For our purpose, it would suffice to refer to the **seven-Judge Bench decision in Pathumma and Others v. State of Kerala and Ors., (1978) 2 SCC 1,** wherein the learned **Judges neatly summed up the ratio of Kesavananda Bharati and other decisions** which are relevant for our purpose. Pathumma holds :-
"(1) Courts interpret the constitutional provisions against the social setting of the country so as to show a complete consciousness and deep awareness of the growing requirements of society, the increasing needs of the nation, the burning problems of the day and the complex issues facing the people, which the legislature, in its wisdom, through beneficial legislation, seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid. This Court while acting as a sentinel on the qui vive to protect fundamental rights guaranteed to the citizens of the country must try to strike a just balance between the fundamental rights and the larger and broader interests of society so that when such a right clashes with a larger interest of the country it must yield to the latter.
(2) The Legislature is in the best position to understand and appreciate the needs of the people as enjoined in the Constitution. The Court will interfere in this process only when the statute is clearly violative of the right conferred on a citizen under Part III or when the Act is beyond the legislative competence of the legislature. The courts have recognised that there is always a presumption in favour of the constitutionality of the statutes and the onus to prove its invalidity lies on the party which assails it.
(3) The right conferred by Article 19(1)(f) is conditioned by the various factors mentioned in clause (5). (4) The following tests have been laid down as guidelines to indicate in what particular circumstances a restriction can be regarded as reasonable:
(a) In judging the reasonableness of the restriction the court has to bear in mind the Directive Principles of State Policy.
(b) The restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirements of the interests of the general public. The legislature must take intelligent care and deliberation in choosing the course which is dictated by reason and good conscience so as to strike a just balance between the freedom in the article and the social control permitted by the restrictions under the article.
(c) No abstract or general pattern or fixed principle can be laid down so as to be of universal application. It will have to vary from case to case and having regard to the changing conditions, the values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances all of which must enter into the judicial verdict.
(d) The Court is to examine the nature and extent, the purport and content of the right, the nature of the evil sought to be remedied by the statute, the ratio of harm caused to the citizen and the benefit conferred on the person or the community for whose benefit the legislation is passed.
(e) There must be a direct and proximate nexus or a reasonable connection between the restriction imposed and the object which is sought to be achieved.
(f) The needs of the prevailing social values must be satisfied by the restrictions meant to protect social welfare.
(g) The restriction has to be viewed not only from the point of view of the citizen but the problem before the legislature and the object which is sought to be achieved by the statute. In other words, the Court must see whether the social control envisaged by Article 19 (1) is being effectuated by the restrictions imposed on the fundamental right. However important the right of a citizen or an individual may be it has to yield to the larger interests of the country or the community.
(h) The Court is entitled to take into consideration matters of common report history of the times and matters of common knowledge and the circumstances existing at the time of the legislation for this purpose.

In State of Kerala and Anr. v. N.M. Thomas and Ors., (1976) 2 SCC 310, also a seven-Judge Bench of this Court culled out and summarized the ratio of this Court in Kesavananda Bharati. Fazal Ali, J extracted and set out the relevant extract from the opinion of several Judges in Kesavananda Bharati and then opined: "In view of the principles adumbrated by this Court it is clear that the directive principles form the fundamental feature and the social conscience of the Constitution and the Constitution enjoins upon the State to implement these directive principles. The directives thus provide the policy, the guidelines and the end of socio-economic freedom and Articles 14 and 16 are the means to implement the policy to achieve the ends sought to be promoted by the directive principles. So far as the courts are concerned where there is no apparent inconsistency between the directive principles contained in Part IV and the fundamental rights mentioned in Part III, which in fact supplement each other, there is no difficulty in putting a harmonious construction which advances the object of the Constitution. Once this basic fact is kept in mind, the interpretation of Articles 14 and 16 and their scope and ambit become as clear as day."

The message of Kesavananda Bharati is clear. The interest of a citizen or section of a community, howsoever important, is secondary to the interest of the country or community as a whole. For judging the reasonability of restrictions imposed on Fundamental Rights the relevant considerations are not only those as stated in Article 19 itself or in Part-III of the Constitution; the Directive Principles stated in Part-IV are also relevant. Changing factual conditions and State policy, including the one reflected in the impugned enactment, have to be considered and given weightage to by the courts while deciding the constitutional validity of legislative enactments. A restriction placed on any Fundamental Right, aimed at securing Directive Principles will be held as reasonable and hence intra vires subject to two limitations : first, that it does not run in clear conflict with the fundamental right, and secondly, that it has been enacted within the legislative competence of the enacting legislature under Part XI Chapter I of the Constitution.

In Municipal Corporation of the City of Ahmedabad & Ors. v. Jan Mohammed Usmanbhai & Anr., (1986) 3 SCC 20, what was impugned before the High Court was a standing order issued by the Municipal Commissioner of the State of Ahmedabad, increasing the number of days on which slaughter houses should be kept closed to seven, in supersession of the earlier standing order which directed the closure for only four days. The writ petitioner, a beef dealer, challenged the constitutional validity of the impugned standing orders (both, the earlier and the subsequent one) as violative of Articles 14 and 19(1)(g) of the Constitution. The challenge based on Articles 14 of the Constitution was turned down both by the High Court and the Supreme Court. However, the High Court had struck down the seven days closure as not "in the interests of the general public" and hence not protected by Clause (6) of Article 19 of the Constitution. In appeal preferred by the Municipal Corporation, the Constitution Bench reversed the Judgment of the High Court and held that the objects sought to be achieved by the impugned standing orders were the preservation, protection and improvement of live-stock, which is one of the Directive Principles. Cows, bulls, bullocks and calves of cows are no doubt the most important cattle for our agricultural economy. They form a separate class and are entitled to be treated differently from other animals such as goats and sheep, which are slaughtered. The Constitution Bench ruled that the expression "in the interests of general public" is of a wide import covering public order, public health, public security, morals, economic welfare of the community and the objects mentioned in Part IV of the Constitution.

In Workmen of Meenakshi Mills Ltd. and Others. v. Meenakshi Mills Ltd. and Anr. , (1992) 3 SCC 336, the Constitution Bench clearly ruled "Ordinarily any restriction so imposed which has the effect of promoting or effectuating a directive principle can be presumed to be a reasonable restriction in public interest."

Similar view is taken in Papnasam Labour Union v. Madura Coats Ltd. and Anr. , (1995) 1 SCC 501. Directive Principles Long back in The State of Bombay and anr. v. F.N. Balsara, 1951 SCR 682, a Constitution Bench had ruled that in judging the reasonableness of the restrictions imposed on the Fundamental Rights, one has to bear in mind the Directive Principles of State Policy set-forth in Part IV of the Constitution, while examining the challenge to the constitutional validity of law by reference to Article 19(1)(g) of the Constitution.

In a comparatively recent decision of this Court in M.R.F. Ltd. v. Inspector, Kerala Govt. and Ors., (1998) 8 SCC 227, this Court, on a conspectus of its various prior decisions summed up principles as 'clearly discernible', out of which three that are relevant for our purpose, are extracted and reproduced hereunder. "On a conspectus of various decisions of this Court, the following principles are clearly discernible:
(1) While considering the reasonableness of the restrictions, the court has to keep in mind the Directive Principles of State Policy. ……..
(3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances……..
(6) There must be a direct and proximate nexus or a reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions and the object of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise.

Very recently in Indian Handicrafts Emporium and Ors. v. Union of India and Ors., (2003) 7 SCC 589, this Court while dealing with the case of a total prohibition reiterated that 'regulation' includes 'prohibition' and in order to determine whether total prohibition would be reasonable, the Court has to balance the direct impact on the fundamental right of the citizens as against the greater public or social interest sought to be ensured. Implementation of the Directive Principles contained in Part IV is within the expression of 'restriction in the interests of the general public'.

Post Kesavananda Bharati so far as the determination of the position of Directive Principles, vis-a-vis Fundamental Rights are concerned, it has been an era of positivism and creativity. Article 37 of the Constitution which while declaring the Directive Principles to be unenforceable by any Court goes on to say "that they are nevertheless fundamental in the governance of the country." Several clauses of Article 37 themselves need to be harmoniously construed assigning equal weightage to all of them. The end part of Article 37 "It shall be the duty of the State to apply these principles in making laws" is not a pariah but a constitutional mandate. The series of decisions which we have referred to hereinabove and the series of decisions which formulate the 3-stages of development of the relationship between Directive Principles and Fundamental Rights undoubtedly hold that, while interpreting the interplay of rights and restrictions, Part-III (Fundamental Rights) and Part-IV (Directive Principles) have to be read together. The restriction which can be placed on the rights listed in Article 19(1) are not subject only to Articles 19(2) to 19(6); the provisions

contained in the chapter on Directive Principles of State Policy can also be pressed into service and relied on for the purpose of adjudging the reasonability of restrictions placed on the Fundamental Rights.

In AIIMS Students' Union v. AIIMS and Ors., (2002) 1 SCC 428, a three-Judge Bench of this Court made it clear that fundamental duties, though not enforceable by writ of the court, yet provide valuable guidance and aid to interpretation and resolution of constitutional and legal issues. In case of doubt, peoples' wish as expressed through Article 51-A can serve as a guide not only for resolving the issue but also for constructing or moulding the relief to be given by the courts. The fundamental duties must be given their full meaning as expected by the enactment of the Forty-second Amendment. The Court further held that the State is, in a sense, 'all the citizens placed together' and, therefore, though Article 51A does not expressly cast any fundamental duty on the State, the fact remains that the duty of every citizen of India is, collectively speaking, the duty of the State.

In Mohan Kumar Singhania & Ors. v. Union of India & Ors., 1992 Supp (1) SCC 594, a governmental decision to give utmost importance to the training programme of the Indian Administrative Service selectees was upheld by deriving support from Article 51-A(j) of the Constitution, holding that the governmental decision was in consonance with one of the fundamental duties.

In State of U.P. v. Yamuna Shanker Misra & Ors., (1997) 4 SCC 7, this Court interpreted the object of writing the confidential reports and making entries in the character rolls by deriving support from Article 51-A(j) which enjoins upon every citizen the primary duty to constantly endeavour to strive towards excellence, individually and collectively.

In Rural Litigation and Entitlement Kendra & Ors. v. State of Uttar Pradesh & Ors., 1986 (Supp) SCC 517, a complete ban and closing of mining operations carried on in the Mussoorie hills was held to be sustainable by deriving support from the fundamental duty as enshrined in Article 51-A(g) of the Constitution. The Court held that preservation of the environment and keeping the ecological balance unaffected is a task which not only Governments but also every citizen must undertake. It is a social obligation of the State as well as of the individuals.

In T.N. Godavarman Thirumalpad v. Union of India & Ors., (2002) 10 SCC 606, a three-Judge Bench of this Court read Article 48-A and Article 51-A together as laying down the foundation for a jurisprudence of environmental protection and held that "Today, the State and the citizens are under a fundamental obligation to protect and improve the environment, including forests, lakes, rivers, wild life and to have compassion for living creatures".

In State of W.B. & Ors. v. Sujit Kumar Rana, (2004) 4 SCC 129, Articles 48 and 51-A(g) of the Constitution were read together and this Court expressed that these provisions have to be kept in mind while interpreting statutory provisions.

SURETY AND GUARANTOR IN KSFC CASE

AIR 2008 SC 1797, KARNATAKA STATE FINANCIAL CORPORATION RESPONDENT: N. NARASIMAHAIAH & ORS BENCH: S.B. SINHA & LOKESHWAR SINGH PANTA

State Financial Corporations Act, 1951: s.29 - Jurisdiction of Corporation to proceed against surety/guarantors under s.29 - Held: Corporation cannot proceed against the surety under s.29 - Right of Corporation in terms of s.29 must be exercised only on a defaulting party - There cannot be any default as is envisaged in s.29 by a surety or a guarantor - Liability of surety or guarantor to repay the loan of the principal debtor arises only when a default is made by the latter.

Dismissing the appeals, the Court HELD:

A lender of money under the common law has the remedy to file a suit for realization of the amount lent if the borrower does not repay the same. The State Financial Corporations Act, however, provides for a special remedy in favour of the Financial Corporation constituted thereunder enabling it to exercise a statutory power of either selling the property or take over the management or possession or both belonging to the industrial concern. S.29, therefore, confers an extraordinary power upon the `Corporation'. It, being a `State' within the meaning of Article 12 of the Constitution of India, is expected to exercise its statutory powers reasonably and bona fide.

Apart from the constitutional restrictions, the statute does not put any embargo upon the corporation to exercise its power under s.29 of the Act. Indisputably, the said provision was enacted by the Parliament with a view to see that the dues of the Corporation are realized expeditiously. When a statutory power is conferred, the same must be exercised within the four corners of the Statute. Power of a lender to realize the amount lent either by enforcing the charged and / or hypothecated or encumbrance created on certain property and/ or proceeding simultaneously and/ or independently against the surety/ guarantor is a statutory right. Different statutes provide for different remedies. Such a right can also indisputably be conferred by way of contract as has been provided for under s.69 of the Transfer of Property Act in terms

whereof a mortgagee is entitled to effect sale without the intervention of the court, subject, of course, to the limitations prescribed therein.

If special provisions are made in derogation to the general right of a citizen, the statute, should receive strict construction. For the purpose of enforcing a liability of an industrial concern, recourse can be taken both under s.29 and s.31 of the Act. Right of the corporation to file a suit or take recourse to the provisions contained in s.32G of the Act also exists.

The heading of s.29 of the Act states "Rights of financial corporation in case of default". The default contemplated thereby is of the industrial concern. Such default would create a liability on the industrial concern. Such a liability would arise when the industrial concern makes any default in repayment of any loan or advance or any instalment thereof under the agreement. It may also arise when it fails to meet its obligation(s) in relation to any guarantee given by the corporation. If it otherwise fails to comply with the terms of the agreement with the financial corporation, also the same provisions would apply. In the eventualities contemplated under s.29 of the Act, the Corporation shall have the right to take over the management or possession or both of the industrial concern. The provision does not stop there. It confers an additional right as the words "as well as" is used which confers a right on the Corporation to transfer by way of lease or sale and realize the property pledged, mortgaged, hypothetical or assigned to the Corporation.

S.29 of the Act nowhere states that the corporation can proceed against the surety even if some properties are mortgaged or hypothecated by it. The right of the financial corporation in terms of s.29 of the Act must be exercised only on a defaulting party. There cannot be any default as is envisaged in s.29 by a surety or a guarantor. The liabilities of a surety or the guarantor to repay the loan of the principal debtor arises only when a default is made by the latter. The words "as well as" play a significant role. It confers two different rights but such rights are to be enforced against the same person, viz., the industrial concern. It is true that sub-section (1) of s. 29 speaks of guarantee. But such a guarantee is meant to be furnished by the Corporation in favour of a third party for the benefit of the industrial concern. It does not speak about a surety or guarantee given in favour of the corporation for the benefit of the industrial concern. The legislative object and intent becomes furthermore clear as in terms of Sub-section (4) of s.29 of the Act only when a property is sold, the manner in which the sale proceeds is to be appropriated has categorically been provided therein. Sub-section (4) of s.29 of the Act which lays down appropriation of the sale proceeds only refers to `industrial concern' and not a `surety' or `guarantor'.

The provisions of s.128 of the Indian Contract Act must also be kept in mind. It is only by reason thereof, subject of course to the contract by the parties thereto, the liability of a surety is made co-extensive with the liability of the principal debtor. Banking practice may enable a financial corporation to ask for a collateral security. Such security, assumingly may be furnished by the Directors of a Company but furnishing of such security or guarantee is not confined to the Directors or employees or their close relatives. They may be outsiders also. The rights and liabilities of a surety and the principal borrower are different and distinct. Apart from the defences available to a principal borrower under the provisions of the Indian Contract Act, a surety or a guarantor is entitled to take additional defence, which may be not only against the corporation but also against the principal debtor. He, in a given situation, would be entitled to show that the contract of guarantee has come to a naught. Ordinarily, therefore, when a guarantee is sought to be enforced, the same must be done through a court having appropriate jurisdiction. In the absence of any express provision in the statute, a person being in lawful possession cannot be deprived thereof by reason of default on the part of a principal borrower. Furthermore, construction of a statute would not depend upon a contingency. A statute must be interpreted having regard to the constitutional provisions as also human rights.

Reference to implied and/ or incidental power of the Corporation deserves outright rejection. Moreover s.29 of the Act does not deal with a case where express and implied conditions have been laid down in the matter of exercise of power conferred upon a statutory authority under a Statute. S.29 does not envisage any prohibition at all either express or implied.

A statutory authority, thus, may have an implied power to effectuate exercise of substantive power, but the same never means that if a remedy is provided to take action against one in a particular manner, it may not only be exercised against him but also against the other in the same manner. It is a trite law that the entire statute must be first read as a whole then section by section, clause by clause, phrase by phrase and word by word.

S.31 of the Act provides for a special provision. It, apart from the default on the part of the industrial concern, can be invoked where the financial corporation requires an industrial concern to make immediate repayment of loan or advance in terms of s.30 if and when such requirement is not met. The aforementioned provision could be resorted to by the Corporation, without prejudice, to its rights under the provisions of s. 29 as also s. 69 of the Transfer of Property Act and for the said purpose it is required to apply to the District Judge having appropriate jurisdiction. S.31 of the Act provides for the reliefs which may be sought for by the Corporation strictly in terms thereof. Clause (aa) of sub-section (1) of s.31 of the Act provides for a final relief. It does not speak of any interlocutory order. Clause (aa) has been inserted by Act No. 43 of 1985. Thus, prior thereto even s.31 could not have been taken recourse to against a surety. Such a relief, if prayed for, would also lead to grant of a final relief and not an interlocutory one. Similarly, clause (b) of Sub-section (1) of s. 31 of the Act also provides for a final relief. Only clause (c) of Sub-section (1) of s.31 of the Act empowers the District Judge in the event any application is filed by the Corporation to pass an ad interim injunction. The very fact that s.31 uses the terminology "without prejudice" to the provisions of s.29 of the Act and/ or s. 69 of the Transfer of

Property Act, it clearly postulates an additional relief. What can be done by invoking s.29 of the Act can be done by invoking s.31 thereof also but therefor a different procedure has to be adopted. S.31 also provides for a relief against a surety and not confined to the industrial concern alone. Sub-section (2) of s.31 also refers to industrial concern and not the surety. The legislative intent, therefore, is clear and unambiguous.

Sub-section (1A) of s.32 of the Act lays down a procedure when clause (aa) of Sub-section (1) of s.31 thereof is invoked. Sub-section (4A) of s. 31 also empowers the court to forthwith order the enforcement of the liability of the surety if no cause is shown on or before the date notified by the parties. However, in the event, a cause is shown upon making an investigation as provided for under Sub-section (6) of s.32, a final order can be passed in terms of Sub-section (7) thereof. Significantly, by Act No. 43 of 1985, s.32G of the Act was also inserted. It does not speak of an industrial concern. S.32G, therefore, can be resorted to both against the industrial concern as also the security.

While interpreting the provisions of a statute, the court employs different principles or canons. To interpret a statute in a reasonable manner, the court must place itself in the chair of a reasonable legislator/ author. Attempt on the part of the court while interpreting the provisions of a statute should, therefore, be to pose a question as to why one provision has been amended and the other was not and why one terminology has been used while inserting a statutory provision and a different clause in another it is well-known that casus omissus cannot be supplied.

The legislative intent, is manifest. The intention of the Parliament in enacting ss. 29 and 31 of the Act was not similar. Whereas s.29 of the Act consists of the property of the industrial concern, s.31 takes within its sweep both the property of the industrial concern and as that of the surety. None of the provisions control each other. The Parliament intended to provide an additional remedy for recovery of the amount in favour of the Corporation by proceeding against a surety only in terms of s.31 of the Act and not under s.29 thereof.

A Corporation, after coming into force of s.32G of the Act has four remedies, viz.: (i) to file a suit (ii) to take recourse to s.29; (iii) to take recourse to s.31; and (iv) to take recourse to s.32G of the Act.

Right of property, although no longer a fundamental right, is still a constitutional right. It is also human right. In absence of any provision either expressly or by necessary implication, depriving a person therefrom, the court shall not construe a provision leaning in favour of such deprivation.

A surety may be a Director of the Company. He also may not be. Even if he is a close relative of the Director or the Managing Director of the Company, the same is not relevant. A Director of the Company is not an industrial concern. He in his capacity as a surety would certainly not be. A juristic person is a separate legal entity. Its veil can be lifted or pierced only in certain situations.

Interpretation of a statute would not depend upon a contingency. It has to be interpreted on its own. The court would ordinarily take recourse to the golden rule of literal interpretation. It is not a case where a defect in the legislative drafting is pointed out nor can it be presumed. 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 therefrom. 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. Even if the legislation is beneficent, the same by itself would not be held to be extendable to a situation which the statute does not contemplate.

It is now well-settled that when more than one remedy is provided for, an option is given to a suiter to opt for one or the other remedy. Such a provision is not ultra vires.

We may take notice of Sub-section (1) of Section 29 of the Act which reads as under: "29. Rights of Financial Corporation in case of default (1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof or in meeting its obligations in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the right to take over the management or possession or both of the industrial concerns, as well as the right to transfer by way of lease or sale and realize the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation."

Section 30 of the Act inter alia provides for power to call for repayment before the agreed period.

Section 31 provides for special provisions for enforcement of claims by Financial Corporation. It reads as under: "31. Special provisions for enforcement of claims by Financial Corporation . (1) Where an industrial concern, in breach of any agreement, makes any default in repayment of any loan or advance or any instalment thereof or in meeting its obligations in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation or where the Financial Corporation requires an industrial concern to make immediate repayment of any loan or advance under Section 30 and the industrial concern fails to make such repayment then, without prejudice to the provisions of Section 29 of this Act and of Section 69 of the Transfer of Property Act, 1882 (4 of 1882), any officer of the Financial Corporation, generally or specially authorised by the Board in this behalf, may apply to

the District Judge within the limits of whose jurisdiction the industrial concern carries on the whole or a substantial part of its business for one or more of the following reliefs, namely (a) for an order for the sale of the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation as security for the loan or advance; or (aa) for enforcing the liability of any surety; or (b) for transferring the management of the industrial concern to the Financial Corporation; or (c) for an ad interim injunction restraining the industrial concern from transferring or removing its machinery or plant or equipment from the premises of the industrial concern without the permission of the Board, where such removal is apprehended. (2) An application under sub-section (1) shall state the nature and extent of the liability of the industrial concern to the Financial Corporation, the ground on which it is made and such other particulars as may be prescribed.

"Section 32 of the Act provides for the procedure in respect of the proceedings before the District Judge on applications under Section 31; sub- section (1A) whereof reads as under: "(1-A) When the application is for the relief mentioned in clause (aa) of sub-section (1) of Section 31, the District Judge shall issue a notice calling upon the surety to show cause on a date to be specified in the notice why his liability should not be enforced.

"For enforcing a claim envisaged under clause (aa) of Sub-section (1) of Section 31 of the Act, a special procedure has been laid down in sub- section (4A) of Section 32 which reads as under: "(4A) If no cause is shown on or before the date specified in the notice under Sub-section (1A) the district judge shall forthwith order the enforcement of the liability of the surety."

Section 32G of the Act, which was also inserted by Act No. 43 of 1985, provides for yet another additional remedy to a financial corporation in the following terms: "32G. Recovery of amounts due to the Financial Corporation as an arrear of land revenue Where any amount is due to the Financial Corporation in respect of any accommodation granted by it to any industrial concern, the Financial Corporation or any person authorised by it in writing in this behalf, may, without prejudice to any other mode of recovery, make an application to the State Government for the recovery of the amount due to it, and if the State Government or such authority, as that Government may specify in this behalf, is satisfied, after following such procedure as may be prescribed, that any amount is so due, it may issue a certificate for that amount to the Collector, and the Collector shall proceed to recover that amount in the same manner as an arrear of land revenue."

INTERPRETATION SECTION 29: A lender of money under the common law has the remedy to file a suit for realization of the amount lent if the borrower does not repay the same. The Act, however, provides for a special remedy in favour of the Financial Corporation constituted thereunder enabling it to exercise a statutory power of either selling the property or take over the management or possession or both belonging to the industrial concern.

Section 29, therefore, confers an extraordinary power upon the 'Corporation'. It, being a 'State' within the meaning of Article 12 of the Constitution of India, is expected to exercise its statutory powers reasonably and bona fide. Apart from the said constitutional restrictions, the statute does not put any embargo upon the corporation to exercise its power under Section 29 of the Act. Indisputably, the said provision was enacted by the Parliament with a view to see that the dues of the Corporation are realized expeditiously. When a statutory power is conferred, it is a trite law that the same must be exercised within the four corners of the Statute. Power of a lender to realize the amount lent either by enforcing the charged and / or hypothecated or encumbrance created on certain property and/ or proceeding simultaneously and/ or independently against the surety/ guarantor is a statutory right. Different statutes provide for different remedies.

If special provisions are made in derogation to the general right of a citizen, the statute, in our opinion, should receive strict construction. 'Industrial concern' has been defined under the Act. For the purpose of enforcing a liability of an industrial concern, recourse can be taken both under Sections 29 and 31 of the Act. Right of the corporation to file a suit or take recourse to the provisions contained in Section 32G of the Act also exists. 13. The heading of Section 29 of the Act states "Rights of financial corporation in case of default". The default contemplated thereby is of the industrial concern. Such default would create a liability on the industrial concern. Such a liability would arise when the industrial concern makes any default in repayment of any loan or advance or any instalment thereof under the agreement. It may also arise when it fails to meet its obligation(s) in relation to any guarantee given by the corporation. If it otherwise fails to comply with the terms of the agreement with the financial corporation, also the same provisions would apply. In the eventualities contemplated under Section 29 of the Act, the corporation shall have the right to take over the management or possession or both of the industrial concern. The provision does not stop there. It confers an additional right as the words "as well as" is used which confers a right on the corporation to transfer by way of lease or sale and realize the property pledged, mortgaged, hypothetical or assigned to the corporation.

Section 29 of the Act nowhere states that the corporation can proceed against the surety even if some properties are mortgaged or hypothecated by it. The right of the financial corporation in terms of Section 29 of the Act must be exercised only on a defaulting party. There cannot be any default as is envisaged in Section 29 by a surety or a guarantor. The liabilities of a surety or the guarantor to repay the loan of the principal debtor arises only when a default is made by the latter. The words "as well as" in our opinion play a significant role. It confers two different rights but such rights are to be enforced against the same person, viz., the industrial concern. Submission of the learned senior counsel that the second part of Section 29 having not referred to 'industrial concern', any property pledged, mortgaged, hypothecated or assigned to the financial corporation can be sold, in our opinion cannot be accepted. It is true that sub-section (1) of Section 29 speaks of guarantee. But such a guarantee is meant to be furnished by the Corporation in favour of a third party for

the benefit of the industrial concern. It does not speak about a surety or guarantee given in favour of the corporation for the benefit of the industrial concern.

DEFENCE OF SURETY

The provisions of Section 128 of the Indian Contract Act must also be kept in mind. It is only by reason thereof, subject of course to the contract by the parties thereto, the liability of a surety is made coextensive with the liability of the principal debtor. Banking practice may enable a financial corporation to ask for a collateral security. Such security, we would assume, may be furnished by the Directors of a Company but furnishing of such security or guarantee is not confined to the Directors or employees or their close relatives. They may be outsiders also. The rights and liabilities of a surety and the principal borrower are different and distinct. Apart from the defences available to a principal borrower under the provisions of the Indian Contract Act, a surety or a guarantor is entitled to take additional defence. Such additional defence may be taken by the guarantor not only against the corporation but also against the principal debtor. He, in a given situation, would be entitled to show that the contract of guarantee has come to a not. Ordinarily, therefore, when a guarantee is sought to be enforced, the same must be done through a court having appropriate jurisdiction. In the absence of any express provision in the statute, a person being in lawful possession cannot be deprived thereof by reason of default on the part of a principal borrower.

In A.P. State Financial Corporation v. M/s GAR Re-Rolling Mills and Another [(1994) 2 SCC 647], this Court held: "19. The right vested in the Corporation under Section 29 of the Act is besides the right already possessed at common law to institute a suit or the right available to it under Section 31 of the Act" Section 32G of the Act provides for an additional remedy. It is, however, interesting to note that while upholding the right of the Corporation to opt for either Section 29 or Section 31 of the Act, it was opined: "In our opinion the Corporation can initially take recourse to Section 31 of the Act but withdraw or abandon it at any stage and take recourse to the provisions of Section 29 of the Act, which section deals with not only the rights but also provides a self-contained remedy to the Corporation for recovery of its dues. If the Corporation chooses to take recourse to the remedy available under Section 31 of the Act and pursues the same to the logical conclusion and obtains an order or decree, it may thereafter execute the order or decree, in the manner provided by Section 32(7) and (8) of the Act. The Corporation, however, may withdraw or abandon the proceedings at that stage and take recourse to the provisions of Section 29 of the Act"

Right of property, although no longer a fundamental right, is still a constitutional right. It is also human right. In absence of any provision either expressly or by necessary implication, depriving a person therefrom, the court shall not construe a provision leaning in favour of such deprivation. **Recently, this Court in P.T. Munichikkanna Reddy & Ors. v. Revamma & Ors. [(2007) 6 SCC 59]** dealing with adverse possession opined: "Human rights have been historically considered in the realm of individual rights such as, right to health, right to livelihood, right to shelter and employment etc. but now human rights are gaining a multifaceted dimension. Right to property is also considered very much a part of the new dimension. Therefore, even claim of adverse possession has to be read in that context. The activist approach of the English Courts is quite visible from the judgement of Beaulane Properties Ltd. v. Palmer, The court herein tried to read the Human Rights position in the context of adverse possession. But what is commendable is that the dimension of human rights has widened so much that now property dispute issues are also being raised within the contours of human rights.

W/S BEYOND 90 DAYS

2008 (15) SCALE 522 , SAMBHAJI & ORS. VS GANGABAI & ORS.

Order 8 Rule 1 CPC after the 1999 amendment, casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Further, the nature of the provision contained in Order 8 Rule 1 is procedural. It is not a part of the substantive law. Substituted Order 8 Rule 1 intends to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases, causing inconvenience to the plaintiffs and the petitioners approaching the court for quick relief and also the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. While justice delayed may amount to justice denied, justice hurried may in some cases amount to justice buried.

All the rules of procedure are the handmaids of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.

The processual law dominates in certain systems so as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence, processual, as much as substantive. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. A procedural law should not ordinarily be construed as mandatory, the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice.

Though the power of the Court under the proviso appended to Rule 1 of Order 8 CPC is circumscribed by the words "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided for though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.

In the instance case, the trial court proceeded on the erroneous premises that there was no scope to accept the written statement after 90 days. The High Court by the impugned order held that though it had power, no case was made out to accept the prayer. The grounds indicated by the appellants seeking acceptance of the written statement filed belatedly, cannot be considered to be trivial or without substance. In the case of this nature where close relatives are litigants a liberal approach is called for.

IN RAZA BULAND SUGAR CO. LTD. V. MUNICIPAL BOARD, RAMPUR [AIR 1965 SC 895] a Constitution Bench of this Court held that the question whether a particular provision is mandatory or directory cannot be resolved by laying down any general rule and it would depend upon the facts of each case and for that purpose the object of the statute in making out the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory. 9 In Sangram Singh v. Election Tribunal, Kotah [AIR 1955 SC 425] considering the provisions of the Code dealing with the trial of suits, it was opined that: (SCR pp. 8-9) `Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it. Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.'

THE POSITION WAS EXAMINED IN DETAILS IN KAILASH'S CASE (SUPRA) AND RANI KUSUM (SMT.) V. KANCHAN DEVI (SMT.) AND OTHERS (2005(6) SCC 705). In the facts and circumstances of the case, the maxim of equity, namely, actus curiae neminem gravabit an act of court shall prejudice no man, shall be applicable. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law. The other maxim is, lex non cogit ad impossibilia the law does not compel a man to do what he cannot possibly perform. The law itself and its administration is understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in the consideration of particular cases. The applicability of the aforesaid maxims has been approved by this Court in Raj Kumar Dey v. Tarapada Dey (1987 (4) SCC 398), Gursharan Singh v. New Delhi Municipal Committee (1996 (2) SCC 459), Ohammod Gazi v. State of M.P. and others (2000(4) SCC 342) and Shaikh Salim Haji Abdul Khayumsab v. Kumar and Ors. (2006 (1) SCC 46).

IN SANGRAM SINGH V. ELECTION TRIBUNAL KOTAH & ANR. [AIR 1955 SC 425], considering the provisions of the Code dealing with the trial of the suits, it was opined that: "Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a Penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it. Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by

and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle. "

PERUMON BHAGVATHY DEVASWOM, PERINADU VILLAGE VS. BHARGAVI AMMA (DEAD) BY LRS & ORS. 2008 (8) SCC 321

The principles applicable in considering applications for setting aside abatement may thus be summarized as follows : (i) The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words `sufficient cause' in section 5 of Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bonafides, deliberate inaction or negligence on the part of the appellant. (ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement. (iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation. (iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in refiling the appeal after rectification of defects. (v) Want of `diligence' or `inaction' can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.

ABATEMENT AND DELAY CONDONATION

Code of Civil Procedure, 1908: Or. 22, rr. 4,10A and 11 - Application for setting aside abatement of second appeal - Delay in filing - `Sufficient cause' with respect to delay. HELD: Lack of diligence or negligence can be attributed to an appellant only when he is aware of the death and fails to take steps to bring the legal representatives on record - In the instant case, second appeal was admitted in 1993 but hearing of dates were not fixed periodically - Neither counsel for deceased respondent in High Court nor her legal representatives reported her death to the High Court - No notice of death given to appellant - There is no material to contradict claim of appellant that it was unaware of death of the respondent - Delay condoned - Abatement set aside - Legal representatives of deceased respondent permitted to be brought on record –

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(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.
(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.
(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in refiling the appeal after rectification of defects.
(v) Want of `diligence' or `inaction' can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.

If following three conditions exist, the courts will usually condone the delay and set aside the abatement (even though the period of delay is considerable and a valuable right might have accrued to the opposite party-LRs of the deceased - on account of the abatement): (i) The respondent died during the period when the appeal was pending without any hearing dates being fixed; (ii) Neither the counsel for the deceased

respondent nor the legal representatives of the deceased respondent reported the death of the respondent to the court and the court has not given notice of such death to the appellant. (iii) The appellant avers that he was unaware of the death of the respondent and there is no material to doubt or contradict his claim.

In N.Balakrishnan v. M.Krishnamurthy [1998 (7) SCC 123], this Court held: "It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammeled by the conclusion of the lower court. The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice..... Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice. It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation."

In Union of India vs. Ram Charan (Deceased) by LRs. [AIR 1964 SC 215], this Court observed thus : "The provisions of the Code are with a view to advance the cause of justice. Of course, the Court, in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time, need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merits of the dispute between the parties and because if the abatement is set aside, the merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance. It is true that it is no duty of the appellant to make regular enquiries from time to time about the health or existing of the respondent."

In Ram Nath Sao vs. Gobardhan Sao [2002 (3) SCC 195] this Court observed thus : "12. Thus it becomes plain that the expression "sufficient cause" within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependent upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over-jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal, an exception, more so when no negligence or inaction or want of bona fides can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine-like manner. However, by taking a pedantic and hypertechnical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates, either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way."

In Sital Prasad Saxena (dead) by LRs. v. Union of India & Ors. [1985 (1) SCC 163], this Court stated : "...once an appeal is pending in the High Court, the heirs are not expected to keep a constant watch on the continued existence of parties to the appeal before the High Court which has a seat far away from where parties in rural areas may be residing. And in a traditional rural family the father may not have informed his son about the litigation in which he was involved and was a party. Let it be recalled what has been said umpteen times that rules of procedure are designed to advance justice and should be so interpreted as not to make them penal statutes for punishing erring parties."

In State of Madhya Pradesh vs. S. S. Akolkar - 1996 (2) SCC 568, this Court held : "Under Order 22 Rule 10A, it is the duty of the counsel, on coming to know of the death of a party, to inform it to the Court and the Court shall give notice to the other party of the death. By necessary implication delay for substitution of legal representatives begins to run from the date of knowledge. It is settled law that the consideration for condonation of delay Under Section 5 of Limitation Act and setting aside of the abatement under Order 22 are entirely distinct and different. The Court always liberally considers the latter, though in some cases, the Court may refuse to condone the delay Under Section 5 in filing the appeals. After the appeal has been filed and is

pending, Government is not expected to keep watch whether the contesting respondent is alive or passed away. After the matter was brought to the notice of the counsel for the State, steps were taken even thereafter after due verification belated application came to be filed. It is true that Section 5 of Limitation Act would be applicable and delay is required to be explained. The delay in official business requires its broach and approach from public justice perspective."

CIVIL PROCEDURE

AIR 2005 SC 3353, SALEM ADVOCATE BAR ASSOCIATION,TAMIL NADU VS UNION OF INDIA BENCH: Y.K.SABHARWAL, D.M.DHARMADIKHARI & TARUN CHATTERJEE

Disposing of the petition, the Court HELD:

APPOINTMENT OF COMMISIONER TO RECORD EVIDENCE AND AFFIDAVIT

The affidavit required to be filed under the amended Section 26(2) and Order VI Rule 15(4) of the Code of Civil Procedure, 1908 has the effect of fixing additional responsibility on the deponent as to the truth of the facts stated in the pleadings. It is, however, made clear that such an affidavit would not be evidence for the purpose of the trial. Further, on amendment of the pleadings, a fresh affidavit shall have to be filed in consonance thereof.

The Court has already been vested with the **power to permit affidavits to be filed as evidence** as provided in **Order XIX Rules 1 and 2 of the Code.** It has to be kept in view that the right of cross-examination and re-examination in open Court has not been disturbed by **Order XVIII Rule 4** inserted by amendment. It is true that after the amendment cross-examination can be before a Commissioner but no exception can be taken in regard to the power of the legislature to amend the Code and provide for the examination-in-chief to be on affidavit or cross-examination before a Commissioner. The scope of Order XVIII Rule 4 had been examined and its validity upheld in Salem Advocates Bar Association, T.N. v. Union of India, [2003] 1 SCC 49,. There is also no question of inadmissible documents being read into evidence merely on account of such documents being given exhibit numbers in the affidavit filed by way of examination-in-chief. Further the trial Court in appropriate cases can permit the examination-in-chief to be recorded in the Court. The proviso to Order XVIII Rule 4(2) clearly suggests that the Court has to apply its mind to the facts of the case, nature of allegations, nature of evidence and importance of the particular witness for determining whether the witness shall be examined in Court or by the Commissioner appointed by it.

The **power under Order XVIII Rule 4(2)** is required to be exercised with great circumspection having regard to the facts and circumstances of the case. It is not necessary to lay down hard and fast rules controlling the discretion of the Court to appoint a Commissioner to record cross-examination and re-examination of witnesses. The purpose would be served by noticing some illustrative cases which would serve as broad and general guidelines for the exercise of discretion. For instance, a case may involve complex question of title, complex question in partition or suits relating to partnership business or suits involving serious allegations of fraud, forgery, and serious disputes as to the execution of the Will etc. In such cases, as far as possible, the Court may prefer to itself record the cross-examination of the material witnesses. Although when evidence is recorded by the Commissioner, the Court would be deprived of the benefit of watching the demeanour of witnesses yet the will of the legislature, which has, by amending the Code, provided for recording evidence by the Commissioner for saving Court's time taken for the said purpose, cannot be defeated merely on the ground that the Court would be deprived of watching the demeanour of the witnesses. Further, in some cases, which are complex in nature, the prayer for recording evidence by the Commissioner may be declined by the Court. In any case Order XVIII Rule 4, specifically provided that the Commissioner may record such remarks as it thinks material in respect of the demeanour of any witness while under examination. The Court would have the benefit of the observations if made by the Commissioner.

In some States, advocates are being required to pass a test conducted by the High Court in the subjects of Civil Procedure Code and Evidence Act for the purpose of empanelling them on the panels of Commissioners. It is a good practice. However, it is for the High Courts to examine this aspect and decide to adopt or not such a procedure.

Regarding the apprehension that the payment of fee to the Commissioner will add to the burden of the litigant, generally the expenses incurred towards the fee payable to the Commissioner is likely to be less than the expenditure incurred for attending the Courts on various dates for recording of evidence besides the harassment and inconvenience to attend the Court again and again for the same purpose and, therefore, in reality in most of the cases, there could be no additional burden.

Order XVIII Rule 19 which was inserted by the Amendment Act of 1999 overrides **Order XVIII Rule 5** which provides the Court to record evidence in all appealable cases. The Court is, therefore, empowered to appoint a Commissioner for recording of evidence in appealable cases as well.

The discretion to declare a witness hostile has not been conferred on the Commissioner. The powers delegated to the Commissioner under Order XXVI Rules 16, 16-A, 17 and 18 do not include the discretion that is vested in Court under Section 154 of the Evidence Act, 1872, to declare a witness hostile.

If a situation as to declaring a witness hostile arises before a Commission recording evidence, the concerned party shall have to obtain permission from the Court under Section 154 of the Evidence Act and it is only after grant of such permission that the Commissioner can allow a party to cross-examine his own witness. Having regard to the facts of the case, the Court may either grant such permission or even consider to withdraw the Commission so as to itself record the remaining evidence or impose heavy costs if it finds that permission was sought to delay the progress of the suit or harass the opposite party.

Undoubtedly, the Commissioner has to take proper care of the original documents handed over to him either by Court or filed before him during recording of evidence. In this regard, the High Courts may frame necessary rules, regulations or issue practice directions so as to ensure safe and proper custody of the documents when the same are before the Commissioner. It is the duty and obligation of the Commissioners to keep the documents in safe custody and also not to give access of the record to one party in absence of the opposite party or his counsel. The Commissioners can be required to redeposit the documents with the Court in cases long adjournments are granted and for taking back the documents before the adjourned date.

Even before insertion of Order XVIII Rule 17-A, **the Court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence.** Order XVIII Rule 17-A did not create any new rights but only clarified the position. Therefore, deletion of Order XVIII Rule 17-A does not disentitle production of evidence at a later stage. On a party satisfying the Court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the Court may permit leading of such evidence at a later stage on such terms as may appear to be just.

WRITTEN STATEMENT AND DELAY IN FILING

The use of the word `shall' in Order VIII Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. The object which is required to be served by this provision and its design and context in which it is enacted has to be ascertained. The use of the word `shall' is ordinarily indicative of the mandatory nature of the provision but having regard to the context in which is used or having regard to the intention of the legislation, the same can be construed as directory. The Rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.

In construing Order VIII Rule 1, support can also be had from Order VIII Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the Court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to suit as it thinks fit. In the context of the provision, despite use of the word `shall', the Court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provision of Order VIII Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 of Order VIII, the Court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided in Order VIII Rule 1. There is no restriction in Order VIII Rule 10 that after expiry of ninety days, further time cannot be granted. The Court has wide power to `make such order in relation to the suit as it thinks fit'. Clearly, therefore, the provision of Order VIII Rule 1 providing for upper limit of 90 days to file written statement is directory.

However, it is made clear that the order extending time to file the written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time limit of 90 days. The discretion of the Court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order VIII Rule 1.

EXECUTION OF DECREE

Section 39 of the Code does not authorize the Court to execute the decree outside its jurisdiction but it does not dilute the other provisions giving such power on compliance of conditions stipulated in those provisions. Thus, the provisions, such as, Order XXI Rule 3 or Order XXI Rule 48 which provide differently, would not be affected by Section 39(4) of the Code.

The concept of registration has been introduced in Section 64(2) of the Code to prevent false and frivolous cases of contracts being set up with a view to defeating the attachments. If the contract is registered and there is subsequent attachment, any sale deed executed after attachment will be valid. If it is unregistered, the subsequent sale after attachment would not be valid. Such sale would not be protected. There is no ambiguity in Section 64(2).

AMENDMENT

The proviso to Order VI Rule 17, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if an application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision.

SERVICE OF SUMMONS

The problem in respect of service of summons has been one of the major causes of delay in the due progress of the case. It is common knowledge that the defendants have been avoiding to accept summons. There have been serious problems in process-serving agencies in various Courts. There can, thus, be no valid objection in giving opportunity to the plaintiff to serve the summons on the defendant or get it served through courier as provided in Order V Rule 9. There is, however, a danger of false reports of service. It is required to be adequately guarded. The Courts shall have to be very careful while dealing with a case where orders for deemed service are required to be made on the basis of endorsement of such service or refusal. The High Courts can make appropriate rules and regulations or issue practice directions to ensure that such provisions of service are not abused so as to obtain false endorsements. In this regard, the High Courts can consider making a provision for filing of affidavit setting out details of events at the time of refusal of service. For instance, it can be provided that the affidavit of person effecting service shall state as to who all were present at the time and also that the affidavit shall be in the language known to the deponent. It can also be provided that if the affidavit or any endorsement as to service is found to be false, the deponent can be summarily tried and punished for perjury and the courier company can be black-listed. The guidelines as to the relevant details to be given can be issued by the High Courts. The High Courts, it is hoped, would issue as expeditiously as possible, requisite guidelines to the trial Courts by framing appropriate rules, order, regulations or practice directions.

ADJOURNMENT AND COSTS

The awarding of cost under Order XVII Rule 1(2) has been made mandatory. Costs that can be awarded are of two types. First, cost occasioned by the adjournment and second such higher cost as the Court deems fit. The provision for costs and higher costs has been made because of practice having been developed to award only a nominal cost even then adjournment on payment of costs is granted. Ordinarily, where the costs or higher costs are awarded, the same should be realistic and as far as possible actual cost that had to be incurred by the other party shall be awarded where the adjournment is found to be avoided but is being granted on account of either negligence or casual approach of a party or is being sought to delay the progress of the case or on any such reason.

The provisos to Order XVII Rule 1 and Order XVII Rule 2 have to be read together. So read, Order XVII does not forbid grant of adjournment where the circumstances are beyond the control of the party. In such a case, there is no restriction on the number of adjournments to be granted. It cannot be said that even if the circumstances are beyond the control of a party, after having obtained third adjournment, no further adjournment would be granted. There may be cases beyond the control of a party despite the party having obtained three adjournments. For instance, a party may be suddenly hospitalized on account of some serious ailment or there may be serious accident or some act of God leading to devastation. It cannot be said that though circumstances may be beyond the control of a party, further adjournment cannot be granted because of restriction of three adjournments as provided in proviso to Order XVII Rule 1.

In some extreme case, it may become necessary to grant adjournment despite the fact that three adjournments have already been granted (take the example of Bhopal Gas Tragedy, Gujarat earthquake and riots, devastation on account of Tsunami). Ultimately, it would depend upon the facts and circumstances of each case, on the basis whereof the Court would decide to grant or refuse adjournment.

Further, to save the proviso to Order XVII Rule 1 from the vice of Article 14 of the Constitution it is necessary to read it down so as not to take away the discretion of the Court in the extreme hard cases as noted above. The limitation of three adjournments would not apply where adjournment is to be granted on account of circumstances beyond the control of a party. Even in cases which may not strictly come within the category of circumstances beyond the control of a party, the Court by resorting to the provision of higher cost which can also include punitive cost in the discretion of the Court, adjournment beyond three can be granted having regard to the injustice that may result on refusal thereof, with reference to peculiar facts of a case.

However, grant of any adjournment let alone first, second or third adjournment is not a right of a party. The grant of adjournment by a Court has to be on a party showing special and extraordinary circumstances. It cannot be in routine. While considering the prayer for grant of adjournment, it is necessary to keep in mind the legislative intent to restrict grant of adjournments.

CALLING WITNESS AT ANY STAGE

The omission of Order XVIII Rule 2(4) by the 1999 amendment does not take away the Court's inherent power to call for any witness at any stage either suo moto or on the prayer of a party invoking the inherent powers of the Court.

SPEEDY JUSTICE

The object of filing written arguments or fixing time limit of oral arguments as laid down in Order XVIII Rule 2 sub-rules (3-A) to (3-D) is with a view to saving time of the Court. The adherence to the requirement of these rules is likely to help in administering fair and speedy justice.

In **Order VII Rule 14(4)** the words `plaintiff's witnesses' have been mentioned as a result of mistake seems to have been committed by the legislature. The words ought to be `defendant's witnesses'. Till the legislature corrects the mistake, the words `plaintiff's witnesses' would be read as `defendant's witnesses' in Order VII Rule 14(4).

COST OF SUIT

Sections 35, 35-A and 95 of the Code deal with three different aspects of award of cost and compensation. Under Section 95 cost can be awarded up to Rs. 50,000 and under Section 35-A, the costs awardable are up to Rs. 3,000. The award of the cost of the suit is in the discretion of the Court. In Sections 35 and 35-B, there is no upper limit of amount of cost awardable.

Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded on the unsuccessful party. Unfortunately, it has become a practice to direct the parties to bear their own costs. In large number of cases, such an order is passed despite Section 35(2) of the Code. Such a practice also encourages filing of frivolous suits. It also leads to taking up of frivolous defences. Further, wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the Court in its discretion may direct otherwise by recording reasons therefor. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost besides the payment of the Court fee, lawyer's fee, typing and other cost in relation to the litigation. It is for the High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate Courts to follow.

SECTION 80

The two months' period mentioned in Section 80(1) of the Code has been provided for so that the Government shall examine the claim put up in the notice and has sufficient time to send a suitable reply. The underlying object is to curtail the litigation. The object also is to curtail the area of dispute and controversy. Similar provisions also exist in various other legislations as well. Wherever the statutory provision requires the service of notice as a condition precedent for filing of suit and prescribed period therefor, it is not only necessary for the governments or departments or other statutory bodies to send a reply to such a notice but it is further necessary to properly deal with all material points and issues raised in the notice. The Governments, Government departments or statutory authorities are defendants in large number of suits pending in various Courts in the country. Judicial notice can be taken of the fact that in large number of cases either the notice is not replied or in a few cases where reply is sent, it is generally vague and evasive. The result is that the object underlying Section 80 of the Code and similar provisions gets defeated. It not only gives rise to avoidable litigation but also results in heavy expense and cost to the exchequer as well. Proper reply can result in reduction of litigation between State and the citizens. In case proper reply is sent either the claim in the notice may be admitted or area of controversy curtailed or the citizen may be satisfied on knowing the stand of the State. There is no accountability in the Government, Central or State or the statutory authorities in violating the spirit and object of Section 80.

These provisions cast an implied duty on all concerned Governments and State and statutory authorities to send appropriate reply to such notices. Having regard to the existing state of affairs, it is directed that all concerned Governments, Central or State or other authorities, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to nominate, within a period of three months, an Officer who shall be made responsible to ensure that replies to notices under Section 80 or similar provisions are sent within the period stipulated in a particular legislation. The replies shall be sent after due application of mind. Despites such nomination, if the Court finds that either the notice has not been replied or reply is evasive and vague and has been sent without proper application of mind, the Court shall ordinarily award heavy cost against the Government and direct it to take appropriate action against the concerned Officer including recovery of costs from him.

SECTION 115

The power of the High Court under Articles 226 and 227 of the Constitution is always in addition to the revisional jurisdiction conferred on it. Curtailment of revisional jurisdiction of the High Court under Section 115 of the Code as amended by Amendment Act 46 of 1999 does not take away and could not have taken away the constitutional jurisdiction of the High Court. The power exists, untrammeled by the amendment in Section 115 and is available to be exercised subject to rules of self-discipline and practice which are well settled.

SECTION 148

The upper limit of 30 days fixed in Section 148 of the Code cannot take away the inherent power of the Court to pass orders as may be necessary for the ends of justice or to prevent abuse of process of Court. The rigid

operation of the Section would lead to absurdity. Section 151 has, therefore, to be allowed to fully operate. Extension beyond the maximum of 30 days, thus, can be permitted if the act could not be performed within 30 days for the reasons beyond the control of the party. However, Section 148 does not apply to cases to which the Limitation Act, 1963 is applicable.

There can be many cases where non-grant of extension beyond 30 days would amount to failure of justice. The object of the Code is not to promote failure of justice. Section 148, therefore, deserves to be read down to mean that where sufficient cause exists or events are beyond the control of a party, the Court would have inherent power to extend time beyond 30 days.

The period of seven days mentioned in Order IX Rule 5 is clearly directory.

The stipulation in **Rule 15 of Order XI** confining the inspection of documents `at or before the settlement of issues' instead of `at any time' is also nothing but directory. It does not mean that the inspection cannot be allowed after the settlement of issues.

NEW ACT AND ITS IMPACT

The Committee has suggested that the Central Government has to provide substantial funds for establishing Courts which are subordinate to the High Court and the Planning Commission and the Finance Commission must make adequate provisions therefor. The Committee has also suggested that there must be `judicial impact assessment', as done in the United States, whenever any legislation is introduced either in Parliament or State Legislatures. The financial memorandum attached to each Bill must estimate not only the budgetary requirement of other staff but also the budgetary requirement for meeting the expenses of the additional cases that may arise out of the new Bill when it is passed by the legislature. The said budget must mention the number of civil and criminal cases likely to be generated by the new Act, how many Courts are necessary, how many Judges and staff are necessary and what is the infrastructure necessary. So far in the last fifty years such a judicial impact assessment has never been made by any legislature or by Parliament in our country. Having regard to the constitutional obligation to provide fair, quick and speedy justice, the Central Government is directed to examine the aforesaid suggestions and submit a report to this Court within four months.

SETTLEMENT

As can be seen from Section 89 of the Code, its first part uses the word `shall' when it stipulates that the `Court shall formulate terms of settlement'. The use of the word `may' in the later part of Section 89 only relates to the aspect of reformulating the terms of a possible settlement. The intention of the legislature behind enacting Section 89 is that where it appears to the Court that there exists an element of a settlement which may be acceptable to the parties, they, at the instance of the Court, shall be made to apply their minds so as to opt for one or the other of the four Alternative Dispute Resolution methods mentioned in the Section and if the parties do not agree, the Court shall refer them to one or the other of the said modes. Section 89 uses both the word `shall' and `may' whereas Order X Rule 1-A uses the word `shall' but on harmonious reading of these provisions it becomes clear that the use of the word `may' in Section 89 only governs the aspect of reformulation of the terms of a possible settlement and its reference to one of the ADR methods. There is no conflict. It is evident that what is referred to one of the ADR modes is the dispute which is summarized in the terms of settlement formulated or reformulated in terms of Section 89. The Arbitration and Conciliation Act, 1996 governs a case where arbitration is agreed upon before or pending a suit by all the parties. The 1996 Act, however, does not contemplate a situation as in Section 89 of the Code where the Court asks the parties to choose one or the other ADRs including Arbitration and the parties choose Arbitration as their option. Of course, the parties have to agree for Arbitration. Section 82 of the 1996 Act enables the High Court to make Rules consistent with this Act as to all proceedings before the Court under the 1996 Act. Section 84 enables the Central Government to make rules for carrying out the provisions of the Act. The procedure for option to Arbitration among the four ADRs is not contemplated by the 1996 Act and, therefore, Sections 82 or 84 has no applicability where the parties agree to go for arbitration under Section 89 of the Code. For the purposes of Section 89 and Order X, Rules 1-A, 1-B and 1-C, the relevant Section in Part X of the Code enable the High Court to frame rules. If reference is made to Arbitration under Section 89 of the Code, the 1996 Act would apply only from the stage after reference and not before the stage of reference when options under Section 89 are given by the Court and chosen by the parties. On the same analogy, the 1996 Act in relation to Conciliation would apply only after the stage of reference to Conciliation. The 1996 Act does not deal with a situation where after the suit is filed, the Court requires a party to choose one or the other ADRs including Conciliation. Thus, for Conciliation also rules can be made under Part X of the Code for the purposes of procedure for opting for `Conciliation' and up to the stage of reference to `Conciliation'. Thus, there is no impediment in the ADR rules being framed in relation to Civil Court as contemplated in Section 89 up to the stage of reference to ADR. The 1996 Act comes into play only after the stage of reference up to the award.

Applying the same analogy, the Legal Services Authority Act, 1987 or the Rules framed thereunder by the State Governments cannot act as impediment in the High Court making rules under Part X of the Code covering the manner in which the option to Lok Adalat can be made being one of the modes provided in Section 89. The 1987 Act also does not deal with the aspect of exercising option to one of the four ADR methods mentioned in Section 89. Section 89 makes applicable the 1996 Act and the 1987 Act from the stage after the exercise of options and making of reference. [972-d-e] 25. It is evident that all the four alternatives, namely, Arbitration, Conciliation, judicial settlement including settlement through Lok Adalat and mediation are meant to be the actions of persons or institutions outside the Court and not before the Court. Order X,

Rule 1-C speaks of the `Conciliation forum' referring back the dispute to the Court. In fact, the Court is not involved in the actual mediation/conciliation. Section 89(2)(d) only means that when mediation succeeds and parties agree to the terms of settlement, the mediator will report to the Court and the Court, after giving notice and hearing the parties, `effect' the compromise and pass a decree in accordance with the terms of settlement accepted by the parties. Further, there is no question of the Court which refers the matter to mediation/conciliation being debarred from hearing the matter where settlement is not arrived at. The Judge who makes the reference only considers the limited question as to whether there are reasonable grounds to expect that there will be settlement and on that ground he cannot be treated to be disqualified to try the suit afterwards if no settlement is arrived at between the parties.

The Central Government is directed to examine the suggestion that expenditure on compulsory reference to conciliation/mediation be borne by the Government and if it is agreed, it shall request the Planning Commission and the Finance Commission to make specific financial allocation for the judiciary for including the expenses involved for mediation/conciliation under Section 89 of the Code. In case, the Central Government has any reservations, the same shall be placed before this Court within four months. With a view to enabling the Court to refer the parties to conciliation/mediation, where the parties are unable to reach a consensus on an agreed name, there should be a panel of well trained conciliators/mediators to which it may be possible for the Court to make a reference. It would be necessary for the High Courts and district Courts to take appropriate steps in the direction of preparing the requite panels.

The Family Courts Act, 1984 applies the Code for all proceedings before it. Therefore, ADR rules made under the Code can be applied to supplement the rules made under the Family Courts Act and provide for ADR insofar as conciliation/mediation is concerned. There is a fine distinction between conciliation and mediation. In `conciliation' there is a little more latitude and conciliator can suggest some terms of settlements too. When the parties come to a settlement upon a reference made by the Court for mediation, as suggested by the Committee there has to be some public record of the manner in which the suit is disposed of and, therefore the Court has to first record the settlement and pass a decree in terms thereof and if necessary proceed to execute it in accordance with law. It cannot be accepted that such a procedure would be unnecessary. If the settlement is not filed in the Court for the purpose of passing of a decree, there will be no public record of the settlement. It is, however, a different matter if the parties do not want the Court to record a settlement and pass a decree and feel that the settlement can be implemented even without a decree. In such an eventuality, nothing prevents them from informing the Court that the suit may be dismissed as the dispute has been settled between the parties outside the Court. Regarding the refund of the Court fee where the matter is settled by the reference to one of the modes provided in Section 89 of the Code, it is for the State Governments to amend the laws on the lines of the amendment made in the Central Court Fee Act by Act 46 of the 1999 Amendment to the Code. The State Governments can consider making similar amendments in the State Court Fee legislations. The draft ADR and Mediation Rules have been finalised by the Committee and now it is for the respective High Courts to take appropriate steps for making rules in exercise of the rule-making power subject to modifications, if any, which may be considered relevant. The High Courts can examine the Model Case Flow Management Rules, discuss the matter and consider the question of adopting or making case law management and model rules with or without modification, so that a step forward is taken to provide to the litigating public a fair, speedy and inexpensive justice. It is hoped that the High Courts in the country would be in a position to examine the aforesaid rules expeditiously and would be able to finalise the Rules within a period of four months. The Registrar Generals, the Central Government and the State/Union Territories shall file the progress reports in regard to the action taken within a period of four months.

In Sangram Singh v. Election Tribunal Kotah & Anr. [AIR 1955 SC 425], considering the provisions of the Code dealing with the trial of the suits, it was opined that: "Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a Penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it. Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle. "

In Topline Shoes Ltd. v. Corporation Bank [(2002) 6 SCC 33], the question for consideration was whether the State Consumer Disputes Redressal Commission could grant time to the respondent to file reply beyond total period of 45 days in view of Section 13(2) of the Consumer Protection Act, 1986. It was held that the intention to provide time frame to file reply is really made to expedite the hearing of such matters and avoid unnecessary adjournments. It was noticed that no penal consequences had been prescribed if the reply is not filed in the prescribed time. The provision was held to be directory. It was observed that the provision is more by way of procedure to achieve the object of speedy disposal of the case.

In State of W.B. v. Sri Sri Lakshmi Janardan Thakur [(2006) 7 SCC 490], this Court opined: "In order to ascertain whether a trust is private, the following factors are relevant:
(1) If the beneficiaries are ascertained individuals.

(2) If the grant has been made in favour of an individual and not in favour of a deity.
(3) The temple is situated within the campus of the residence of the donor.
(4) If the revenue records or entries suggest the land being in possession of an individual and not in the deity.
On the other hand an inference can be drawn that the temple along with the properties attached to it is a public trust:
(1) If the public visit the temple as of right.
(2) If the endowment is in the name of the deity.
(3) The beneficiaries are the public.
(4) If the management is made through the agency of the public or the accounts of the temple are being scrutinised by the public."

CONTINUING GUARANTEE

2008 (5) SCC 711 SITA RAM GUPTA VS PUNJAB NATIONAL BANK AND ORS BENCH: TARUN CHATTERJEE & HARJIT SINGH BEDI

Indian Contract Act 1872 Section 130: Continuing guarantee -

The High Court was perfectly justified in holding that the appellant was liable to pay the decretal amount to the Bank in view of the clause in the agreement of guarantee itself. The agreement of guarantee clearly provides that the guarantee shall be a continuing guarantee and shall not be considered as cancelled or in any way affected by the fact that at any time, the said accounts may show no liability against the borrower or may even show a credit in his favour but shall continue to be a guarantee and remain in operation in respect of all subsequent transactions. This was an agreement entered into by the appellant with the Bank, which is binding on him.

The agreement cannot be said to be unlawful nor the parties have alleged that it was unlawful either before the Trial Court or before the High Court. Therefore, the agreement of guarantee entered into by the appellant with the Bank was lawful.

The High Court has rightly held and that the appellant cannot claim the benefit under Section 130 of the Indian Contract Act because he had waived the benefit by entering into the agreement of guarantee with the Bank.

The appellant had clearly agreed that the guarantee that he had entered into with the Bank was a continuing guarantee and the same was to continue and remain in operation for all subsequent transactions. Having entered into the agreement in the manner as indicated it was, therefore, not open to the appellant to turn around and say that in view of Section 130 of the Act, since the guarantee was revoked before the loan was advanced to defendant Nos. 1 to 4 and 6, he was not liable to pay the decretal amount as a guarantor to the Bank as his guarantee had already stood revoked.

Even if a letter was written to the Bank by the appellant withdrawing the guarantee given by him, it was contrary to the clause in the agreement of guarantee. Therefore, it was not open to the appellant to revoke the guarantee as the appellant had agreed to treat the guarantee as a continuing one and was bound by the terms and conditions of the said guarantee.

In Shri Lachoo Mal Vs. Shri Radhey Shyam, [(1971) 1 SCC 619], this Court observed that the general principle is that everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public principle.

In Brijendra Nath Bhargava and anr. Vs. Harsh Wardhan and ors. [(1988) 1 SCC 454], it has been observed at page 461 in para 10 that if a party had given up the advantage he could take of a position of law, it was not open to him to change and say that he could avail of that ground. The same principle has been followed in Bank of India and Ors. Vs. O.P.Swarnakar & Ors. [(2003) 2 SCC 721].

SEIZURE

2008 (7) SCC 532 Banks/Banking: Recovery of loans or seizure of vehicles can only be done through legal means- Lenders/Banks not to resort to use of muscle power for recovery of loans and persistently bothering borrower at odd hours.

Prosecution case was that son of respondent committed suicide as a result of harassment and humiliation caused to him by the appellants bank's recovery agents. The respondent filed a writ petition seeking for directions to the Commissioner of Police to take action against the appellant-bank. High Court ordered the Police to file reports as to the status of the investigation against the bank. The High Court later reviewed the two status reports that were filed by the Police. It found them unsatisfactory and accordingly, directed the Investigating Officer to conclude the investigation into the matter as expeditiously as possible and take

necessary action against those found guilty of abetting the deceased to commit suicide. In addition, the High Court stated the proximate cause of death of the deceased that led him to commit suicide was on account of humiliation caused by the Bank people from where loan was taken by him; and the modus-operandi employed by the banks for realization of their loan amount and for recovering the possession of the vehicle against which loans are given was not legal.

Disposing of the appeal, the Court HELD:

Reference to the complaint shows that its contents contain allegations and not facts. Moreover, the investigation was ongoing. Thus, it should have been understood that the High Court was referring to alleged facts. The High Court could have been more careful to note that the facts that it discussed were alleged. Recognizing as much, the High court clarified that its observations were not to influence or affect the proceedings. This Court is reiterating the same. The observations would have no bearing on the ongoing investigation. Given this clarification, it cannot be said that the appellant bank has been substantially aggrieved. Nor expunging the impugned observations would have much of an effect. Under either scenario, having the observations expunged or having them clarified, no one can rely on the observations. Nevertheless, it is appropriate to remind financial institutions that they are bound by law. The recovery of loans or seizure of vehicles can only be done through legal means.

The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) and the Security Interest (Enforcement) Rules, 2002 (SIER) framed thereunder provide some of the procedures by which security interests may be recovered. In addition to SARFAESI and SIER, the Reserve Bank of India (RBI) has promulgated Guidelines on the subject.

The RBI Guidelines on Fair Practices Code for Lenders dated 5.5.2003 provides at (v)(c) that: "In the matter of recovery of loans, the lenders should not resort to undue harassment viz. persistently bothering the borrowers at odd hours, use of muscle power for recovery of loans, etc." A more comprehensive version of these Guidelines was recently released on April 24, 2008. The Guidelines expressly reference the 5.5.2003 Guidelines at (i)(x) with regard to the methods by which recovery agents collect on security interests. In addition, the April 24, 2008 Guidelines further referred paragraph 6 of the "Code of Bank's Commitment to Customers" pertaining to collection of dues.

RBI has expressed its concern about the number of litigations filed against the banks in the recent past for engaging recovery agents who have purportedly violated the law. In the letter accompanying its April 24th, 2008 Guidelines on Engagement of Recovery Agents, RBI stated: "In view of the rise in the number of disputes and litigations against banks for engaging recovery agents in the recent past, it is felt that the adverse publicity would result in serious reputational risk for the banking sector as a whole." RBI has taken this issue seriously, as evidenced by the penalty that banks could face if they fail to comply with the Guidelines.

It is appropriate to remind the banks and other financial institutions that we live in a civilized country and are governed by the rule of law. Looking to the gravity of the above allegations, the matter should be investigated as expeditiously as possible and, in any event, it must be concluded within a period of three months and, thereafter, the concerned Deputy Commissioner of Police is directed to submit the report of the investigation in the High Court.

"Code of Bank's Commitment to Customers" (BCSBI Code) pertaining to collection of dues. The BCSBI Code at para 6 inter alia provides: "All the members of the staff or any person authorized to represent our bank in collection or/and security repossession would follow the guidelines set out below: 1. You would be contacted ordinarily at the place of your choice and in the absence of any specified place at the place of your residence and if unavailable at your residence, at the place of business/occupation. 2. Identity and authority to represent would be made known to you at the first instance. 3. Your privacy would be respected. 4. Interaction with you would be in a civil manner. 5. Normally our representatives will contact you between 0700 hours and 1900 hrs, unless the special circumstances of your business or occupation require otherwise. 6. Your requests to avoid calls at a particular time or at a particular place would be honored as far as possible. 7. Time and number of calls and contents of conversation would be documented. 8. All assistance would be given to resolve disputes or differences regarding dues in a mutually acceptable and in an orderly manner. 9. During visits to your place for dues collection, decency and decorum would be maintained. 10. Inappropriate occasions such as bereavement in the family or such other calamitous occasions would be avoided for making calls/visits to collect dues.

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"Banks, as principals, are responsible for the actions of their agents. Hence, they should ensure that their agents engaged for recovery of their dues should strictly adhere to the above guidelines and instructions, including the BCSBI Code, while engaged in the process of recovery of dues. Complaints received by Reserve

Bank regarding violation of the above guidelines and adoption of abusive practices followed by banks' recovery agents would be viewed seriously. Reserve Bank may consider imposing a ban on a bank from engaging recovery agents in a particular area, either jurisdictional or functional, for a limited period. In case of persistent breach of above guidelines, Reserve Bank may consider extending the period of ban or the area of ban. Similar supervisory action could be attracted when the High Courts or the Supreme Court pass strictures or impose penalties against any bank or its Directors/ Officers/ agents with regard to policy, practice and procedure related to the recovery process. It is expected that banks would, in the normal course ensure that their employees or agents also adhere to the above guidelines during the loan recovery process."

AIR 2007 SC 1349, MANAGER, ICICI BANK LTD RESPONDENT: PRAKASH KAUR & ORS BENCH: DR. AR. LAKSHMANAN & ALTAMAS KABIR

Banks/Banking: Recovery agents-Hiring of-For recovery of loan/possession of vehicle-Held:

(Altamas Kabir, J) : Practice of hiring recovery agents/musclemen, deprecated-Banks must resort to procedure recognized by law to take possession of vehicles where borrower defaults in payment of instalments instead of taking resort to strong arm tactics.

(Dr. AR Lakshmanan, J): Suggestions to Banks not to resort to goondas to take possession of vehicle by force.

The respondent had obtained loan from ICICI Bank for purchase of truck. She defaulted in payment of instalments and the Bank forcibly took possession of truck through their agents. On 25.7.2006, the respondent wrote to the agents to provide the details of the instructions given to them to seize the truck. She also sent legal notice to the recovery agent, which was refused. According to the respondent, the Bank and its officials had conspired to cheat her by advancing the loan for purchase of truck and accordingly, she wrote to the police authorities on 3/4.9.2006 to register the FIR. No steps were taken by police. Aggrieved respondent filed writ petition before High Court praying for directions to register FIR against the police officials and for recovery of truck illegally taken from her possession and for direction to Union of India for cancellation of licence of the Appellant-Bank. High Court directed the SSP to register the case and hold investigation.

Per Dr. AR. Lakshmanan, J. (supplementing):

The recovery of loans or seizure of vehicles could be done only through legal means. The Banks cannot employ goondas to take possession by force.

The entrance of the multi national banks into the country has spread the culture of Credit Cards, Loans on an unimaginable level. Inadequate information on the Credit Card application, Loan Applications, Advertisements or even while meeting the bankers in person in respect of the lending rates and hidden charges, leads to this class of people being lured into the buying of the Credit Cards or taking of the home loan or education loan without knowing the ramifications of non-payment and default. Once the credit card or loan is taken and there appears a default, then the witch-hunt begins. The first step to recovery of the money due is through the so called RECOVERY/COLLECTION AGENTS.

A very dignified term used for paid recovery agents who are individual and independent contractors hired by the Banks to trace the defaulters and to both physically, mentally and emotionally torture and force them into submitting their dues. A man's self respect, stature in society are all immaterial to the agent who is only primed at recovery. This is the modernized version of Shylock's pound of flesh. No explanation is given regarding the interest charged and the bank takes cover under the guise of the holder of the card or loan having signed the agreement whose fine print is never read or explained to the owner. Young and Old members of the family are threatened on streets, institutions and also at home at godforsaken hours by these agents who have the full support of their contractor bank. Using of the abusive language for recovery is the norm of the day for most nationalized or multi national bank or non-nationalized bank. The banks escape liability since these agents are not salaried employees of the bank and hence not directly liable for anything.

Considering the difficulties of the customers as well as banks, the concept to be developed is to create distinct and separate department for recovery. This should be manned by persons who will not resort to violence or force when they are in the process of recovery of the dues.

While the fraudulent defaulters can be dealt with by taking the Police help for such action, it is only when law is taken into the hands of the so called recovery agents, who are appointed on contract basis, the issue gets aggravated. A separate wing, wherein appropriate training is given in accordance with RBI guidelines would facilitate the bank in its recovery process and also would provide more responsibilities to the persons so engaged.

The Lok Adalat should be used as an effective machinery to resolve the issues and concentrate with reference to keeping the fine balance between the Banks and Borrowers.

If the Agency System is inescapable, then the Agency must be coupled with a license issued after conducting examination. Appropriate training should be given to the agents who should have requisite qualification and

maturity to handle delicate and sensitive situation. Merely because the Agency System is convenient to the banks, and has been approved by RBI, it should not lead to lawlessness and conduct resulting in challenge to rule of law.

I had the privilege of perusing the judgment proposed by my learned Brother - Hon'ble Mr. Justice Altamas Kabir. While respectfully concurring with the conclusion arrived by the learned Judge, I would like to add the following few paragraphs:-

1) Regarding the role of Recovery Agents use of abusive language due process of law RBI guidelines. FACTORS:?

The issue of Banks employing alternate means of recovery other than by due process of law i.e., either through Courts, Tribunals, Adalats or Commissions is an issue that has to be viewed from two angles (1) from the angle of the common man and (2) from the angle of the bank. REASONS: ? First of all, the entrance of the multi national banks into the country has spread the culture of Credit Cards, Loans on an unimaginable level where rather than the rich, it is the middle class, the lower middle class and the lower class who are at the receiving end of the bonanzas promised by the Banks. ? Inadequate information on the Credit Card application, Loan Applications, Advertisements or even while meeting the bankers in person in respect of the lending rates and hidden charges, leads to this class of people being lured into the buying of the Credit Cards or taking of the home loan or education loan without knowing the ramifications of non-payment and default. ? The first mistake here is most definitely on the part of the bank who does not believe in educating the masses regarding the promises. Once the credit card or loan is taken and there appears a default, then the witch-hunt begins. ? Now the bank is the aggressor and the public is the victim.

The first step to recovery of the money due is through the so called **RECOVERY/COLLECTION AGENTS.** A very dignified term used for paid recovery agents who are individual and independent contractors hired by the Banks to trace the defaulters and to both physically, mentally and emotionally torture and force them into submitting their dues. ? A man's self respect, stature in society are all immaterial to the agent who is only primed at recovery. This is the modernized version of Shylock's pound of flesh. No explanation is given regarding the interest charge and the bank takes cover under the guise of the holder of the card or loan having signed the agreement whose fine print is never read or explained to the owner. ? When a harassed man approaches the Court or the police station he is not armed with a recording phone and finds it difficult to give evidence of the abuse he has suffered. Here the bank gets away with everything. Young and Old members of the family threatened on streets, institutions and also at home at godforsaken hours by these agents who have the full support of their contractor bank. The stance taken by the bank in any suit alleging such incidents is that no such agent has been appointed by them or their agents do not misbehave in the manner aforesaid and if found guilty the agents have to bear the cross and the bank gets away scot free. ? Using of the abusive language for recovery is the norm of the day for most nationalized or multi national bank or non-nationalized bank. Though some are smart enough to record the abuse and proceed to establish the same through Court of Law, most of them are unfortunate not to have recourse to it. Such people form the majority and such litigations are pending in large volumes before the Civil and Consumer Courts. Again the banks escape liability since these agents are not salaried employees of the bank and hence not directly liable for anything. ? Taking it from the angle of the common man the inflow of software money and high salaries has resulted in uncontrolled expenditure. Rather than utility it is a fashion to carry a card for it makes a statement depending on the type of card one carries. ? To maintain ones image one pays the price of utilizing the card without realizing that even a single day's delay in payment results in more than 100 to 200 rupees being charged as default and penalty charges, which if accumulates over a month, results in the charges exceeding the actual payment due. ? As for loans, when litigation is commenced by the customer against the bank or an institution, then they refuse to divulge the true statement of account stating that it will be produced in court. This gives ample scope for manipulation.

SUGGESTIONS ? Chronic defaulters should mean a default of a maximum of three months if intermittent payments have been made. ? It is mandatory that the banks be held vicariously liable for such acts of agents. These agents have to be identified as registered agents of the bank and should be bought directly under the purview of the RBI. ? It may be useful that in view of the enormous amount of litigation pending and being filed against the banks that the recovery agents be made employees of the bank and the bank be held liable directly for all actions of such employees. ? Also every statement sent by the bank should disclose clearly the rate of interest and the default interest and penalty charges separately calculated and added to the amount pending and due by the customer. ? At the very first month of default, the card should automatically be terminated by the bank to prevent further use/misuse. ? At the time of issuance of card itself, the issuance letter should contain every single charge being made, explained in simple terms and the penalty the customer will bear for such non-payment. ? These agents should be held responsible for every background check done on the person to whom the card is issued and the defaulter should be made liable along with the agent. This would ensure that the agent does not source illegal or fraudulent customer. ? This is dealt with elaborately in the RBI guidelines issued on 21.11.2005 but which still remains only on paper and is not being followed.

HIRE PURCHASE: FACTORS: Very many banks and more importantly banks like ICICI have extended liberal credit facilities for purchase of vehicles whether two wheelers or four wheelers, more the number the targets are achieved. This results in a certain amount of default cases. The default can be two-fold (1) genuine and (2) fraudulent. Both, in the case of genuine and fraudulent the method usually adopted by these institutions is to engage thug/hooligan/gangster for recovery or the two wheelers or four wheelers. Many times even notice is not given to them. They seize the vehicles even in public places deliberately to cause embarrassment. There

is no codification till date. This requires immediate attention. In all the cases of hire purchase, advance cheques for a period of 36 months or 48 months or 60 months are obtained and since there is no proper collection process, they not only seize the vehicles but also continue to present the cheques merely to harass the customers. A recent incident has taken place when the Recovery Agent had gone and threatened a school going child for the money due by the father. Unless we have an effective supervisory system the abuse will continue.

SUGGESTION Most of the non-banking financial institutions adopt the arbitration route for the purpose of getting a commissioner of the Court appointed for seizing the vehicles. The most important aspect would be a broad guideline for fixing the targets, whether they be for lending or for recovery. This would result in a proper balance between the extreme differences of working conditions between the Multinational Commercial Banks and Nationalized and Non-nationalized Banks who are doing the very same credit business with dignity. 3) Agency systems to be abolished

FACTORS Though there are voices raised stating that the agency system should be abolished, this has to be examined from the view of the bank for whom this system has proved to be extremely productive in view of chronic and regular defaulters and customers who have a premeditated intention of cheating the bank. Such people are identified easily by the agents and produced physically before the bank who resort to all means including the local police help to force such customers to repay their dues. **REASON** The delay in the Courts and the in-effective and corrupt police structure enables the bank to seek the help of such agencies which proves to be cost effective and less cumbersome. **SUGGESTION ?** Abolition of the system is not the answer but effective control over the agency by the respective banks is essential. ? Even though, the Reserve Bank of India Guidelines permit the use of an Independent Agency, no prescribed qualification or licence is granted. ? If there could be a guideline only licensed recovery agents would be employed and misuse of the agents as against the borrowers can be eradicated. ? License also should be granted after the respective agents get through in a course conducted by the banks. ? In accordance with the RBI Guidelines, in any proven cases the license of the agent should be cancelled with penal consequences on them. ? This could be the best alternative if the banks do not come forward to employ their own personnel and depute them for recovery of outstandings.

RBI Guidelines ? The widely published and circulated guidelines dated 21.11.2005 has constituted a working group on regulatory mechanisms and for fair trade practices. ? It came into effect as of 30th November, 2005 and covers a wide area pertaining to the rights of the customers and right to privacy, confidentiality, practice of debt collections, Redressal of grievances and monitoring systems to be implemented by the banks. ? Pursuant to this certain knowledgeable persons/executives aggrieved by the agencies behaviour took recourse through the Ombudsman. ? Not many are aware of this forum and the banks continue to be safe. 5) Banking Regulations Act ? Banking Regulations Act does not, in any way, provide the details of the conduct of the bank business. ? It only contemplates the registration of a bank, incorporation of a bank and thereafter puts the bank under the control of RBI. ? While there are guidelines both for lending and recovery which contemplates that no use of force or abuse is used in recovery proceedings, in the absence of an effective overseeing body, these abuses continues. ? Since every bank should hold a license issued to carry on the banking business in India by the RBI in accordance with the conditions imposed by the RBI, if and when both nationalized and MNB's violate any of the rules and regulations consistently over a period of time, then strictures ought to be imposed on such digressing banks to curb their high handed activities and to make them answerable to the general public. ? Only this would reinstate the confidence of the masses in the banking system who are already burdened with the population of over 60 years of age having lost tremendously on the lowering of the interest rates. ? The banking procedures should be people friendly at the same time, strict in its enforcement and educative enough to guide the public on the benefits of prudent banking and savings and at the same time, enlighten them on the pitfalls of borrowing or taking credit from institutions for various purposes, way beyond their means.

CONCLUSION: On an overall assessment of the system presently existing in India, the Multi National Banks score over the nationalized banks in terms of connectivity and ease in functioning, since they are highly automated and efficient. The staff too is well trained and well paid also. The disadvantage here is that the more the pay, the greater the pressure. Every facility is provided but work is extracted to the maximum irrespective of the age or personal circumstances. In a nationalized bank, since there is no fear of immediate removal, the attitude of the staff is tolerant. No effort is made to go a little more to help the masses. Burden is shifted easily at the lower level. The middle management and higher management are under tremendous pressure, since they are to achieve targets on par with the Multi National Banks. Though there is job security and comfort in pension, there is no answerability. This leads to a recalcitrant attitude and apathy. As a conclusion, one can state that though efficiency is necessary, it should not be attained under pressure and this situation would only improve if answerability is made the prime criteria in both the sectors.

ADDITIONAL INPUTS Considering the difficulties of the customers as well as banks, the concept to be developed is to create distinct and separate department for recovery. This should be manned by persons who will not resort to violence or force when they are in the process of recovery of the dues. While the fraudulent defaulters can be dealt with by taking the Police help for such action, it is only when law is taken into the hands of the so called recovery agents, who are appointed on contract basis, the issue gets aggravated. A separate wing, wherein appropriate training is given in accordance with RBI guidelines would facilitate the bank in its recovery process and also would provide more responsibilities to the persons so engaged. Yet another suggestion would be that of loans whether they are Personal Loans or Credit Cards or Housing Loan with less than Rs.10 lakhs exposure, can be referred to Lok Adalat which can be specially created for

resolving the issues between the banks and the borrowers. In fact, the Lok Adalat should be used as an effective machinery to resolve the issues and concentrate with reference to keeping the fine balance between the Banks and Borrowers. If the Agency System is inescapable, then the Agency must be coupled with a license issued after conducting examination. Appropriate training should be given to the agents who should have requisite qualification and maturity to handle delicate and sensitive situation. Merely because the Agency System is convenient to the banks, and has been approved by RBI, it should not lead to lawlessness and conduct resulting in challenge to rule of law. While performance of the banks are always co-related with reference to its growth, its assets utilization and finally profit in the balance sheet, that and that alone cannot be relied upon, with reference to a country like India, where there is enormous disparity in respect of various sections of the society. These are all positive steps that would bring in the over all balance in the working of all these institutions. Whether it is a bank, which concentrate on higher segment of banking or it is a bank which concentrate upon middle class, lower middle class and such other segment of the Indian Public who look to and requires the banking comfort, it is not mere question of lending the money that matters, but also the consequences thereafter. The social responsibility is larger than the banks profit and growth ratio alone. Keeping in mind the social responsibility, it is absolutely necessary to appoint a Special Committee who will look into the disparity in working conditions, at least upto the managerial level and make such recommendations to the RBI and Union of India for all remedial actions. In conclusion, we say that we are governed by a rule of law in the country. The recovery of loans or seizure of vehicles could be done only through legal means. The Banks cannot employ goondas to take possession by force.

JUDICIARY ON SOCIETAL NEEDS

Justice D.V. Shylendra Kumar, J. in Anganwadi case observed as follows; "It is more than sixty years since we achieved independence and about two years less since we became a Socialist Secular Democratic Republic. The Constitution of India proclaims that providing ourselves a Constitution was for the purpose of achieving justice - social, economical and political. Also declared that there shall be liberty of thought, expression, belief, faith and worship and very importantly equality of status and opportunity to all citizens of the country. Leave alone providing the means and source for leading a dignified life, we have not been able to provide even the basic necessities of life to all our fellow citizens. Poverty, concomitant hunger, lack of food for all people, and also clothing and shelter, no housing facility to all citizens, totally inadequate health facilities, not all can afford medical services, if is to be obtained as a cost, mal-nutrition, diseases, even social maladies, have persisted with gay abreaction even today, notwithstanding pockets of affluence, prosperity, even despicable wealth. Though successive governments over the past about sixty years have strived 1o have a planned growth and achieve development by providing basic needs and facilities to the citizens, plans have not worked, schemes have not. been properly implemented and though a good number of developmental schemes have been mooted, the benefits of the schemes have not reached the citizens for whom it was envisaged, the object of the scheme is not Ail filled, the poor have remained poor even have become poorer, but large amounts of public funds are already spent, and continues to be spent."

INDUSTRIAL DISPUTE – WORKING FOR 240 DAYS – BURDEN OF PROOF

In the case of Manager, Reserve Bank of India, Bangalore v. S. Mani reported in (2005) 5 SCC 100, the workmen raised a contention of rendering continuous service between April, 1980 to December, 1982 in their pleadings and in their representations. They merely contended in their affidavits that they had worked for 240 days. The tribunal based its decision on the management not producing attendance register. In view of the affidavits filed by the workmen, the tribunal held that the burden on the workmen to prove 240 days service stood discharged. In that matter, a three- judge bench of Supreme court held that pleadings did not constitute a substitute for proof and that the affidavits contained self-serving statements; that no workman took an oath to state that they had worked for 240 days; that no document in support of the said plea was ever produced and, therefore, Supreme court took the view that the workmen had failed to discharge the burden on them of proving that they had worked for 240 days. According to the said judgment, only by reason of non-response to the complaints filed by the workmen, it cannot be said that the workmen had proved that they had worked for 240 days. In that case, the workmen had not called upon the management to produce relevant documents. The court observed that the initial burden of establishing the factum of continuous work for 240 days in a year was on the workmen. In the circumstances, this court set aside the award of the industrial tribunal ordering reinstatement.

In the case of Municipal Corporation, Faridabad v. Siri Niwas reported in (2004) 8 SCC 195, the employee had worked from 5.8.1994 to 31.12.1994 as a tube- well operator. He alleged that he had further worked from 1.1.1995 to 16.5.1995. His services were terminated on 17.5.1995 whereupon an industrial dispute was raised. The case of the employee before the tribunal was that he had completed working for 240 days in a year; the purported order of retrenchment was illegal as the conditions precedent to section 25-F of Industrial Dispute Act were not complied with. On the other hand, the management contended that the employee had worked for 136 days during the preceding 12 months on daily wages. Upon considering all the material placed on record by the parties to the dispute, the tribunal came to the conclusion that the total number of working days put in by the employee were 184 days and thus he, having not completed 240 days of working in a year, was not entitled to any relief. The tribunal noticed that neither the management nor the workman cared to produce the muster roll w.e.f. August, 1994; that the employee did not summon muster roll although the management had failed to produce them. Aggrieved by the decision of the tribunal, the employee filed a writ petition before the High Court which took the view that since the management did not produce

the relevant documents before the industrial tribunal, an adverse inference should be drawn against it as it was in possession of best evidence and thus, it was not necessary for the employee to call upon the management to do so. The High Court observed that the burden of proof may not be on the management but in case of non-production of documents, an adverse inference could be drawn against the management. Only on that basis, the writ petition was allowed holding that the employee had worked for 240 days. Overruling the decision of the High Court, Supreme court found on facts of that case that the employee had not adduced any evidence before the court in support of his contention of having complied with the requirement of section 25-B of Industrial Dispute Act; that apart from examining himself in support of his contention, the employee did not produce or call for any document from the office of the management including the muster roll (MR) and that apart from muster rolls, the employee did not produce offer of appointment or evidence concerning remuneration received by him for working during the aforementioned period. It is in this light that this court, speaking through Hon'ble Sinha, J., has held as follows: "A court of law even in a case where provisions of the Evidence Act apply, may presume or may not presume that if a party despite possession of the best evidence had not produced the same, it would have gone against his contentions. The matter, however, would be different where despite direction by a court the evidence is withheld. Presumption as to adverse inference for non-production of evidence is always optional and one of the factors which is required to be taken into consideration is the background of facts involved in the lis. The presumption, thus, is not obligatory because notwithstanding the intentional non-production, other circumstances may exist upon which such intentional non-production may be found to be justifiable on some reasonable grounds.

IN DELHI TRANSPORT CORPORATION Vs. D.T.C. MAZDOOR CONGRESS AIR 1991 SC 101

Service Law: Termination of service of permanent employee without assigning any reasons and holding enquiry -Contract providing for termination of service without notice and holding of en- quiry--Whether enforceable. The 'audi alteram partem' rule which, in essence, enforces the equality clause in Article 14 of the Constitution is applicable not only to quasi- judicial orders but to administrative orders affecting prejudicially the party- in- question unless the application of the rule has been ex- pressly excluded by the Act or Regulation or Rule which is not the case here. Rules of natural justice do no supplant but supplement the Rules and Regulations. Moreover, the Rule of Law, which permeates the Constitution of India, demands that it has to be observed both substantially and procedurally. Rule of law posits that the power to be exercised in a manner which is just, fair and reasonable and not in an unreasonable, capricious or arbitrary manner leaving room for discrimination. ……..
'audi alteram parterm' rule and as such the order of termi- nation of service of a permanent employee cannot be passed by simply issuing a month's notice or pay in lieu thereof without recording any reason in the order and without giving any hearing to the employee to controvert the allegation on the basis of which the purported order is made. Such powers is illegal and void, as it is arbitrary, discriminatory and without any guidelines for exercise of the power. It confers unbridled, uncanalised and arbitrary power on the authority to terminate the services of a permanent employee without recording any reasons and without conforming to the princi- ples of natural justice. It is also void under Section 23 of the Contract Act, as being opposed to public policy and also ultra vires of Article 14 of the Constitution. ……..

The rights of the parties in the present cases cannot be governed by the general principle of master and servant, and the management cannot have unrestricted and unqualified power of terminating the services of the employees. In the interest of efficiency of the public bodies, however, they should have the authority to terminate the employment of undesirable, inefficient, corrupt, indolent and disobedient employees, but it must be exercised fairly, objectively and independently; and the occasion for the exercise must be delimited with precision and clarity. Further, there should be adequate reason for the use of such a power, and a decision in this regard has to be taken in a manner which should show fairness, avoid arbitrariness and evoke credibility. And this is possible only when the law lays down detailed guidelines in unambiguous and precise terms so as to avoid the danger of misinterpretation of the situation. An element of uncertainty is likely to lead to grave and undesirable consequences. Clarity and precision are. therefore, essential for the guidelines. ……..

There is need to minimise the scope of the arbi- trary use of power in all walks of life. It is inadvisable to depend on the good sense of the individuals. however high-placed they may be. It is all the more improper and undesirable to expose the precious rights like the rights of life. liberty and property to the vagaries of the individual whims and fancies. It is trite to say that individuals are not and do not become wise because they occupy high seats of power, and good sense, circumspection and fairness do not go with the posts, however high they may be. There is only a complaisant presumption that those who occupy high posts have a high sense of responsibility. The presumption is neither legal nor rational. History does not support it and reality does not warrant it. In particular, in a society pledged to uphold the rule of law, it would be both unwise and impolitic to leave any aspect of its life to be governed by discretion when it can conveniently and easily be covered by the rule of law. ……..

The employment under the public undertakings is a public employment and a public property. It is not only the undertakings but also the society which has a stake in their proper and efficient working. Both discipline and devotion are necessary for efficiency. To ensure both, the service conditions of those who work for them must be encouraging, certain and secured, and not vague and whimiscal. With capricious service conditions, both discipline and devotion are endangered, and efficiency is impaired. The right to life includes right to livelihood. The right to livelihood, therefore, cannot hang on to the fancies of individuals in authority. The employment is not a bounty from them nor can its survival be at their mercy. Income is the foundation of

many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limb of undefined premises and uncertain applications. That will be a mockery of them. Both the society and the individual employed, therefore, have an anxious interest in service conditions being well-defined and explicit to the extent possible. The arbitrary rules which are also sometimes described as Henry VIII Rules, can have no place in any service conditions. ……

The right to life, a basic human right, assured by Article 21 of the Constitution comprehends some thing more than mere animal existence; it does not only mean physical existence, but includes basic human dignity. The right to public employment and its concomitant right to livelihood receive their succour and nourishment under the canopy of the protective umbrella of Articles 14, 16(1), 19(1)(g) and 21. The arbitrary, unbridled and naked power of wide discretion to dismiss a permanent employee without any guidelines or procedure would tend to defeat the constitutional purpose of equality and allied purposes. Therefore, when the Constitution assures dignity of the individual and the right to livelihood, the exercise of power by the executive should be combined with adequate safeguards for the rights of the employees against any arbitrary and capricious use of those powers……..

Undoubtedly, efficiency of the administration and the discipline among the employees is very vital to the successful functioning of an institution or maximum production of goods or proper maintenance of the services. Discipline in that regard amongst the employees is its essential facet and bas to be maintained. The society is vitally interested in the due discharge of the duties by the government employees or employees of corporate bodies or statutory authorities or instrumentalities under Art. 12 of the Con- stitution. The government or corporate employees are, after-all, paid from the public exchequer to which everyone contributes either by way of direct or indirect taxes. The employees are charged with public duty and they should perform their public duties with deep sense of responsibility. The collective responsibility of all the officers from top most to the lowest maximises the efficient public administration. They must, therefore, be held to have individual as well as collective responsibility in discharge of their duties faithfully honestly with full dedication and utmost devotion to duty. Equally the employees must also have a feeling that they have security of tenure. They should also have an involvement on their part in the organisation or institution, corporation, etc. They need assurance of service and protection. The public interest and the public good demands that those who discharge their duties honestly, efficiently and with a sense of devotion and dedication to duty should receive adequate protection and security of tenure. There- fore, before depriving an employee of the means of livelihood to himself and his dependents, i.e. job, the procedure prescribed for such deprivation must be just, fair and reasonable under Arts. 21 and 14 and when infringes Art. 19(1)(g) must be subject to imposing reasonable restrictions under Art. 19(5). ……..

Conferment of power on a high rank officer is not always an assurance, in particular, when the moral standards are generally degenerated, that the power would be exercised objectively, reasonably, conscientiously, fairly and justly without inbuilt protection to an employee. Even officers who do their duty honestly and conscientiously are subject to great pressures and pulls. Therefore, the competing claims of the "public interest" as against "individual interest" of the employees are to be harmoniously blended so as to serve the societal need consistent with the constitutional scheme. ……

In A.K. Kraipak and Others v. Union of India and Others, [1969] 2 SCC 262 it has been held at page 268-269 Paragraph 13: "The dividing line between an administrative power and a quasi judicial power 'is quite thin and is being gradually obliterated. For determining whether a power is an adminis- trative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. Under our Constitution the rule of law pervades over the entire field of administration. Every organ of the State under our Constitution is regulated and con- trolled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision .....

What was considered as an administrative power some years back is now being considered as a quasi judicial power. ' ' In the case of Union of India v. Col. J.N. Sinha and Anr., [1971] 1 SCR 79 1. Col. J.N. Sinha was compulsorily retired by an order of the President of India dated 13.8.69 under Section 56(j) of the Fundamental Rules from Government service without assigning any reason in the order. The High Court on a writ petition against the impugned order held that there was violation of principles of natural justice. On an appeal on Special Leave this Court held: "Rules of natural justice are not embodied rules nor can they be elevated to the position of fundamental rights. As observed by this Court in Kraipak and Ors. v. Union of India "the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. If a statutory provision can be read consist- ently with the principles of natural justice, the courts should do so because it must be presumed that the legislature and the statutory authorities intend to act in accord- ance with the principles of natural justice. But on the other hand a statutory provision either specifically or by necessary implication excludes the application of any or all the principles of natural justice then the court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the princi- ples of natural justice.

Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the ex- press words of the provisions conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of that power." It was held that Fundamental Rule 56(j) does not in term require that any opportunity should be given to the concerned servant to show cause against the compulsory retirement. The order of the President is, therefore, not bad as the authority bonafide forms that opinion……."

That if the termination of service is a colourable exercise of the power vested in the management or as a result of victimisation or unfair labour practice, the Industrial Tribunal would have jurisdiction to intervene and set aside such a termination. In order to find out whether the order of termination is one of termination simpliciter under the provisions of contract or of standing orders, the Tribunal has ample jurisdiction to go into all the circumstances which led to the termination simpliciter. The form of the order of termination, is not conclusive of the true nature of the order, for it is possible that the form may be merely a camouflage for an order of dismissal for misconduct. It is, therefore, open to the Tribunal to go behind the form of the order and look at the substance. If the Tribunal comes to the conclusion that though in form the order amounts to termination simpliciter but in reality cloaks a dismissal for misconduct, it will be open to it to set aside the orders as a colourable exercise of power by the management."

The same principles have also been reiterated in the later decision of this Court in Tara Oil Mills Co. Ltd. v. Workmen & Anr., [1964] 2 SCR 125. It has been observed in this case: "That the position of the industrial workman is different from that of a Government servant because an industrial employer cannot "hire and fire" his workmen on the basis of an unfettered right under the contract of employment, that right now being subject to industrial adjudication; and there is also on the other hand no provision of the Consti- tution like Arts. 3 10 and 311 requiring consideration in the case of industrial workmen."

GRANTED LANDS ENURES TO THE BENEFIT OF FAMILY

REPORTABLE IN THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION CIVIL APPEAL NO. 5646 OF 2008 (Arising out of SLP (C) No. 21197 of 2006) K.V. Sudharshan VS A. Ramakrishnappa & Ors. JUDGMENT TARUN CHATTERJEE, J.

Mysore (Religious and Charitable Inams) Abolition Act, 1955: Inam lands - Granted to eldest son with the consent of brother and other family members - Partition - Father of respondent Nos. 1 & 2 was serving as an Archak in a temple and had been cultivating the inam lands attached to the temple. After his death, the lands were granted by the authority to respondent No.1, the eldest son, with the consent of other members of the family. Respondent No.1 was also acting as the Manager of the ancestral and self-acquired property of his father. Appellant, son of respondent No.2, issued a legal notice to respondent No.1 demanding partition of the joint family properties including inam lands. Respondent No.1 refused to partition the immovable properties. The appellant filed a suit for partition claiming his share in the properties along with mesne profits. The Trial Court dismissed the suit holding that prior partition was established in view of the admission by respondent No.2 and as such the appellant could not demand partition. Aggrieved, the appellant filed an appeal, which was dismissed by the High Court. Review petition was also dismissed by the High Court. Hence the present appeal. Appellant contended that in respect of inam lands granted to respondent No. 1, the High Court had committed an error by holding that since the appellant and the respondent No.2 had not performed the duties as archak of the Inamdar Temple and they had not personally cultivated the lands, they were not entitled to grant of the inam lands. Counsel for respondent Nos. 1 and 3 submitted that respondent no.1 had got the properties, imam land in question, vacated from the tenants who had been cultivating it and thereafter he was personally cultivating the same and after coming into force of the Mysore (Religious and Charitable Inams) Abolition Act, an application for grant of occupancy rights was moved on his behalf and the right was conferred on him by the competent authority after proper inquiry and therefore, the appellant could not claim partition of the same; that respondent no.1 was admittedly the archak of the temple and he was also cultivating the properties personally for a continuous period of 3 years prior to the date of its vesting with him and therefore, he was entitled to apply for registration of his right in terms of provisions of the Act; and that the grant of such right is a personal right which cannot be characterized as an ancestral right because in this case, even if his father was alive, he could not have become entitled to grant of occupancy rights because he was not cultivating the lands.

Allowing the appeal, the Court HELD:

Under the scheme of the Mysore (Religious and Charitable Inams Abolition) Act, inam lands are liable to be granted to the tiller of such lands, be, as it may, as tenants, archaks or office bearers of the inamdar temple. Accordingly, this Court is of the view that such grants are meant for the benefit of the family of the tiller and not for him individually and for this reason, there can be no justification to disregard the rights of the junior members of the family if their eldest member was performing the duties of archak with the consent of others. For this reason and in view of the decision of this court in the case of Nagesh Bishto, this Court is of the view that grant of land to archak cannot disentitle the other members of the family of the right to the land and such granted land, therefore, is also available for partition.

Furthermore, it also emerges from the judgment of the Trial Court that the tenants cultivating the land had stated that respondent no.2 had requested his father to allow him to cultivate the lands who accordingly gave his consent before the land tribunal also. Such being the position, if other members of the family had not

objected to his becoming the archak of the temple because he was the eldest and also allowed him to cultivate the lands then, if subsequently he was, by virtue of the fact that he was the archak and also personally cultivating the lands, granted the lands, he cannot take away the rights of such other members of the family in the granted lands.

However, this Court is not inclined to look at Section 6A in isolation. If seen in totality, it is discernible that the father of respondent No.1 gave his consent and allowed respondent no.1 to cultivate the land after taking the same from the tenants. Even the land tribunal, while passing the order granting occupancy rights, had not confined itself to the fact that the conditions in Section 6A were fulfilled. Rather, the land tribunal had observed that the father of respondent No. 1 was the archak and anubhavdar of the temple and this was a prime consideration in granting occupancy rights to the respondent No.1. Therefore, it would be wrong to hold that simply because the conditions in Section 6A were fulfilled, the respondent no. 1 was granted occupancy rights and it was his individual rights. The truth is that the respondent No.1 became the Archak after the death of his father because he was the eldest in the family and only then came the question of satisfying the conditions of Section 6A of the Act.

It is wrong on the part of respondent No.1 to say that his father, even if he had been alive, would not have been granted occupancy rights because the lands at that time were cultivated by the tenants. For grant of occupancy rights, personal cultivation is just one condition. The other conditions include that if a person is managing the properties, which his father was doing, would also be entitled to the grant of occupancy rights.

Respondent No. 1 was made archak after the death of his father because he was the eldest member of the family. Being the archak, he cultivated the lands and obtained occupancy rights. In such circumstances, it would be highly unjust to deprive the other members of the family from getting their share in the properties by relying only on Section 6A of the Act. Therefore, this Court is also of the opinion that the granted lands are also available for partition and grant of occupancy to one member will not disentitle the other members.

WILL CASE

Savithri & Ors VS Karthyayani Amma & Ors BENCH: S.B. Sinha & Harjit Singh Bedi J AIR 2008 SC 300

Dismissing the appeal, the Court HELD:

The legal requirement in terms of section 63 of the Indian Succession Act, 1925 and section 68 of the Evidence Act, 1872 is that a Will like any other document is to be proved in terms of the provisions of the Act. The onus of proving the Will is on the propounder. The testamentary capacity of the testator must also be established. Execution of the Will by the testator has to be proved. At least one attesting witness is required to be examined for the purpose of proving the execution of the Will. It is required to be shown that the Will has been signed by the testator with his free will and that at the relevant time he was in sound disposing state of mind and understood the nature and effect of the disposition. It is also required to be established that he has signed the Will in the presence of two witnesses who attested his signature in his presence or in the presence of each other. Only when there exist suspicious circumstances, the onus would be on the applicant to explain them to the satisfaction of the court before it can be accepted as genuine.

The submission that if both KN and SN were to bequeath their entire right, title and interest in the properties in favour of the respondents by way of family arrangement or otherwise, no deed of partition was required to be executed, cannot be accepted as thereby they would have lost their interest in the property during their life time. They evidently intended to have life interest in the property, bequeathing the same in favour of the respondents. The parties are governed by Marumakkattayam School of Hindu Law. The sisters in the family have a role to play. The fact that the testator was totally dependent on his nephew and nieces is beyond any dispute. He lost his employment in the year 1959. Apart from the properties which were subject-matter of the Will, he had no other independent source of income. Being totally dependent on the respondents and having been suffering from cancer, he was bound to place implicit faith and confidence only upon those who had been looking after him. The Will was admittedly registered. The testator lived for seven years after execution of the Will. He could change his mind; he did not. The very fact that he did not take any step for cancellation of the Will is itself a factor which the Court may take into consideration for the purpose of upholding the same. The question as to whether the Registrar was brought to the house of the propounder or he had gone to the Registrar's office is not a matter which requires serious consideration. But it may be noticed that the witness examined on behalf of the respondents, DW-2, categorically stated that he had gone to the Registrar's office to get the same registered. Execution of the will might have taken place at the house of SN, but according to DW-2 he came to his office even after registration. Even the other Will was also scribed by him and he was an attesting witness therein also.

It is not correct to contend that DW-2 could not have been the attesting witness. He in his deposition categorically stated that he had seen the Will being read over to the propounder. The witnesses and he had seen SN putting his signature on the Will. SN had also seen the witnesses putting their signatures. This satisfies the requirements of the provisions of section 63 of the Indian Succession Act, 1925 and section 68 of the Evidence Act, 1872.

It was appellant's case that the signature of the testator on the Will was obtained under undue influence or coercion. The onus to prove the same was on them. They have failed to do so. If the propounder proves that the Will was signed by the testator and he at the relevant time was in sound disposing state of mind and

understood the nature and effect of disposition, the onus stands discharged. For this purpose the background fact of the attending circumstances may also be taken into consideration.

The circumstances relevant for determining the existence of the suspicious circumstances are (i) when a doubt is created in regard to the condition of mind of the testator despite his signature on the Will; (ii) when the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances; (iii) where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit. In the fact situation obtaining herein no such suspicious circumstance was existing. The court must satisfy its conscience before its genuineness is accepted. Therefore, a rational approach is necessary.

Deprivation of a due share by the natural heirs itself is not a factor which would lead to the conclusion that there exist suspicious circumstances. The son was not meeting his father. He had not been attending to him. He was not even meeting the expenses for his treatment from 1959, when he lost his job till his death in 1978. The testator was living with his sister and her children. If in that situation, if he executed a Will in their favour, no exception thereto can be taken. Even then, something was left for the appellant.

The conscience of the court must be satisfied. In the instant case, the High Court has considered the relevant factors. It has been found that the Will was the product of the free will. He had executed the Will after knowing and understanding the contents thereof.

DOUBTFULL CIRCUMSTANCES OF WILL

Adivekka & Ors. VS Hanamavva Kom Venkatesh 'D' By LRs. & Anr BENCH: S.B. Sinha & Markandey Katju AIR 2007 SC 2025,

Will-Execution of-Testator executing Will in favour of his niece-Allegation of suspicious circumstances-Sustainability of Will-Held: Testator's wife and children unaware of the execution of the Will-Beneficiary too unaware and did not know from where and how she obtained possession of the Will-Beneficiary not examining herself which leads to drawal of adverse inference against her-Also registration of Will before Sub-Registrar doubtful-Disposition made in Will unfair, unnatural and improbable as no sane person for very cogent reasons would disinherit his children-Thus, Will not genuine.

Allowing the appeals, the Court HELD:

The High Court was not correct in setting aside the judgment of the Trial Judge that execution of Will has not been proved.

The subject matter of the Will was a piece of agricultural land. That was the only agricultural land in possession of the testator. He was although owner of four houses, according to the appellants, the same had not been generating any income. Admittedly, the appellants, other than son of H were residing with him. Therefore, it is difficult to believe that respondent no. 1 had been looking after him or despite her marriage with respondent no. 2, she had been residing in his house.

It may or may not be true that testator's son B had been residing separately, but evidently he had been able to perform the marriage of only one of his daughters and, thus, six other daughters were yet to be married. Assuming that respondent No. 1 was brought up by him, she was married. Her husband was affluent. He could afford to purchase the property in question. Thus, there was apparent reason to execute a Will in her favour depriving his wife and children.

There is no explanation as to why a Will had to be executed and registered without the knowledge of his wife by H. There is nothing on record to show that the testator had any special love or affection for respondent no. 1. Respondent No. 1 did not examine herself. According to her, she was not even aware of the execution of the Will. She came to know the same at a much later stage, i.e., after lapse of 10-12 months. How and on what basis she obtained the possession of the original Will is not known. On what basis the Sub-Registrar handed over possession of the Will to husband of Respondent No. 1 has not been disclosed. Had she examined herself, she could have been accosted with the said question. It could have been shown that H did not have any love and affection for her. Non-examination of the party to the lis would lead to drawal of an adverse inference against her.

Grave suspicion in regard to the execution of the Will arises as husband of respondent No. 1 being her power of attorney holder spoke of an agreement for sale. According to him, out of a total consideration of Rs. 58,000/- or Rs. 50,000/- as the case may be, a sum of Rs. 49,000 had already been paid. If that be so, in ordinary course, he would have tendered the balance amount. He could have filed a suit for specific performance. At least a notice in that behalf could have been served. Therefore, husband of respondent No. 1, admittedly had an eye over the property. Why only the agricultural land possessed by H would be the subject matter of the Will, thus, has not been proved. Admittedly he had been suffering from cancer. He died only two weeks after the execution of the Will.

Submission of respondent no, 1 that they were in possession of the land in question, cultivated the same for one year and thereafter sold the same, ex-facie does not appear to be correct as the lands had been sold by her on 16.3.1989 whereas the testator died on 11.9.1988, i.e., within a period of six months from the date of execution of the Will.

The disposition made in the Will is unfair, unnatural and improbable as no sane person, save and except for very cogent reasons, would disinherit his minor children. According to attesting witness he went with the testator at about 4.30 p.m. on 25.8.1998 to Taluk Office. The Will is said to have been first scribed by bond writer. The same thereafter was typed out by another typist. It was brought back to the same bond writer. He had allegedly read over the contents of the Will whereafter only H signed and thereafter the witnesses put their signatures. The entire process must have taken about two hours. How the Will could be registered on the same day, i.e., beyond the office hours is again a matter which is beyond anybody's comprehension. Sub-Registrar did not say that the Will was executed and registered before him.

FEMALE RIGHTS UNDER SECTION 14 OF HINDU SUCCESSION ACT

Santhosh and others VS Saraswathibai and another BENCH: S.B. SINHA & HARJIT SINGH BEDI AIR 2008 SC 500.

Dismissing the appeal, the Court HELD:

The possession of first wife in respect of 6 acres 33 guntas of land even prior to the institution of the suit has been accepted in the said consent decree. Appellants undertook not to interfere in her peaceful possession thereover. Admittedly after the death of `T' who died after coming into force of the Hindu Succession Act, first wife became one of the co-owners of the property. It is, therefore, not a case where she had no right to possess the said land. If she had a right to possess the said land as a co-owner, the question of divesting her of the said right by invoking sub-s.(2) of s.14 of the Act would not arise. The stipulations made in the consent decree dated 20.7.1964 must thus be construed having regard to the well settled legal position.

The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognising such a right does not confer any new title but merely endorses or confirms the pre-existing rights.

S.14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in favour of the females so as to advance the object of the 1956 Act and promote the socio-economic ends sought to be achieved by this long needed legislation. Sub-section (2) of s.14 is in the nature of a proviso and has a field of its own without interfering with the operation of s.14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by s.14(1) or in a way so as to become totally inconsistent with the main provision. Sub-section (2) of s.14 applies to instruments, decrees, awards, gifts, etc. which create independent and new titles in favour of the females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise pre-existing rights. In such cases a restricted estate in favour of a female is legally permissible and s.14(1) will not operate in this sphere. Where, however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of s.14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of sub-section (2) and would be governed by Section 14(1) despite any restrictions placed on the powers of the transferee.

The use of express terms like `property acquired by a female Hindu at a partition', `or in lieu of maintenance', `or arrears of maintenance', etc. in the Explanation to s.14(1) clearly makes sub-section (2) inapplicable to these categories which have been expressly excepted from the operation of sub-section (2). The words `possessed by' used by the Legislature in s. 14(1) are of the widest possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same. Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property would be deemed to be possessed by her and by force of s.14(1) she would get absolute interest in the property. It is equally well settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the section does not contemplate the possession of any rank trespasser without any right or title.

The pre-existing right of first wife was crystallized by reason of the said consent decree. Furthermore there is nothing on record to show that 12 acres 33 guntas of land was the only property belonging to the joint family and thus, she had been granted more lands to which she was not entitled to.

Chinthamani Ammal Vs. Nandagopal Gounder and Anr Coram: S.B. SINHA MARKANDEY KATJU 2007 (4) SCC163 ,

Dismissing the appeal, the Court HELD:

The legal position that the appellant could not claim any right, title and interest whether in terms of the provisions of the Hindu Women's Right to Property Act, 1937 or as a successor of her father, if the joint status was not severed, is not in dispute.

The Hindu Women's Right to Property Act was not applicable in relation to agricultural land. The State made an amendment in that behalf in the year 1947 whereafter, only a widow became entitled to claim limited ownership in the share of her husband. The mother of the appellant i.e. wife of 'K', thus, did not derive any right, title and interest in the property of her husband in the year 1943, when he expired. Furthermore, admittedly, she left the family and married another person in the year 1945 and thus the question of her deriving any benefit in terms of the 1947 amendment also did not arise.

The first Appellate Court reversed the finding of the trial Court relying only on or on the basis of the statement made by DW-2 - the aunt of the appellant. The said statement by itself does not prove that 'K' made an unequivocal declaration that he intended to separate himself from his brother or the same was duly communicated to the other co-sharers. DW-2 did not say when such a declaration was made in presence of all coparceners. It was not stated that at the time of making such purported declaration, the respondents were present. If such a declaration had been made and the respondents accepted the same, ordinarily, not only the respondents would be asked to divide the property by partition by meets and bounds but also to look after the said property which fell in the share of the appellant. Allegedly, Respondent No. 1 was requested to look after his family and not their property. The property, admittedly, continued to be possessed as a joint property. It was never partitioned by meets and bounds. Appellant never paid any rent separately. No revenue record was prepared in her name.

Even the husband of the appellant claimed the property as a lessee. When the properties continued to be possessed jointly by the owners thereof, a presumption in regard to the status of joint family both backward and forward must be raised as no evidence was brought on records to establish unequivocal declaration on the part of 'K'to separate himself from the joint family. If having regard to the nature of oral evidences adduced before it, the Trial Judge came to the conclusion that the appellant had failed to prove her case, the first Appellate Court, as has rightly been held by the High Court, could not have reversed the said finding without assigning sufficient and cogent reason therefor.

In law there exists a presumption in regard to the continuance of a joint family. The party who raises a plea of partition is to prove the same. Even separate possession of portion of the property by the co-sharers itself would not lead to a presumption of partition. Several other factors are required to be considered therefor.

When the Trial Court arrived at a finding on the basis of appreciation of oral evidence, the first Appellate Court could have reversed the same only on assigning sufficient reasons therefor. Save and except the said statement of DW-2, the Court did not consider any other materials brought on records by the parties.

HINDU WOMENS RIGHT TO PROPERTY AFTER STATE AND CENTRAL AMENDMENTS

Sugalabai vs Gundappa A. Maradi And Ors. on 18/9/2007 KARNATAKA HIGH COURT JUDGMENT BY JUSTICE V. Jagannathan, J.

Question of law of considerable importance being raised concerning the question relating to a married daughter also being entitled to be treated as a co-parcener irrespective of the marriage taking place prior to the Karnataka Amendment Act, 1990 coming into force or afterwards, in view of the amendment affected to the Hindu Succession Act, 1956, (for short 'the Principal Act') by the State of Karnataka by The Hindu Succession (Karnataka Amendment) Act, 1990 (Karnataka Act No. 23/1994), with effect from 30th July 1994 and the subsequent amendment brought to the Principal Act by the Central Government by the Hindu Succession (Amendment) Act, 2005 (C.A. 39/2005) with effect from 9.9.2005.

The settled principles of interpretation of statutes as laid down by the Apex Court and referred to by a Division Bench of supreme court in the case of Mercury Press v. Ameen Shacoor , the principles laid down by the Apex Court in the case of Mahadeolal Kanodia v. Administrator General of West Bengal , have been extracted and they are as under:

(1) Statutory provisions which create or take away substantive rights are ordinarily prospective. They can be retrospective if made so expressly or by necessary implication and the retrospective operation must be limited only to the extent to which it has been so made either expressly or by necessary implication.

(2) The intention of the legislature has to be gathered from the words used by it, giving them their plain, normal, grammatical meaning.

(3) If any provision of a legislation, the purpose of which is to benefit a particular class of persons is ambiguous so that it is capable of two meanings, the meaning which preserves the benefits should be adopted.

(4) If the strict grammatical interpretation gives rise to an absurdity or inconsistency, such interpretation should be discarded and an interpretation which will give effect to the purpose will be put on the words, if necessary, even by modification of the language used.

In Commissioner of Income Tax v. Indian Bank Limited , the Supreme Court reiterated: In our opinion, in construing the Act, we must adhere closely to the language of the Act. If there is ambiguity in the terms of a provision, recourse must naturally be had to well established principles of construction, but it is not permissible first to create an artificial ambiguity and then try to resolve the ambiguity by resort to some general principles.

The principles are so succinctly stated in American Jurisprudence, quoted with approval in S.R. Bommai v. Union of India A.I.R. 1994 S.C. 1980. While it has been held that it is duty of the courts to interpret as statute as they find it without reference to whether its provisions are expedient or inexpedient. It has also been recognised that where a statute is ambiguous and subject to more than one interpretation, the expediency of one construction or the other is properly considered. Indeed, where the arguments are nicely balanced, expediency may trip the scales in favour of a particular construction. It is not the function of a court in the interpretation of statutes, to vindicate the wisdom of the law. The mere fact that the statute leads to unwise results is not sufficient to justify the Court in rejecting the plain meaning of unambiguous words or in giving to a statute a meaning of which its language is not susceptible, or in restricting the scope of a statute. By the same token an omission or failure to prove for contingencies, which it may seem wise to have provided for specifically, does not justify any judicial addition to the language of the statute. To the contrary, it is the duty of the Courts to interpret a statute as they find it without reference to whether its provisions are wise or unwise, necessary or unnecessary, appropriate or inappropriate, or well or ill conceived.

Rule of interpretation are meant to ascertain the true intent and purpose of the enactment and set right any anomaly, inconsistency or ambiguity, while giving effect to it. The several rules of interpretation when juxtapositioned may give an impression that they are ' inconsistent with each other. Further, the same provision, when interpreted with reference to different Rules of interpretation may lead to different results. This is because the Rules of interpretation are meant to set right different types of defects. It is not possible to apply all rules of interpretation together, to a provision of law. An appropriate rule of interpretation should be chosen as a tool depending upon the nature of the defect in drafting which has to be set right. The Rules of interpretation are to be applied in interpreting the statutes, only if there is ambiguity, inconsistency,

absurdity or redundancy. Where the words are clear and unambiguous, there is little need to open the tool kit of Interpretation.

The Apex Court, in the case of S. Sai Reddy v. S. Narayana Reddy (1993)3 SCC 647, dealing with the question with regard to the daughter's share in coparcenary property, where, on facts, the partition had taken place prior to the commencement of the amending Act, answered the point concerning disentitlement of the daughter under clause (iv) of Section 29-A of the Hindu Succession (A.P. Amendment) Act, 1986 by observing that the said question will have to be determined on the basis of the date of passing of the final partition decree by metes and bounds and where the preliminary decree had been passed prior to the commencement of the amending Act, the final decree passed after such commencement, daughter would be entitled to a share in the coparcenary property under clause (ii) of the said Section 29-A and observed that since the legislation is beneficial and placed on the statute book with the avowed object of benefitting women who are a vulnerable section of the society in all its stratas, it is necessary to give a liberal effect to it.

Whether the change in the law will also affect pending appeals or not was the question considered by the Apex Court in the case of Lakshmi Narayan Guin v. Niranjan Modak and the observations made at paragraph-9 are as under: That a change in the law during the pendency of an appeal has to be taken into account and will govern the rights of the parties was laid down by this court in Ram Sarup v. Munshi , which was followed by this Court in Mula v. Godhu . We may point out that in Dayawati v. Indeijit , this Court observed: If the new law speaks in language, which, expressly or by clear intendment, takes in even pending matters, the Court of trial as well as the Court of appeal must have regard to an intention so expressed, and the Court of appeal may give effect to such a law even after the judgment of the Court of first instance.

As far as the use of the words "on" and "from" in the Central Act, 2005 is concerned, the submission of the learned counsel Shri Balakrishna Shastry :- submitted that “insofar the daughter being entitled to be treated as a coparcener is concerned, by virtue of the State amendment, a daughter will be entitled to the same share as is allotable to a son in a partition in the joint family coparcenary property and as far as the position of a married daughter is concerned, the learned counsel referred to the Central Amendment Act, 2005 to contend that when no such distinction is made by the Central Act between a married daughter and an unmarried daughter, it will have to be deemed that the Central Act will prevail over the State amendment as the State Amendment Act is repugnant to the provisions of the Central Amendment Act, 2005.” has sufficient force behind it inasmuch as the use of the word "on" means immediately and the word "from" has been explained by a Division Bench of this court in the case of Srinivasa Silk Mills v. State of Mysore AIR 1962 Mysore 117 thus: The word "from" is akin to "after" and if the word "from" is used for the purpose of and in reference to the computation of time, as for example, from a stated date, stated date is prima facie excluded from computations.

Thus, the two words "on" and "from" mean, therefore, immediately and after the commencement of the Amendment Act of 2005. In other words, as soon as the Amending Act of 2005 was brought into force, the daughter of a coparcener becomes, by birth, a coparcener in her own right in the same manner as the son. Since the change in the law has already come into effect during the pendency of these appeals, it is the changed law that will have to be made applicable to the case on hand. A daughter, therefore, by birth, becomes a coparcener and there is nothing in the Central Amendment Act, 2005 to indicate that the said Amendment Act will be applicable in respect of daughter born on and after the commencement of the Amending Act of 2005. The effect of the use of the expressions "on" and "from" and the expression "by birth becomes a coparcener in her own right", therefore, will have the effect of the amended law being made applicable to the pending appeals as well, having regard to the aforesaid propositions of law laid down by the Apex Court and also by a Division Bench of this court.

The subject matter of the two amendment Acts viz., succession falling under List-Ill – Concurrent List of Seventh Schedule to the Constitution, and both the Centre and the State having the power to legislate on the said subject, "succession", which falls in item No. 5 of List-III - Concurrent List. Article 254. (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of repugnancy, be void.

Article 254 of the Constitution, the Apex Court, in the case of T. Barai v. Henry Ah Hoe , has laid down the following principles: There is no doubt or difficulty as to the law applicable. Article 254 of the Constitution makes provision firstly, as to what would happen in the case of conflict between a Central and State law with regard to the subjects enumerated in the Concurrent List, and secondly, for resolving such conflict. Article 254(1) enunciates the normal rule that in the event of a conflict between a Union and a State law in the concurrent field, the former prevails over the latter. Clause (1) lays down that if a State law relating to a concurrent subject is 'repugnant' to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. To the general rule laid down in Clause (1), Clause (2) engrafts an exception, viz., that if the President assents to a State law which has been reserved for his consideration, it will prevail notwithstanding its repugnancy to an earlier law of the Union, both laws dealing with a concurrent subject. In such a case, the Central Act will give way to the State Act only to the extent of inconsistency between the two, and no more. In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only. The predominance of the State law may however be taken away if Parliament legislates under the proviso to Clause (2). The proviso to Article 254(2) empowers the Union Parliament to repeal or amend a repugnant State law even though it has become valid by virtue of the President's assent-Parliament may repeal or amend the repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the same matter'. Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together, e.g., where both prescribe punishment for the same offence but the punishment differs in degree or kind or in the procedure prescribed. In all such cases, the law made by Parliament shall prevail over the State law under Article 254(1). That being so, when Parliament stepped in and enacted the Central Amendment Act, it being a later law made by Parliament "with respect to the same matter", the state Amendment Act stood implied repealed.

This Court in a recent decision in V.L. Shankar and Anr. v. State of Karnataka by its Chief Secretary and Anr. ILR 2006 KAR 1158, dealing with the question as to whether the assent of the President to a State Law under Article 254(2) does confer irrevocable immunity to the State Law or not, has observed thus: It is relevant to state that the President's assent to a State Law under Article 254(2) does not confer irrevocable immunity to the State Law from the operation of the rule of repugnancy. The fact that the President's assent has been obtained for a State law under clause (2) of Article 254 will not make it immune from attack for repugnancy to a subsequent parliamentary enactment. The immunity will be available only till parliament makes any law with respect to the same matter making a provision conflicting with the State law. In view of the Proviso to clause 2 of Article 254, parliament can enact any law repugnant to the earlier State law which had received the assent of the President. When parliament enacts such a law, the State law would be void to the extent of repugnancy.

Thus, it is clear from the above proposition of law laid down by a Constitution Bench of the Apex Court that a law made by the State Legislature which is inconsistent with and repugnant to a previous law made by the Parliament can be protected by obtaining the assent of the President under Article 254(2) of the Constitution and the said assent would enable the State law to prevail in the State and overrule the provisions of the Central Act in its applicability to the State only.

In yet another decision in the case of M.P. Shikshak Congress v. R.P.F. Commissioner, Jabalpur , the Supreme Court, dealing with the issue concerning repugnancy between the State Act and the Parliamentary legislation, has observed thus at paragraph-10: .Under Article 254(1) of the Constitution, if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament, which Parliament is competent to enact, then subject to the provisions of Cl.(2), the law made by the Parliament, whether passed before or after the law made by the Legislature of such State, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void. The ordinary rule, therefore, is that when both the State Legislature as well as Parliament are competent to enact a law on a given subject, it is the law made by Parliament which will prevail. The exception which is carved out is under Cl.(2) of Article 254. Under this Cl.(2) where a law made by the Legislature of a State with respect to one of the matters

enumerated in the concurrent list contains any provision repugnant to the provisions of an earlier law-made by Parliament, then the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in the State. Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

Finally, the Court held thus: On a careful consideration, therefore, of the authorities referred to above, the following propositions emerge:

1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.
2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.
3. That where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.
4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field.

Thus, in the light of the above settled proposition of law laid down by the Apex Court and also by this Court in the aforementioned cases, I am of the view that the provision of Section 6-A(d) of the Karnataka Amendment Act, 1990 is repugnant to the Central Act of 2005 and as the Central Act is later in point of time, it will prevail over the State Act to the extent the provision of Section 6-A(d) of the State Act is repugnant or to the Central Act in so far as position of married daughter is concerned. In other words, as a result of substitution of Section 6 of the Principle Act by way of the Central Amendment Act of 2005, the State Act, which is earlier in point of time, cannot have any effect. Supremacy of the parliament, therefore renders Section 6-A(d) of the Karnataka Amendment Act, 1990, void.

As far as the apprehension that the flood gate would be opened, is concerned, I do not see any rational basis for the said apprehension for two reasons.

(1) The Central Act of 2005 clearly mentions that a daughter of coparcener shall by birth become a co-parcener in her right from the commencement of the Hindu Succession (Amendment) Act of 2005.

(2)The said Central Act of 2005 also mentions in proviso to Section 6(1) that nothing contained in the sub-section 6(1) shall affect or invalidate any disposition or alienation or including any partition or testamentary or disposition of property which have taken place before 20 day of December 2004.

Further, the object behind the Central Legislation also will have to be borne in mind and in the statement of "objects and reasons" to the Hindu Succession Amendment Act 2005 it has been clearly stated that having regard to the need to render social justice to women, it is proposed to remove the discrimination contained in Section 6 of the Hindu Succession Act of 1956 by giving equal rights to daughters amongst co-parcener's property as the sons have. It is this goal that has also led to Section 23 of the Principal Act being omitted by the Central Act of 2005.

Having thus arrived at the conclusion that the provision of Section 6-A(d) of the Karnataka Amendment Act 1990 is repugnant to the Central Act of 2005 and to the extent of repugnancy, the said provision of 6-A(d) is void and rendered ineffective, the question will arise as to from when the repugnancy of the State Act will come into effect.

As regards this, it is useful to refer to the decision of this Court in the case of Ramappa Gudadappa Gudadannavar v. Chandangouda Neelangowda Goudar 1960 MYS LJ 476. In the said case, this Court has observed that the provisions of the Hindu Succession Act, 1956 are not retrospective in their operation arid in a case where succession had already opened and the estate in question had already vested in persons in accordance with the law which was in force before the Hindu Succession Act, 1956 came into force, the said succession cannot be reopened and the vesting which has taken place, cannot be divested. Following the aforesaid law laid down by this court, in the cases on hand, the repugnancy of the provision of Section 6-A(d) of the Karnataka Act will take effect from the date on which the Central Amendment Act of 2005 came into force i.e. 9.9.2005 and further, the Central Act itself makes it clear in the proviso to Section 6(1) that nothing contained in the said sub-Section 6(1) shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which have taken place before 20th December 2004. It thus becomes obvious that cases, which are covered by the said proviso, however will not be affected by the change in the law brought about by the Central Amendment Act of 2005.

But, as regards the pending proceedings are concerned, the law laid down by the Apex Court in the case of United Bank of India, Calcutta v. Abhijit Tea Co. Pvt. Ltd. and Ors. will have to be taken note of. In the said decision, the Apex Court has observed thus: It is well settled that it is the duty of a court whether it is trying original proceedings or hearing an appeal, to take notice of the change in the law affecting pending actions and to give effect to the same. If the law states that after its commencement, no suit shall be "disposed of or "no decree shall be passed" or "no court shall exercise powers or jurisdiction". The Act applies even to the pending proceedings and has to be taken judicial notice by the Civil Courts.

FINAL ORDERS

(1) The provision of Section 6-A(d) of the Karnataka (Amendment) Act 1990 is repugnant to the Central Amendment Act of 2005 insofar as the position of a daughter married prior to coming into force of the Karnataka Amendment Act, 1990, is concerned and as such, the Central Amendment Act of 2005 which makes no such discrimination will prevail over the State Act.

(2) To the extent the provision of Section 6-A(d) of the Karnataka Amendment Act 1990 is repugnant to the Central Amendment Act, 2005, the said provisions of Section 6-A(d) of the Karnataka Amendment Act 1990 is declared void and it shall cease to have any effect.

(3) The Central Amendment Act of 2005, which has been brought into force from 9.9.2005, shall not have any effect insofar as any disposition or alienation including any partition or testamentary disposition of property which had taken place, before the 20th day of December, 2004.

(4) In respect of pending proceedings i.e. suits/appeals, the provisions of Section 6-A(d) of the Karnataka Amendment Act 1990, to the extent it is repugnant to the Central Amendment Act of 2005, shall cease to have any effect and the said pending proceedings shall be governed by the Central Amendment Act of 2005 which has been brought into force from 9.9.2005.

JUDICIAL CONDUCT

In Iswar Chandra Jain v. High Court of Punjab and Haryana, AIR 1988 SC 1395, this Court observed that while exercising control over subordinate judiciary under Art. 235 of the Constitution, the High Court is under a Constitutional obligation to guide and protect subordinate judicial officers. An honest and strict judicial officer is likely to have adversaries. If complaints are entertained in trifling matters and if the High Court encourages anonymous complaints, no judicial officer would feel secure and it would be difficult for him to discharge his duties in an honest and independent manner. It is imperative that the High Court should take steps to protect honest judicial officers by ignoring ill- conceived or motivated complaints made by unscrupulous lawyers and litigants.

In K.P. Tiwari v. State of Madhya Pradesh, AIR 1994 SC 1031, where the High Court reversed the order passed by the lower court making remarks about interestedness and motive of the lower court in passing the unmerited order, this Court observed that one of the functions of the higher court is either to modify or set aside erroneous orders passed by the lower courts. Our legal system acknowledges fallibility of judges. It has to be kept in mind that a subordinate judicial officer works mostly in a charged atmosphere. He is under a psychological pressure -- contestants and lawyers breathing down his neck. He does not enjoy the detached atmosphere of the higher court. Every error, however gross it may be, should not be attributed to improper motives. The Judges of the High Court have a responsibility to ensure judicial discipline and respect for the judiciary from all concerned. No greater damage can be done to the administration of justice and to the confidence of the people in the judiciary if the higher courts express lack of faith in the subordinate judiciary for some reason or other. That amounts to destruction of judiciary from within.

In Kashi Nath Roy v. The State of Bihar, AIR 1996 SC 3240, this Court observed under a similar circumstance that in our system appellate and revisional courts have been set up with the presupposition that the lower courts in some measure of cases can go wrong in decision making in law and in fact. The higher courts have been established to correct errors. In cases where intolerable error is pointed out, it is functionally required to correct the error in an appropriate case and in a manner befitting maintaining dignity of the court and independence of the judiciary. The higher court should convey its message in the judgment to the officer concerned through a process of reasoning, essentially persuasive, reasonable, mellowed but clear and result oriented and rarely a rebuke.

In Lunjarrao Bhikaji Nagarkar v. Union of India, AIR 1999 SC 2881, this Court held that wrong exercise of jurisdiction by a quasi judicial authority or mistake of law or wrong interpretation of law cannot be the basis for initiating disciplinary proceeding. Of course, if the Judicial Officer conducted in a manner as would reflect on his reputation or integrity or good faith or there is a prima facie material to show recklessness or misconduct in discharge of his duties or he had acted in a manner to unduly favour a party or had passed an order actuated by corrupt motive, the High Court by virtue of its power under Art. 235 of the Constitution may exercise its supervisory jurisdiction. Nevertheless, under such circumstances it should be kept in mind that the Judges at all levels have to administer justice without fear or favour. Fearlessness and maintenance of judicial independence are very essential for an efficacious judicial system. Making adverse comments against subordinate judicial officers and subjecting them to severe disciplinary proceedings would ultimately harm the judicial system at the grassroot level.

JUDICIAL ACTIVISM

K. Veeraswami v. Union of India [(1991) 3 SCC 655], majority of the Constitution Bench upheld the power of the police to investigate into the disproportionate assets alleged to be possessed by a Judge, an offence under Section 5 of the Prevention of Corruption Act, 1947 subject to prior sanction of the Chief Justice of India to maintain independence of the judiciary. By interpretive process, the Court carved out primacy to the role of the Chief Justice of India, whose efficacy in a case like one at hand would be considered at a later stage. Duty of the Judge to maintain high standard of conduct. Its judicial individualism - whether protection imperative? Judicial office is essentially a public trust. Society is, therefore, entitled to except that a Judge must be a man of high integrity, honesty and required to have moral vigour, ethical firmness and impervious to corrupt or venial influences. He is required to keep most exacting standards of propriety in judicial conduct. Any conduct which tends to undermine public confidence in the integrity and impartiality of the court would be deleterious to the efficacy of judicial process. Society, therefore, expects higher standards of conduct and rectitude from a Judge. Unwritten code of conduct is writ large for judicial officers to emulate and imbibe high moral or ethical standards expected of a higher judicial functionary, as wholesome standard of conduct which would generate public confidence, accord dignity to the judicial office and enhance public image, not only of the Judge but the court itself. It is, therefore, a basic requirement that a Judge's official and personal conduct be free from impropriety; the same must be in tune with the highest standard of propriety and probity. The standard of conduct is higher than expected of a layman and also higher than expected of an advocate. In fact, even his private life must adhere to high standards of probity and propriety, higher than those deemed acceptable for others. Therefore, the Judge can ill-afford to seek shelter from the fallen standard in the society.

In Krishna Swami v. Union of India & Ors. [(1992) 4 SCC 605 at 650-51], one of us (K. Ramaswamy, J). held that the holder of office of the Judge of the Supreme Court or the High Court should, therefore, be above the conduct of ordinary mortals in the society. The standards of judicial behaviour, both on and off the Bench, are normally high. There cannot, however, be any fixed or set principles, but an unwritten code of conduct of well-established traditions is the guidelines for judicial conduct. The conduct that tends to undermine the public confidence in the character, integrity or impartiality of the Judge must be eschewed. It is expected of him to voluntarily set forth wholesome standards of conduct reaffirming fitness to higher responsibilities. To keep the stream of justice clean and pure, the Judge must be endowed with sterling character, impeccable integrity and upright behaviour. Erosion thereof would undermine the efficacy of the rule of law and the working of the Constitution itself. The Judges of higher echelons, therefore, should not be mere men of clay with all the frailties and foibles, human failings and weak character which may be found in those in other walks of life. They should be men of fighting faith with tough fibre not susceptible to any pressure, economic, political or any sort. The actual as well as the apparent independence of judiciary would be transparent only when the office holders endow those qualities which would operate as impregnable fortress against surreptitious attempts to undermine the independence of the judiciary. In short, the behaviour of the Judge is

the bastion for the people to reap the fruits of the democracy, liberty and justice and the antithesis rocks the bottom of the rule of law.

In S.P. Gupta vs. Union of India [(1981) Supp. SCC 87] in paragraph 27, this Court held that if there is one principle which runs through the entire fabric of the Constitution it is the principle of the rule of law, and under the Constitution it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. Judicial review is one of the most potent weapons in the armoury of law. The judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers. The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse of power by the executive. It is, therefore, absolutely essential that the judiciary must be free from executive pressure or influence which has been secured by making elaborate provisions in the Constitution with details. The independence of judiciary is not limited only to the independence from the executive pressure or influence; it is a wider concept which takes within its sweep independence from any other pressure and prejudices. It has many dimensions, viz., fearlessness of other power centers, economic or political, and freedom from prejudices acquired and nourished by the class to which the judges belong.

In P.N. Duda vs. P. Shiv Shankar [AIR 1988 SC 1208]

Administration of justice and Judges are open to public criticism and public scrutiny. Judges have their accountability to the society and their accountability must be judged by their conscience and oath of their office, that is to defend and uphold the Constitution and the laws without fear and favour. This the Judges must do in the light given to them to determine what is right. Any criticism about the judicial system or the Judges which hampers the administration of justice or which erodes the faith in the objective approach of Judges and brings administration of justice into ridicule must be prevented. The contempt of Court proceedings arise out of that attempt. Judgments can be criticised, motives of the Judges need not be attributed. It brings the administration of Justice into deep disrepute. Faith in the administration of justice is one of the pillars through which democratic institution functions and sustains. In the free market place of ideas, criticism about the judicial system or Judges should be welcomed, so long as such criticisms do not impair or hamper the administration of justice. This is how the courts should approach the powers vested in them as judges to punish a person for an alleged contempt, be it by taking notice of the matter suo motu or at the behest of the litigant or lawyer.

It has to be admitted frankly and fairly that there has been erosion of faith in the dignity of the Court and in the majesty of law and that has been caused not so much by scandalising remarks made by politicians or ministers but the inability of the courts of law to deliver quick and substantial justice to the needy. It is a criticism which judges and lawyers must make about themselves. We must turn the search light inwards. At the same time, the Court cannot be oblivious of the attempts made to decry or denigrate the judicial process, if it is seriously done.

In Rama Dayal Markarha v. State of Madhya Pradesh, [1978] 3 S.C.R. 497, where it was held that fair and reasonable criticism of a judgment which is a public document or which is a public act of a Judge concerned with administration of justice would not constitute contempt. In fact, such a fair and reasonable criticism must be encouraged because after all no one, much less Judges, can claim infallibility. Such a criticism may fairly assert that the judgment is incorrect or an error has been committed with regard to law or established facts. But when it is said that the Judge had a predisposition to convict or deliberately took a turn in discussion of evidence because he had already made up his mind to convict the accused or has a wayward bend of mind, is attributing motives, lack of dispassionate and objective approach and analysis and prejudging of issues, that would bring administration of justice into ridicule. Such criticism sometime interferes with the administration of justice and that must be judged by the yardstick whether it brings the

administration of justice into ridicule or hampers administration of justice. After all, it cannot be denied that pre-disposition or subtle prejudice or unconscious prejudice or what in Indian language is called "Sanskar" are inarticulate major premises in decision making process. That element in decision making process cannot be denied, it should be taken note of.

It has to be borne in mind, as has been said by Banjamin N. Cardozo in "The Nature of the Judicial Process" that the judge as the interpreter for the community of its sense of law and order must supply omissions, correct uncertainties and harmonize results with justice through a method of free decision. Courts are to "search for light among the social elements of every kind that are the living force behind the facts they deal with".

In E.M. Sankaran Namboodiripad v. T. Narayanan Nambiar, [1971] I S.C.R. 697, this Court had to deal with this jurisdiction in respect of Mr. Namboodiripad who at the relevant time was the Chief Minister of Kerala. He had held a press conference in November, 1976 and made various critical remarks relating to the judiciary which inter alia was described by him as "an instrument of oppression" and the Judges as "dominated by class hatred, class prejudices", "instinctively" favouring the rich against the poor. He also stated that as part of 564 the ruling classes the judiciary "works against workers, peasants and A other sections of the working classes" and "the law and the system of judiciary essentially served the exploiting classes" (emphasis supplied) It was found that these remarks were reported in the newspapers and thereafter proceedings commenced in the High Court of Kerala. The appellant Shri Namboodiripad was called upon to show cause why he should not be committed for contempt. In his affidavit the appellant stated that the reports were "substantially correct", though incomplete in some respects. The appellant further claimed that his observations did no more than give expression to the Marxist Philosophy and what was contained in the programme of the Communist Party of India. By a majority judgment of the High Court the appellant was convicted for contempt of court and fined Rs. 1000 or simple imprisonment for one month. He moved this Court by an appeal. He contended that the law of contempt must be read without encroaching upon the guarantee of freedom of speech and expression under Article 19(1)(a) of the Constitution and that the intention of the appellant in making his remarks at the press conference should be examined in the light of his political views which he was at liberty to put before the people. He sought to justify the remarks as an exposition of his ideology which he claimed was based on the teachigs of Marx and Engels and on this ground claimed protection of the first clause of Article 19(1) of the Constitution. The conviction of the appellant was upheld by this Court. It was observed by Hidayatullah, C.J speaking for the Court that the law punishes not only acts which do not in fact interfere with the courts and administration of justice but also those which have that tendency, that is to say, are likely to produce a particular result. Judged from the angle of courts and administration of justice, there was no doubt that the appellant was guilty of contempt of court. The Chief Justice observed whether the appellant misunderstood the teachings of Marx and Engels or deliberately distorted them was not to mush purpose. The likely effect of his words must be seen and they clearly had the effect of lowering the prestige of judges and courts in the eyes of the people. (emphasis supplied) That he did not intend any such result may be a matter for consideration in the sentence to be imposed on him but could not serve as a justification. This Court further held that the appellant had misguided himself about the true teachings of Marx, Engles and Lenin. According to the Chief Justice he had misunderstood the attack by them on State and the laws as involving an attack on the Judiciary. No doubt the courts, while upholding the laws and enforcing them, do give support to the State but they do not do so out of any impure motives. To charge the Judiciary as an instrument of oppression, the Judges as guided and dominated by class hatred, class 565 interests and class prejudices, instinctively favouring the rich against the poor is to draw a very distorted and poor picture of the Judiciary. It A was clear that the appellant bore an attack upon judges which was calculated to raise in the minds of the people a general dissatisfaction with and distrust of all judicial decisions. According to the Chief Justice it weakened the authority of law and law courts (emphasis supplied). It was further held that while the spirit underlying Article 19(1)(a), must have due play, the Court could not overlook the provisions of the second clause of that Article. Its provisions are to be read with Articles 129 and 215 which specially confer on this Court and the High Courts the power to punish for contempt of themselves. Although Article 19(1)(a) guaranteed complete freedom of speech and expression, it also made an exception

in respect of contempt of court. While the right is essential to a free society, the Constitution had itself imposed restrictions in relation to contempt of court and it could not therefore be said that the right abolished the law of contempt or that attack upon judges and courts would be condoned.

In Shri Baradakanta Mishra etc. v. The Registrar of Orissa High Court & Anr. etc. [1974) 1 SCC 374], the appellant, a District judge was suspended and a spate of litigation in that behalf had ensued. When an order of suspension was set aside by the Government, in exercise of his power under Article 235, the High Court further ordered suspension of him pending enquiry of the allegations made against judges in a memorandum and letters sent to the Governor in a vilificatory criticism of the judges in their function on the administration side. When contempt action was initiated, he challenged the jurisdiction of the court and the competency to initiate action for contempt on the specious plea that the acts done by the High Court were on the administration side and were not judicial actions. A three-Judge Bench had negatived the plea and convicted the appellant under section 12 of the Act. When the matter had come up before this court, a constitution Bench considered the gravamen of the imputations and had held that the allegations made against the court in the memo submitted to the Governor constituted scurrilous allegations against the High Court. Again some of the allegations made in the memo of appeal and various communications to the Supreme Court were held to constitute contempt of the Court and the conviction was confirmed though sentence was reduced. This Court held that imputation of improper motives, bias and prejudice constitutes contempt under Section 2[c] of the Act.

In L.D. Jaikwal v. State of U.P. [1984) 3 SCC 405], the conduct of an advocate in using abusive language in pleadings and vilification of a judge was held to constitute contempt under Section 2 [c] (i) of the Act and his sentence under Section 12 of the Act was upheld.

In Re: Shri S. Mulgaokar [(1978) 3 SCC 497] the conduct of a senior advocate in publishing a pamphlet imputing improper motives to the Magistrate who decided his case was held to constitute substantial interference with the due administration of justice. His conviction was accordingly upheld though sentence was reduced.

In K.A. Mohammed Ali v. C.N. Prasannan [(1994) Supp. 3 SCC 509] while arguing the case, the counsel raised his voice unusually high to the annoyance of the Magistrate and used derogatory language against the Magistrate before whom he conducted the trial of an accused. His conviction and sentence for contempt was accordingly upheld.

A.M. MATHUR Vs. RESPONDENT: PRAMOD KUMAR GUPTA DATE OF JUDGMENT22/03/1990 BENCH: SHETTY, K.J. (J) BENCH: SHETTY, K.J. (J) SAHAI, R.M. (J) CITATION: AIR 1990 SC 1737

While allowing a writ petition, one of the Judges deliv- ered the main Judgment invalidating the decision of the Government on the ground that it violated Article 14 of the Constitution. The other Judge delivered a separate, but concurring opinion which contained highly disparaging re- marks attributing mala fides and underhand dealing on the part of the State Government. Several appeals were filed against the said decision before this Court.

Judicial restraint and discipline are as neces- sary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint, this humility of function should be a constant theme of our judges. This quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary..Judicial restraint in this regard might better be called judicial respect; that is,

respect by the judiciary. Respect to those who come before the Court as well to other co-ordinate branches of the State, the Execu- tive and the Legislature. There must be mutual respect. When these qualities fail or when litigants and public believe that the judge has failed in these qualities, it will be neither good for the judge nor for the judicial process.

The Judges Bench is a seat of power. Not only do judges have power to make binding decisions, their decisions legitimate the use of power by other officials. The Judges have the absolute and unchallengeable control of the Court domain. But they cannot misuse their authority by intemperate comments, undignified banter or scathing criticism of counsel, parties or witnesses. The Court has the inherent power to act freely upon its own conviction on any matter coming before it for adjudication but it is a general principle of the highest importance to the proper administration of justice that derogatory remarks ought not to be made against persons or authorities whose conduct comes into consideration unless it is absolutely necessary for the decision of the case to animadvert on their conduct.

ADOPTION VALIDITY

AIR 2006 SC 3275, M. Gurudas & Ors. VS Rasaranjan & Ors.

To prove valid adoption, it would be necessary to bring on records that there had been an actual giving and taking ceremony. Performance of `datta homam' was imperative, subject to just exceptions.

Regarding the question whether adoption of a daughter was permissible in law, it appears that trial Judge missed the last sentence of the passage of Mayne's Treatise on Hindu Law and Usage "it is now settled that the adoption of a daughter is invalid under the Hindu law." In section 480 of the treatise, it is stated that the person to be adopted must be a male.

Mayne's Treatise on Hindu Law and Usage, 13th edition, pages 429-430: "Adoption of daughters Nandapandita in his Dattaka Mimamsa would construe 'putra' (or son) as including a daughter and he draws the inference that on failure of a daughter, a daughter of another could be adopted. He supports his conclusion by referring to ancient precedents, such as the adoption of Shanta, the daughter of King Dasaratha by King Lomapada and the adoption of Pritha or Kunti, the daughter of Sura by Kunti Bhoja. This view is sharply criticized by Nilakantha in the Vyavahara Mayukha. It is now settled that the adoption of a daughter is invalid under the Hindu law."

In Mulla's Principles of Hindu Law, 17th edition, page 710, it is stated: "488. Ceremonies relating to adoption (1) The ceremonies relating to an adoption are (a) the physical act of giving and receiving, with intent to transfer the boy from one family into another; (b) the datta homam, that is, oblations of clarified butter to fire; and (c) other minor ceremonies, such as putresti jag (sacrifice for male issue). (2) They physical act of giving and receiving is essential to the validity of an adoption; As to datta homam it is not settled whether its performance is essential to the validity of an adoption in every case. As to the other ceremonies, their performance is not necessary to the validity of an adoption. (3) No religious ceremonies, not even datta homam, are necessary in the case of Shudras. Nor are religious ceremonies necessary amongst Jains or in the Punjab."

INJUNCTION ORDERS BY COURT PRINCIPLES

AIR 2006 SC 3275, M. GURUDAS & ORS. *VS* RASARANJAN & ORS.

While considering an application for injunction, the courts would pass an order thereupon having regard to: (i) prima facie (ii) balance of convenience (iii) irreparable injury. A finding on `prima facie case' would be a finding of fact. However, while arriving at such finding of fact, the court not only must arrive at a conclusion

that a case for trial has been made out but also other factors requisite for grant of injunction exist. The contention of the plaintiffs must be bona fide. The question sought to be tried must be a serious question and not only on a mere triable issue.

An appellate court would not ordinarily interfere with but then there are certain exceptions thereto. The courts below have not applied their mind as regards balance of convenience and irreparable injury which may be suffered by the appellants.

The properties may be valuable but would it be proper to issue an order of injunction restraining the appellants from dealing with the properties in any manner whatsoever is the core question. They have not been able to enjoy the fruits of the development agreements. The properties have not been sold for a long time. The commercial property has not been put to any use. The condition of the properties being remaining wholly unused could deteriorate. These issues are relevant. The courts below did not pose these questions unto themselves and, thus, misdirected themselves in law.

The conduct of the defendants was indisputably relevant. But, then conduct of the plaintiffs would also be relevant. Therefore, the court while granting an order of injunction, would take into consideration as to whether the plaintiffs have pre-varicated their stand from stage to stage. Even this question had not been adverted to by the courts below. Further, while doing so, the courts would look into the documents produced before the trial court as also the appellate court in terms of Order 41, Rule 27 CPC but the same would not mean that this Court must confine itself only to the questions which were raised before the courts below and preclude itself from considering other relevant questions although explicit on the face of the records. Questions of law in a given case may be considered by this Court although raised for the first time. The question as to whether this Court would permit the parties to raise fresh contentions, however, must be based on the materials placed on records.

While making endeavours to find out a prima facie case, the court could take into consideration the extent of plaintiffs' share in the property, if any.

Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd. [(2001) 5 SCC 73]." While considering the question of granting an order of injunction one way or the other, evidently, the court, apart from finding out a prima facie case, would consider the question in regard to the balance of convenience of the parties as also irreparable injury which might be suffered by the plaintiffs if the prayer for injunction is to be refused. The contention of the plaintiffs must be bona fide. The question sought to be tried must be a serious question and not only on a mere triable issue.

PTCL ACT

AIR 2008 SC 1276,

Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978: s.4 - Prohibition of transfer of granted land under - Sale deed executed and registered after the commencement of the Act, but in respect of which, agreement for sale executed before commencement of the Act - Sale effected without previous permission of Government - Validity of - Held: Not valid - Agreement for sale of any granted land is included within the meaning of `transfer' as defined in s.3(e) of the Act - Therefore, transfer made without prior permission of Government was null and void in view of s.4(2) of the Act

Dismissing the appeal, the Court HELD:

A plain reading of the statement of objects and reasons, for which the legislature has introduced Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978 would show that the non-alienation clause contained in the existing land grant rules and the provisions for cancellation of grants where the land was alienated in contravention of the above said provisions were found insufficient to help the Scheduled Castes and Scheduled Tribes grantees. From the objects and reasons of the Act, it is evident that ignorance and poverty of the scheduled castes and scheduled tribes were exploited by persons belonging to the affluent and powerful sections to get sales or mortgages, either for a nominal consideration or for no consideration at all and on account of this, the scheduled castes and schedules tribes had become the victims of circumstances. It is for this reason and to fulfill the purposes of the grant, it was thought fit by the legislature that the land, even if it has been alienated, must be restored to the original grantee or his heirs and legal representatives who are admittedly scheduled castes and scheduled tribes. It is in that background, the Act was introduced providing for prohibition of transfer and restoration of lands granted by the Government to persons belonging to scheduled castes and scheduled tribes in the State. However, it is also evident from the relevant provisions of the Act, that total prohibition of transfer by scheduled castes and scheduled tribes was also not intended by the legislature. It is provided that in respect of transfers after the commencement of the Act, it would be open to transfer the land granted to scheduled castes and scheduled tribes if prior permission is obtained from the State Government.

"Transfer" under s.3(e) of the Act means a sale, gift, exchange, mortgage with or without possession, lease or any other transaction not being a partition among members of a family or a testamentary disposition and includes the creation of a charge or an agreement to sell, exchange, mortgage or lease or enter into any other transaction. A bare reading of the definition of "Transfer" as defined in s.3(e) of the Act would show that an `agreement for sale" of any "granted land" is included within the meaning of "Transfer". That being the position, the word "Transfer" as defined under the Act is an inclusive definition. That is to say, it includes "sale" as well as "agreement for sale" , although an agreement for sale under the Transfer of Property Act is not a transfer and the right, title or interest in the land does not pass until the sale deed is executed and registered. "Sale" has been defined in s.54 of the Transfer of Property Act which means transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. An agreement to sell does not by itself create any interest of the proposed vendee in the immovable property but only creates an enforceable right in the parties. Therefore, it is clear that under the general law, that is, under the Transfer of Property Act, an `agreement for sale' is not the same as `sale' and in the case of an agreement for sale, the title of the property agreed to be sold still remains with the vendor but in the case of `sale', title of the property is vested with the vendee. Therefore, an agreement for sale is an executory contact whereas sale is an executed contract.

Admittedly, the parties had entered into an agreement for sale in respect of the granted land before the commencement of the Act. It is also an admitted position that the respondents belonged to the scheduled caste community. From an overall consideration of the objects and reasons for which this Act was introduced and the relevant provisions of the Act, it is pellucid that the definition of "Transfer" under s.3(e) of the Act includes an agreement for sale also and "Transfer" has been so defined to protect the right, title and interest of the scheduled castes and scheduled tribes so that possess-ion of the lands could be restored to them even if they had entered into an agreement for sale. S.4 deals with prohibition of transfer of granted lands. Sub-section (1) of s.4 starts with the non-obstante clause and provides that any transfer of granted land, either before or after the commencement of the Act in contravention of the terms of the grant of such land or the law providing for such grant or sub-section (2) shall be null and void and no right, title or interest in such land shall be conveyed or be deemed ever to have conveyed by such transfer. Therefore, it is clear from a plain reading of s.4(1) that if any one of the conditions is satisfied, it would render the transfer null and void.

So far as the first condition, namely, transfer in contravention of the terms of the grant of such land is concerned, it cannot be disputed in the facts of this case that there was no contravention of the terms of the grant of such land as the transfer was admittedly made after 15 years of the date of certificate, which was the only condition regarding prohibition of transfer in the grant. It is also not in dispute that there is no contravention of any law providing for such grant. Therefore, so far as these two conditions are concerned, it

cannot be disputed that they are not satisfied. In respect of the third condition i.e. transfer made in contravention of sub-Section 2 of s. 4 of the Act, a transfer of any granted land made after the commencement of the Act in contravention of sub-Section 2 shall be null and void and no right, title or interest in such land shall be conveyed or be deemed ever to have conveyed by such transfer. Sub-Section 2 of s.4 clearly says that no person shall, after the commencement of this Act, transfer or acquire by transfer any granted land without the previous permission of the Government. Therefore, after the commencement of this Act, if any transfer is effected or any person acquires any granted land by transfer, without the previous permission of the Government, such transfer shall be null and void and no right, title or interest in such land shall be conveyed or be deemed ever to have conveyed by such transfer.

Admittedly, the transfer was effected after the commencement of the Act by a deed of sale dated 13th of October, 1986 without the previous permission of the Government. That being the position, such transfer must be held to be null and void and no right, title or interest in such land shall be conveyed or be deemed ever to have conveyed by such transfer.

Section 3(b) defines "Granted Land" which means any land granted by the Government to a person belonging to any of the Scheduled Castes or the Scheduled Tribes and includes land allotted or granted to such person under the relevant law for the time being in force relating to agrarian reforms or land ceilings or abolition of inams, other than that relating to hereditary offices or rights and the word "granted" shall be construed accordingly.

SALE OF MINOR PROPERTY COURT PERMISSION NEEDED

1993 (4) SCC 38,

The Hindu Minority and Guardianship Act, 1956: Section 8--Intent of--Whether protects the property of a minor from the depredations of the parents even. Words and Phrases--Voidable and Void--Sale of the property of the minor by his mother without permission of the court and attested by the father Whether voidable or void. Sale of the property of the minor by his mother and attested by his father--Interpretation of--Whether amounts to a sale by the natural guardian of the minor for legal necessity. and benefit of the minor.

The mother of the respondent minors, acting as their guardian, sold their land, while they were still minors, to the appellant under a registered sale deed dated July 30,1964. The respondents, upon attaining majority, sued the appellant for possession of the said land on the ground that the sale thereof, having been made without the permission of the court, was void. The appellant in his written statement and at the time of hearing of the suit contended that the sale deed had been attested by the father of the respondents and the sale should, therefore, he deemed to have been a sale by the legal guardian of the respondents. It was also pleaded that the sale had been for legal necessity and the benefit of the respondents. It was also alleged that the suit was barred by limitation because the sale was voidable and not void and the suit had not been brought within three years of each of the respondents attaining majority. The trial court framed appropriate issues and came to the conclusion that it had not been proved that the sale was for legal necessity or for the benefit of the respondents, that the sale by the respondent's mother without the permission of the court was void, and the sale was void and not voidable and the suit was, therefore, in time and was decreed. The appeal filed by the appellant before the Additional Distt. Judge and the High Court failed. The appellant, therefore, preferred this appeal by special leave. Dismissing the appeal, this court,

HELD :
1. The provisions of section 8 of the Hindu Minority and Guardianship Act, 1956 are devised to fully protect the property (.if a minor, even from the depredations of his parents. Section 8 empowers only the legal guardian to alienate a minor's immovable property provided it is for the necessity or benefit of the minor or his estate and it further requires that such alienation shall be effected after the permission of the Court has been obtained."

2. It was difficult, therefore, to hold that the sale, by reason of the fact that the mother of the minor respondents signed the sale deed and the father attested it, was voidable, not void.

3. The attestation of the sale deed by the father showed that he was very much existent and in the picture. If he was, then the sale by the mother, notwithstanding the fact that the father attested it, cannot he held to be sale by the father and natural guardian satisfying the requirements of section 8.

Jijabai Vithalrao Gajre vs. Pathankhan and ors., AIR 1971 S.C. 315. This was a case in which it was held that the position in Hindu law was that when the father was alive he was the natural guardian and it was only after him that the mother became the natural guardian. Where the father was alive but had fallen out with the mother of the minor child and was living separately for several years without taking any interest in the affairs of the minor, who was in the keeping and care of the mother, it was held that, in the peculiar circumstances, the father should be treated as if nonexistent and, therefore, the mother could be considered as the natural guardian of the minor's person as well as property, having power to bind the minor by dealing with her immovable property.

GIFT OF ANCESTRAL PROPERTY BY KARTA

This Court in Ammathayee alias Perumalakkal and Another V. Kumaresan alias Balakrishnan and Others AIR 1967 SC 569 summarised the Hindu Law on the question of gifts of ancestral properties in the following words: Hindu law on the question of gifts of ancestral property is well settled. So far as moveable ancestral property is concerned, a gift out of affection may be made to a wife, to a daughter and even to a son, provided the gift is within reasonable limits. A gift for example of the whole or almost the whole of the ancestral moveable property cannot be upheld as a gift through affection.

But so far as immovable ancestral property is concerned, the power of gift is much more circumscribed than in the case of moveable ancestral property. A Hindu father or any other managing member has power to make a gift of ancestral immovable property within reasonable limits for pious purposes; Now what is generally understood by pious purposes is gift for charitable and/or religious purposes. But this Court has extended the meaning of pious purposes to cases where a Hindu father makes a gift within reasonable limits of immovable ancestral property to his daughter in fulfilment of an antenuptial promise made on the occasion of the settlement of the terms of her marriage, and the same can also be done by the mother in case the father is dead.

AIR 2000 SC 3529 THIMMAIAH VS NINGAMMA The Karta is competent or has the power to dispose of coparcenary property only if (a) the disposition is of a reasonable portion of the coparcenary property and (b) the disposition is for a recognised pious purpose.

This Court in Guramma V. Mallappa AIR 1964 SC 510 has envisaged three situations of voidable transactions. It was held that a managing member may alienate joint family property in three situations namely: (i) legal necessity, or (ii) benefit of the estate or (iii) with the consent of all the coparceners of the family. Where the alienation is not with the consent of all the coparceners, it is voidable at the instance of the coparcener whose consent has not been obtained.

In this connection, a reference may be made in the case of State Bank of India Vs. Ghamandi Ram reported in AIR 1969 SC 1333, it was held thus:- "According to the Mitakshara School of Hindu Law all the property of a Hindu Joint Family is held in collective ownership by all the coparceners in the quasi-corporate copacity. The textual authority of the Mitakshara Lays down in express terms that the joint famil;y property is held in trust from the joint family members then living and thereafter to be both. The incidents of coparcernership under the Mitakshara Law are: first the lineal male descendants of a person upto the third generation, acquire on birth ownership in the ancestral properties of such person; Secondly that such descendants can at any time work out their rights by asking for partition; thirdly, that till partition each member has got ownership extending over the entire property co- jointly with the rest; forthly, that as a

result of such co-ownership the possession and enjoyment of the properties is common fifthly that no alienation of the property is possible unless it before necessity, without the concurrence of the coparceners, and sixthly; that the interest of a deceased member lapses on his death to the survivors. A coparcenary under the Mitakshara School is a creature of law and cannot arise by act of parties except in so far that on adoption the adopted son becomes a co-parcener with his adoptive father as regards the ancestral properties of the letter." The concept of coparcener as given in the Mitakshara School of Hindu Law as already mentioned above, is that of a joint family property wherein all the members of the coparceners share equally. In this connection a reference may be made to a decision of this Court in the case of State of Maharashtra vs. Narayan Rao Sham Rao Deshmukh & Ors. reported in (1985) 2 SCC 321 in which Their Lordships have held as follows: " A Hindu coparcenary is however, a narrower body than the joint family. Only males who acquire by birth an interest in the joint or coparcenary property can be members of the coparcenary or coparceners. A male member of a joint family and his sons, grandsons and great grandsons constitute a coparcenary. A coparcener acquires right in the coparcenary property by birth but his right can be definitely ascertained only when a partition takes place. When the family is joint, the extent of the share of a coparcener cannot be definitely predicated since it is always capable of fluctuating."

In N.R. Raghavachariar's Hindu Law Principles and precedents " 8th Edition (1987) at page 230 under the heading 'Rights of Coparceners' it is said thus:- "The following are the rights of a coparcener :- (1) Right by birth (2) Right by survivorship, (3) Right to partition, (4) Right to joint possession and enjoyment, (5) Right to restrain unauthorized acts (6) Right of alienation, (7) Right to accounts and (8) Right to make self-acquisition".

Likewise, S.V. Gupta, author of Hindu Law, Vol. 1, Third Edition (1981) at page 162, the learned author deals with the rights of a coparcener. He says thus:- "Until partition, coparcener is entitled to:- (1) join possession and enjoyment of joint family property (2) the right to take the joint family property by survivorship, and (3) the right to demand partition of the joint family property"

The position in Hindu law is that whereas the father has the power to gift ancestral movables within reasonable limits, he has no such power with regard to the ancestral immovable property or coparcenary property. He can, however make a gift within reasonable limits of ancestral immovable property for "pious purposes". However, the alienation must be by an act inter vivos, and not by will. This Court has extended the rule and held that the father was competent to make a gift of immovable property to a daughter, if the gift is of reasonable extent having regard to the properties held by the family. This Court considered the question of extended meaning given in numerous decisions for "pious purposes" in **Kamla Devi vs. Bachulal Gupta [1957 SCR 452].** In the said case a Hindu widow in fulfilment of an ante-nuptial promise made on the occasion of the settlement of the terms of marriage of her daughter, executed a registered deed of gift in respect of 4 houses allotted to her share in a partition decree, in favour of her daughter as her marriage dowry, after two years of her marriage. The partition decree had given her the right to the income from property but she had no right to part with the corpus of the property to the prejudice of the reversioners. Her step sons brought a suit for declaration that the deed of gift was void and inoperative and could not bind the reversioners. The trial court and the High Court dismissed the suit holding that the gift was not valid. This Court accepted the appeal and held that the gift made in favour of the daughter was valid in law and binding on the reversioners. This point was again examined in depth by this Court in Guramma Bhratar Chanbasappa Deshmukh and another vs. Malappa 1964 (4) SCR 497 and it was held:- "The legal position may be summarized thus: The Hindu law texts conferred a right upon a daughter or a sister, as the case may be, to have a share in the family property at the time of partition. That right was lost by efflux of time. But it became crystallized into a moral obligation. The father or his representative can make a valid gift, by way of reasonable provision for the maintenance of the daughter, regard being had to the financial and other relevant circumstances of the family. By custom or by convenience, such gifts are made at the time of marriage, but the right of the father or his representative to make such a gift is not confined to the marriage occasion. It is a moral obligation and it continues to subsist till it is discharged. Marriage is only a customary occasion for such a gift. But the obligation can be discharged at any time, either during the lifetime of the father or thereafter. It is not possible to lay down a hard and fast rule, prescribing the quantitative limits of such a gift as that would

depend on the facts of each case and it can only be decided by Courts, regard being had to the overall picture of the extent of the family estate, the number of daughters to be provided for and other paramount charges and other similar circumstances. If the father is within his rights to make a gift of a reasonable extent of the family property for the maintenance of a daughter, it cannot be said that the said gift must be made only by one document or only at a single point of time. The validity or the reasonableness of a gift does not depend upon the plurality of documents but on the power of the father to make a gift and the reasonableness of the gift so made. If once the power is granted and the reasonableness of the gift is not disputed, the fact that two gift deeds were executed instead of one, cannot make the gift anytheless a valid one."

In M.V.S. Manikayala Rao vs. M. Narasimhaswami & Ors. [(AIR 1966 SC 470], this Court held: "Now, it is well settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased. His only right is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased."

Bharat Singh & Anr. vs. Bhagirathi [(1966) 1 SCR 606], wherein this Court held: "Admissions have to be clear if they are to be used against the person making them. Admissions are substantive evidence by themselves, in view of ss. 17 and 21 of the Indian Evidence Act, though they are not conclusive proof of the matters admitted. We are of opinion that the admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions."

HOUSE BUILDING CONTRACT AND CONSUMER

2008 (10) SCC 345 , FAQIR CHAND GULATI VS. UPPAL AGENCIES PVT. LTD. & ANR.

Consumer Protection Act, 1986: Ss. 2(1)(d)(ii)(g) & (o), 3 and 14: Service –

Owner entering into a collaboration agreement with a builder for construction of a residential building and sharing constructed area - Owner is as Consumer and builder as service provider for the purpose of application of 1986 Act, complaint under consumer Act, Maintainable.

Building Contract between Landowner and builder - Breach of conditions - Remedy - Landowner may file suit for specific performance of contract or claim damages or can approach to Consumer Forum for relief as Consumer against a builder, service provider.

Allowing the appeal, the Court HELD:

The usual feature of hybrid agreement entered in India is that the land-holder will have no say or control in the construction. Nor will he have any say as to whom and at what cost the builder's share of apartments are to be dealt with or disposed of. His only right is to demand delivery of his share of constructed area in accordance with the specifications. An agreement between the owner of a land and a builder, for construction of apartments and sale of those of apartments so as to share the profits in a particular ratio may be a joint venture, if the agreement discloses an intent that both parties shall exercise joint control over the construction/development and be accountable to each other for their respective acts with reference to the project. There are various terms in the agreement between the appellant and first respondent which militate against the same being a `joint venture'. Firstly, there is a categorical statement, that the agreement shall not be deemed to constitute a partnership between the owner and the builder. The land-owner is specifically excluded from management and is barred from interfering with the construction in any manner and the Builder has the exclusive right to appoint the Architects, Contractors and sub-contractors for the construction. The Builder is entitled to sell its share of the building as it deemed fit, without reference to the land owner. The builder undertakes to the landowner that it will construct the building within 12 months

from the date of sanction of building plan and deliver the owner's share to the land owner. The Builder alone is responsible to pay penalties in respect of deviations and for payment of compensation under the Workmen's Compensation Act in case of accident. Secondly, there is no community of interest or common/joint control in the management, nor sharing of profits and losses. The land owner has no control or participation in the management of the venture. The requirement of each joint venturer being the principal as well as agent of the other party is also significantly absent. Such hybrid agreements are not a joint venture, as understood in law.

The basic underlying purpose of the agreement in question is the construction of a house or an apartment (ground floor) in accordance with the specifications, by the builder for the owner, the consideration for such construction being the transfer of undivided share in land to the builder and grant of permission to the builder to construct two floors. Such agreement whether called as a `collaboration agreement' or a `joint-venture agreement', is not however a `joint-venture'. There is a contract for construction of an apartment or house for the appellant in accordance with the specifications and in terms of the contract. There is a consideration for the construction, flowing from the landowner to the builder (in the form of sale of an undivided share in the land and permission to construct and own the upper floors). To adjust the value of the extent of land to be transferred, there is also payment of cash consideration by the builder. But the important aspect is the availment of services of the builder by the land-owner for a house construction (construction of owner's share of the building) for a consideration. To that extent, the land-owner is a consumer, the builder is a service-provider and if there is deficiency in service in regard to construction, the dispute raised by the land owner will be a consumer dispute. It makes no difference for the purpose whether the collaboration agreement is for construction and delivery of one apartment or one floor to the owner or whether it is for construction and delivery of multiple apartments or more than one floor to the owner. The principle would be the same and the contract will be considered as one for house construction for consideration. The deciding factor is not the number of apartments deliverable to the land owner, but whether the agreement is in the nature of a joint-venture or whether the agreement is basically for construction of certain area for the land-owner.

In a true joint venture agreement between the land-owner and another (whether a recognized builder or fund provider), the land-owner is a true partner or co-adventurer in the venture where the land owner has a say or control in the construction and participates in the business and management of the joint venture, and has a share in the profit/loss of the venture. In such a case, the land owner is not a consumer nor is the other co-adventurer in the joint venture, a service provider. The land owner himself is responsible for the construction as a co-adventurer in the venture. But such true joint ventures are comparatively rare. What is more prevalent are agreements of the nature found in this case, which are a hybrid agreement for construction for consideration and sale and are pseudo joint-ventures. Normally a professional builder who develops properties of others is not interested in sharing the control and management of the business or the control over the construction with the land owners. Except assuring the land owner a certain constructed area and/or certain cash consideration, the builder ensures absolute control in himself, only assuring the quality of construction and compliance with the requirements of local and municipal laws, and undertaking to deliver the owners' constructed area of the building with all certificates, clearances and approvals to the land owner.

It is now well settled that the title or caption or the nomenclature of the instrument/document is not determinative of the nature and character of the instrument/document, though the name may usually give some indication of the nature of the document. The nature and true purpose of a document has to be determined with reference to the terms of the document, which express the intention of the parties. Therefore, the use of the words `joint venture' or `collaboration' in the title of an agreement or even in the body of the agreement will not make the transaction a joint venture, if there are no provisions for shared control of interest or enterprise and shared liability for losses.

If there is a breach by the landowner of his obligations, the builder will have to approach a civil court as the landowner is not providing any service to the builder but merely undertakes certain obligations towards the builder, breach of which would furnish a cause of action for specific performance and/or damages. On the

other hand, where the builder commits breach of his obligations, the owner has two options. He has the right to enforce specific performance and/or claim damages by approaching the civil court. Or he can approach the Forum under Consumer Protection Act, for relief as consumer, against the builder as a service- provider. Section 3 of the Consumer Protection Act makes it clear that the remedy available under the Act is in addition to the normal remedy or other remedy that may be available to the complainant.

The builder cannot be permitted to avoid or escape the consequences of his illegal acts. The obligation on the part of the builder to secure a sanctioned plan and construct a building, carries with it an implied obligation to comply with the requirements of municipal and building laws and secure the mandatory permissions/certificates.

The agreement clearly contemplates the builder completing the construction and securing completion certificate. The agreement, in fact, refers to the possibility of deviations and provides that if there are deviations, the builder will have to pay the penalties, that is do whatever is necessary to get the same regularized. Even if such a provision for providing completion certificate or payment of penalties is not found in the agreement, the builder cannot escape the liability for securing the completion certificate and providing a copy thereof to the owner if the law requires the builder to obtain completion certificate for such a building.

If it is not issued, the builder owes a duty to make necessary application and obtain it. If it is wrongly withheld, he may have to approach the appropriate court or other forum to secure it. If it is justifiably withheld or refused, necessarily the builder will have to do whatever that is required to be done to bring the building in consonance with the sanctioned plan so that the municipal authorities can inspect and issue the completion certificate and also assess the property to tax. If the builder fails to do so, he will be liable to compensate the complainant for all loss/damage. Therefore, the assumption of the State Commission and National Commission that the obligation of the builder was discharged when he merely applied for a completion certificate is incorrect.

ADMISSION

2008 (7) SCC 85, GAUTAM SARUP VS LEELA JETLY & ORS.

Appellant filed a suit for declaration of his title to the properties and for decree of permanent injunction. Respondent No.6 on being served with the summons appeared through MPV, Advocate. She filed a written statement admitting the averments made in the plaint. She, however, filed another written statement denying and disputing the claim of the appellant in toto. She also filed an application on 28.8.2000 for permission to take the first written statement off the records and to file another written statement on the premise that she had not engaged MPV, Advocate nor filed any written statement through him. She denied her signatures appearing on the said written statement. The said application was allowed by the trial court. Appellant filed revision wherein High Court while setting aside the order of trial court directed it to hold an enquiry as to whether the respondent no.6 ever engaged MPV, Advocate or ever signed the written statement which had been placed on record. It was directed that in the event the findings of the said enquiry go in her favour, it would be open to her to file the second written statement or the one which has been filed by her may be accepted. Pursuant thereto, enquiry was held and it was opined that respondent no.6 had, in fact, appointed the said MPV as her lawyer and filed her written statement on 30.3.2000. This order was upheld by High Court. Thereafter, Respondent no.6 filed an application for amendment which was allowed by trial Court and affirmed by High Court. Hence the present appeal.

Allowing the appeal, the Court HELD:

An admission made in a pleading is not to be treated in the same manner as an admission in a document. An admission made by a party to the lis is admissible against him proprio vigore.

A thing admitted in view of s.58 of the Indian Evidence Act need not be proved. Order VIII Rule 5 CPC provides that even a vague or evasive denial may be treated to be an admission in which event the court may pass a decree in favour of the plaintiff. It is one thing to say that without resiling from an admission, it would be permissible to explain under what circumstances the same had been made or it was made under a mistaken belief or to clarify one's stand in regard to the extent or effect of such admission, but it is another thing to say that a person can be permitted to totally resile therefrom.

A categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other. An explanation can be offered provided there is any scope therefor. A clarification may be made where the same is needed.

Respondent No.6 accepted the case of the appellant in its entirety. It went to the extent of accepting the plea of the appellant that his suit, claiming half share in the property left by his father, may be decreed. Each and every contention of the plaintiff-appellant was accepted by respondent no.6. The only explanation which could be offered by her was that the purported admission had been taken from her by playing fraud on her and she, therefore, was not bound thereby. If, she had not engaged MPV as her advocate or had not put her signature on the written statement, the purported contention contained in her written statement filed on 30.3.2000 might not constitute `admission' in the eyes of law. In such a situation in law, she must be held to have not filed any written statement at all. It was bound to be taken off the records and substituted by a written statement which was properly and legally filed. Such a contention raised on the part of respondent No.6 having been rejected by the Trial Judge as also be the High Court, the submission that she should be permitted to explain her admissions does not and cannot arise.

It is not correct to say that other respondents having denied and disputed the genuineness of the Will and an issue in that behalf having been framed, the appellant in no way shall be prejudiced if the amendment of the written statement be allowed.

GIFT DEED

2007 (13) SCR 901 ASOKAN VS LAKSHMIKUTTY & ORS.

Transfer of Property Act; Ss.122 & 123: Gift-Donor-parents executed a deed of gift transferring possession of property gifted in favour of his son-donee-Averment in a deed of gift in regard to handing over of possession-Whether amounts to sufficient proof of acceptance thereof by donee-Held:-

In order to constitute a valid gift, acceptance thereof is essential-Even a silence may sometimes indicate acceptance-Overt act not necessary as express acceptance need not be required for completing the transaction of gift-When a registered document is executed, presumption arises in regard to the correctness thereof -Onus lies on the donor and not on the donee-The fact that possession had been given to donee raises a presumption of acceptance-Thus, the gift in question is a valid gift-Once a gift is complete, it cannot be rescinded on the ground of subsequent conduct of the donee.

Allowing the appeal, the Court HELD:

Gifts do not contemplate payment of any consideration or compensation. It is, however, beyond any doubt or dispute that in order to constitute a valid gift acceptance thereof is essential. However, the Transfer of Property Act does not prescribe any particular mode of acceptance. It is the circumstances attending to the transaction which may be relevant for determining the question. There may be various means to prove

acceptance of a gift. The document may be handed over to a donee, which in a given situation may also amount to a valid acceptance. The fact that possession had been given to the donee also raises a presumption of acceptance.

While determining the question as to whether delivery of possession would constitute acceptance of a gift or not, the relationship between the parties plays an important role. It is not a case that the appellant was not aware of the recitals contained in deeds of gift. The very fact that the parents-donor contended that the donee, son, was to perform certain obligations, is itself indicative of the fact that the parties were aware thereabout. Even a silence may sometime indicate acceptance. It is not necessary to prove any overt act in respect thereof as an express acceptance is not necessary for completing the transaction of gift.

When a registered document is executed and the executors are aware of the terms and nature of the document, a presumption arises in regard to the correctness thereof. When such a presumption is raised coupled with the recitals in regard to putting the donee in possession of the property, the onus should be on the donor and not on the donee.

The deeds of gift categorically state, as an ingredient for a valid transaction, that the property had been handed over to the donee and he had accepted the same. Even assuming that the legal presumption therefore may be raised, the same is a rebuttable one but in a case of this nature, a heavy onus would lie on the donors.

Once a gift is complete, the same cannot be rescinded. For any reason whatsoever, the subsequent conduct of a donee cannot be a ground for rescission of a valid gift.

REVENUE DOCUMENTS ARE NOT DOCUMENT OF TITLE

AIR 2008 SC 901 , GURUNATH MANOHAR PAVASKAR & ORS VS NAGESH SIDDAPPA NAVALGUND & ORS

A revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof both forward and backward can also be raised under s.110 of the Evidence Act.

BANKING CASES AND INTEREST

Central Bank of India vs. Ravindra and others (2001 (7) Scale 351), while considering the issue relating to loan transactions and levy of interest in such matters, due to conflict of opinion, a three-Judges Bench of the Hon'ble Apex Court referred the matter to the Constitution Bench on the following question:- " What is the meaning to be assigned to the phrases the principal sum adjudged and such principal sum as occurring in Section 34 of the Code of Civil Procedure, 1908 as amended by the Code of Civil Procedure (Amendment) Act (66 of 1956) w.e.f. 1-1-1957], a question of frequent recurrence and having far- reaching implications in suits for recovery of money, specially those filed by banking institutions against their borrowers, has been referred by a three-Judge Bench of this Court to the Constitution Bench."

In the course of the Judgment, the Hon'ble Supreme Court made some vital observations, which run thus:- "The Banking Regulation Act, 1949 empowers the Reserve Bank, on it being satisfied that it is necessary or expedient in the public interest or in the interest of depositors or banking policy so to do, to determine the policy in relation to advances to be followed by banking companies generally or by any banking company in particular and when the policy has been so determined it has a binding effect. In particular, the Reserve Bank of India may give directions as to the rate of interest and other terms and conditions on which advances or other financial accommodation may be made. Such directions are also binding on every banking company.

Section 35-A also empowers the Reserve Bank of India in the public interest or in the interest of banking policy or in the interests of depositors (and so on) to issue directions generally or in particular which shall be binding. With effect from 15-2-1984 Section 21-A has been inserted in the Act which takes away power of the court to reopen a transaction between a banking company and its debtor on the ground that the rate of interest charged is excessive. The provision has been given an overriding effect over the Usury Loans Act, 1918 and any other provincial law in force relating to indebtedness.

During the course of hearing it was brought to our notice that in view of several usury laws and debt relief laws in force in several States private moneylending has almost come to an end and needy borrowers by and large depend on banking institutions for financial facilities. Several unhealthy practices having slowly penetrated into prevalence were pointed out. Banking is an organised institution and most of the banks press into service long-running documents wherein the borrowers fill in the blanks, at times without caring to read what has been provided therein, and bind themselves by the stipulations articulated by the best of legal brains. Borrowers other than those belonging to the corporate sector, find themselves having unwittingly fallen into a trap and rendered themselves liable and obliged to pay interest the quantum whereof may at the end prove to be ruinous. At times the interest charged and capitalised is manifold than the amount actually advanced. Rule of damdupat does not apply. Penal interest, service charges and other overheads are debited in the account of the borrower and capitalised of which debits the borrower may not even be aware. If the practice of charging interest on quarterly rests is upheld and given a judicial recognition, unscrupulous banks may resort to charging interest even on monthly rests and capitalising the same. Statements of accounts supplied by banks to borrowers many a times do not contain particulars or details of debit entries and when written in hand are worse than medical prescriptions putting to test the eyes and wits of the borrowers. Instances of unscrupulous, unfair and unhealthy dealings can be multiplied though they cannot be generalised. Suffice it to observe that such issues shall have to be left open to be adjudicated upon in appropriate cases as and when actually arising for decision and we cannot venture into laying down law on such issues as do not arise for determination before us. However, we propose to place on record a few incidental observations, without which, we feel, our answer will not be complete and that we do as under: (1) Though interest can be capitalised on the analogy that the interest falling due on the accrued date and remaining unpaid, partakes the character of amount advanced on that date, yet penal interest, which is charged by way of penalty for non-payment, cannot be capitalised. Further interest i.e. interest on interest, whether simple, compound or penal, cannot be claimed on the amount of penal interest. Penal interest cannot be capitalised. It will be opposed to public policy. (5) The power conferred by Sections 21 and 35-A of the Banking Regulation Act, 1949 is coupled with duty to act. The Reserve Bank of India is the prime banking institution of the country entrusted with a supervisory role over banking and conferred with the authority of issuing binding directions, having statutory force, in the interest of the public in general and preventing banking affairs from deterioration and prejudice as also to secure the proper management of any banking company generally. The Reserve Bank of India is one of the watchdogs of finance and economy of the nation. It is, and it ought to be, aware of all relevant factors, including credit conditions as prevailing, which would invite its policy decisions. RBI has been issuing directions/circulars from time to time which, inter alia, deal with the rate of interest which can be charged and the periods at the end of which rests can be struck down, interest calculated thereon and charged and capitalised. It should continue to issue such directives. Its circulars shall bind those who fall within the net of such directives. For such transaction which are not squarely governed by such circulars, the RBI directives may be treated as standards for the purpose of deciding whether the interest charged is excessive, usurious or opposed to public policy. (7) Any interest charged and/or capitalised in violation of RBI directives, as to rate of interest, or as to periods at which rests can be arrived at, shall be disallowed and/or excluded from capital sum and be treated only as interest and dealt with accordingly.

In view of the law having been settled with this judgment, it is expected henceforth from the banks, bound by the directives of the Reserve Bank of India, to make an averment in the plaint that interest/compound interest has been charged at such rates, and capitalised at such periodical rests, as are permitted by, and do not run counter to, the directives of the Reserve Bank of India. A statement of account shall be filed in the

court showing details and giving particulars of debit entries, and if debit entry relates to interest then setting out also the rate of, and the period for which, the interest has been charged. ....."

SOCIETY AND MEMBERSHIP

AIR 2007 SC 1794, D. DWARAKANANTHA REDDY VS CHAITNYA BHARATHI EDUCATIONAL SOCIETY & OTHERS

No particulars, much less sufficient particulars, have been placed on record to show that the action taken by the Society was mala fide or had been taken in colourable exercise of power. The plea that the appellants were all throughout treated by the Society as Promoter-Members and they had worked for all these years which is established from various photographs, reports etc., is of no consequence. If the appellants had not been legally admitted as Patron Members, they could not be treated as such and cannot get benefit on the basis of photographs, reports, functions, etc.

According to the learned counsel, it was not a case of removal, termination or expulsion of a Member and hence there was no question of issuing notice, calling for explanation or affording opportunity of hearing or observance of principles of natural justice or fair play. Since the appellants had never become Promoter-Members, what was done on October 24, 2006 was to make it clear that their so called membership was void and of no effect. Reliance was placed on Hyderabad Karnataka education Society v. Registrar of Societies & Others, (2000) 1 SCC 566 : AIR 2000 SC 301

FAILURE OF STERILIZATION OPERATION NO GROUND TO CLAIM COMPENSATION

AIR 2005 SC 3280, State of Punjab vs : Shiv Ram & Ors. Court observed:

This is not a case where the surgeon who performed the surgery has committed breach of any duty cast on her as a surgeon. The plaintiffs have not alleged that the lady surgeon who performed the sterilization operation was not competent to perform the surgery and yet ventured into doing it. It is neither the case of the plaintiffs, nor has any finding been arrived at by any of the courts below that the lady surgeon was negligent in performing the surgery. The surgery was performed by a technique known and recognized by medical science. It is a pure and simple case of sterilization operation having failed though duly performed.

There are several alternative methods of female sterilization operation which are recognized by medical science of today. Some of them are more popular because of being less complicated, requiring minimal body invasion and least confinement in the hospital. However, none is foolproof and no prevalent method of sterilization guarantees 100% success. The causes for failure can well be attributable to the natural functioning of the human body and not necessarily attributable to any failure on the part of the surgeon.

Merely because a woman having undergone a sterilization operation became pregnant and delivered a child, the operating surgeon or his employer cannot be held liable for compensation on account of unwanted pregnancy or unwanted child. The claim in tort can be sustained only if there was negligence on the part of the surgeon in performing the surgery. The proof of negligence shall have to satisfy Bolam's test. So also, the surgeon cannot be held liable in contract unless the plaintiff alleges and proves that the surgeon had assured 100% exclusion of pregnancy after the surgery and was only on the basis of such assurance that the plaintiff was persuaded to undergo surgery.

The cause of action for claiming compensation in cases of failed sterilization operation arises on account of negligence of the surgeon and not on account of child birth. Failure due to natural causes would not provide any ground for claim. It is for the woman who has conceived the child to go or not to go for medical termination of pregnancy. Having gathered the knowledge of conception in spite of having undergone sterilization operation, if the couple opts for bearing the child, it ceases to be an unwanted child. Compensation for maintenance and upbringing of such a child cannot be claimed.

Failure of many a sterilization operation, though successfully performed, is attributable to causes other than medical negligence. And, yet the doctors are being faced with claim for damages. Some of the claims have been decreed by the courts without arriving at any finding providing a foundation in law for upholding such a claim. The State is also being called upon to honour such decrees on the principle of vicarious liability when the surgeon has performed a surgery in discharge of his duty. Mostly such surgeries are performed on a large scale and as a part of family welfare programmes of the Government. Obviously, such programmes are in public interest. Such like decrees act as a disincentive and have deterrent effect on the surgeons performing sterilization operations. The State, flooded with such decrees is also inclined not to pursue family planning camps on large scale though in public interest.

To popularize family planning programmes in lower economic strata of society, the State Government should provide some solace to them if they, on account of their illiteracy, ignorance or carelessness, are unable to avoid the consequences of a failed sterilization operation. Towards this end, the State Governments should think of devising and making provisions for a welfare fund or taking up with the insurance companies, a proposal for devising an appropriate insurance policy or an insurance scheme, which would provide coverage for such claims where a child is born to woman who has undergone a successful sterilization operation.

In Javed & Ors. v. State of Haryana & Ors. (2003) 8 SCC 369, popularly known as 'Two-Child Norm' case, this Court had an occasion to deal with the problem of increasing population, the danger which it poses for the progress of the nation and equitable distribution of its resources and upheld the validity of the Haryana legislation imposing a disqualification on persons having more than two children from contesting for an elective office. The fact cannot be lost sight of that while educated persons in the society belonging to the middle-class and the upper class do voluntarily opt for family planning and are careful enough to take precautions or remedial steps to guard against the consequences of failure of sterilization, the illiterate and the ignorant and those belonging to the lower economic strata of society face the real problem. To popularize family planning programmes in such sections of society, the State Government should provide some solace to them if they, on account of their illiteracy, ignorance or carelessness, are unable to avoid the consequences of a failed sterilization operation. Towards this end, the State Governments should think of devising and making provisions for a welfare fund or taking up with the insurance companies, a proposal for devising an appropriate insurance policy or an insurance scheme, which would provide coverage for such claims where a child is born to woman who has undergone a successful sterilization operation, as in the present case.

CAUSE OF ACTION

GURDIT SINGH AND ORS. ETC. Vs. MUNSHA SINGH AND ORS. ETC. AIR 1977 SC 640

Beg, .J. (Dissenting) Observed: The expression "cause of action" has sometimes been employed to convey the restricted idea of facts or circum- stances which constitute either the infringement or the basis of a right and no more. In a wider and more compre- hensive sense, it has been used to denote the whole bundle of material facts which a plaintiff must prove in order to succeed. These are all those essential facts without the proof of which the plaintiff must fail in his suit.

SUBSEQUENT DEVELOPMENTS

In Pratap Rai Tanwani Vs. Uttam Chand (2004 (8) SCC 490), Supreme Court held that subsequent developments can be taken into consideration to afford relief to the parties, provided only when such developments had a material impact on those rights and obligations.

In Ramesh Kumar Vs. Kesho Ram [1992 Supp. (2) SCC 623 where this Court observed as follows : - "The normal rule is that in any litigation the rights and obligations of the parties are adjudicated upon as they obtain at the commencement of the lis. But this is subject to an exception. Wherever subsequent events of fact or law which have a material bearing on the entitlement of the parties to relief or on aspects which bear on the moulding of the relief occur, the court is not precluded from taking a `cautious cognizance of the subsequent changes of fact and law to mould the relief."

MATERIAL FACTS

Mahadeorao Sukaji Shivankar Vs. Ramaratan Bapu & Ors (2004) 7 SCC 181"material facts" are facts upon which the plaintiff's cause of action or defendant's defence depends. Broadly speaking, all primary or basic facts which are necessary either to prove the cause of action by the plaintiff or defence by the defendant are "material facts". Material facts are facts which, if established, would give the petitioner the relief asked for. But again, what could be said to be material facts would depend upon the facts of each case and no rule of universal application can be laid down.

In Harkirat Singh v. Amrinder Singh (2005) 13 SCC 511, this Court again reiterated the distinction between `material facts' and `material particulars' and observed as under: "51. A distinction between "material facts" and "particulars", however, must not be overlooked. "Material facts" are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. "Particulars", on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. "Particulars" thus ensure conduct of fair trial and would not take the opposite party by surprise. 52. All "material facts" must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial."

TAKING POSSESSION OF ACQUIRED LAND

In Tamil Nadu Housing Board vs. Viswam (D) by Lrs. AIR 1996 SC 3377 "It is settled law by series of judgments of this Court that one of the accepted modes of taking possession of the acquired land is recording of a memorandum or Panchanama by the LAO in the presence of witnesses signed by him/them and that would constitute taking possession of the land as it would be impossible to take physical possession of the acquired land. It is common knowledge that in some cases the owner/interested person may not cooperative in taking possession of the land."

In Balmokand Khatri Educational and Industrial Trust, Amritsar vs. State of Punjab & Ors. AIR 1996 SC 1239 yet again the question was as to the taking over of the possession of agricultural land and it was observed thus: "It is seen that the entire gamut of the acquisition proceedings stood completed by April 17, 1976 by which date possession of the land had been taken. No doubt, Shri Parekh has contended that the appellant still retained their possession. It is now well-settled legal position that it is difficult to take physical possession of the land under compulsory acquisition. The normal mode of taking possession is drafting the

Panchnama in the presence of Panchas and taking possession and giving delivery to the beneficiaries is the accepted mode of taking possession of the land. Subsequent thereto, the retention of possession would tantamount only to illegal or un lawful possession."

PARTITION

Shub Karan Bubna @ Shub Karan Prasad Bubna Vs. Sita Saran Bubna & Ors. SPECIAL LEAVE PETITION [C] NO.17932 OF 2009, August 21, 2009.

`Partition' is a re-distribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them, into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty. A partition of a property can be only among those having a 4 share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. `Separation of share' is a species of 'partition'. When all co-owners get separated, it is a partition. Separation of share/s refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother. In a suit for partition or separation of a share, the prayer is not only for declaration of plaintiff's share in the suit properties, but also division of his share by metes and bounds.

The court held following principles emerge from the cases regarding partition suits :

1. In regard to estates assessed to payment of revenue to the government (agricultural land), the court is required to pass only one decree declaring the rights of several parties interested in the suit property with a direction to the Collector (or his subordinate) to effect actual partition or separation in accordance with the declaration made by the court in regard to the shares of various parties and deliver the respective portions to them, in accordance with section 54 of Code. Such entrustment to the Collector under law was for two reasons. First is that Revenue Authorities are more conversant with matters relating to agricultural lands. Second is to safeguard the interests of government in regard to revenue. (The second reason, which was very important in the 19th century and early 20th century when the Code was made, has now virtually lost its relevance, as revenue from agricultural lands is negligible). Where the Collector acts in terms of the decree, the matter does not come back to the court at all. The court will not interfere with the partitions by the Collector, except to the extent of any complaint of a third party affected thereby.

2. In regard to immovable properties (other than agricultural lands paying land revenue), that is buildings, plots etc. or movable properties: (i) where the court can conveniently and without further enquiry make the division without the assistance of any Commissioner, or where parties agree upon the manner of division, the court will pass a single decree comprising the preliminary decree declaring the rights of several parties and also a final decree dividing the suit properties by metes and bounds. (ii) where the division by metes and bounds cannot be made without further inquiry, the court will pass a preliminary decree declaring the rights of the parties interested in the property and give further directions as may be required to effect the division. In such cases, normally a Commissioner is appointed (usually an Engineer, Draughtsman, Architect, or Lawyer) to physically examine the property to be divided and suggest the manner of division. The court then hears the parties on the report, and passes a final decree for division by metes and bounds. The function of making a partition or separation according to the rights declared by the preliminary decree, (in regard to non-agricultural immovable properties and movables) is entrusted to a Commissioner, as it involves inspection of the property and examination of various alternatives with reference to practical utility and site conditions. When the Commissioner gives his report as to the manner of division, the proposals contained in the report are considered by the court; and after hearing objections to the report, if any, the court passes a final decree whereby the relief sought in the suit is granted by separating the property by metes and bounds.

It is also possible that if the property is incapable of proper division, the court may direct sale thereof and distribution of the proceeds as per the shares declared.

3. As the declaration of rights or shares is only the first stage in a suit for partition, a preliminary decree does not have the effect of disposing of the suit. The suit continues to be pending until partition, that is division by metes and bounds, takes place by passing a final decree. An application requesting the court to take necessary steps to draw up a final decree effecting a division in terms of the preliminary decree, is neither an application for execution (falling under Article 136 of the Limitation Act) nor an application seeking a fresh relief (falling under Article 137 of Limitation Act). It is only a reminder to the court to do its duty to appoint a Commissioner, get a report, and draw a final decree in the pending suit so that the suit is taken to its logical conclusion.

AWARDING OF COSTS AND AMENDMENT

Revajeetu Builders & Developers Vs Narayanaswamy & Sons & Others CIVIL APPEAL NO.6921 OF 2009. DECIDED ON 09-10-2009 IT IS OBSERVED:

In a recently published unique, unusual and extremely informative book "Justice, Courts and Delays", the author Arun Mohan, a Senior Advocate of the High Court of Delhi and of this Court, from his vast experience as a Civil Lawyer observed that 80% applications under Rule VI Order 17 are filed with the sole objective of delaying the proceedings, whereas 15% application are filed because of lackadaisical approach in the first instance, and 5% applications are those where there is actual need of amendment. His experience further revealed that out of these 100 applications, 95 applications are allowed and only 5 (even may be less) are rejected. According to him, a need for amendment of pleading should arise in a few cases, and if proper rules with regard to pleadings are put into place, it would be only in rare cases. Therefore, for allowing amendment, it is not just costs, but the delays caused thereby, benefit of such delays, the additional costs which had to be incurred by the victim of the amendment. The Court must scientifically evaluate the reasons, purpose and effect of the amendment and all these factors must be taken into consideration while awarding the costs.

The general principle is that courts at any stage of the proceedings may allow either party to alter or amend the pleadings in such manner and on such terms as may be just and all those amendments must be allowed which are imperative for determining the real question in controversy between the parties. The basic principles of grant or refusal of amendment articulated almost 125 years ago are still considered to be correct statement of law and our courts have been following the basic principles laid down in those cases.

WHETHER AMENDMENT IS NECESSARY TO DECIDE REAL CONTROVERSY: 61. The first condition which must be satisfied before the amendment can be allowed by the court is whether such amendment is necessary for the determination of the real question in controversy. If that condition is not satisfied, the amendment cannot be allowed. This is the basic test which should govern the courts' discretion in grant or refusal of the amendment.

NO PREJUDICE OR INJUSTICE TO OTHER PARTY: 62. The other important condition which should govern the discretion of the Court is the potentiality of prejudice or injustice which is likely to be caused to other side. Ordinarily, if other side is compensated by costs, then there is no injustice but in practice hardly any court grants actual costs to the opposite side.

The costs cannot and should not be imposed arbitrarily. In our view, the following parameters must be taken into consideration while imposing the costs. These factors are illustrative in nature and not exhaustive. (i) At what stage the amendment was sought? (ii) While imposing the costs, it should be taken into consideration whether the amendment has been sought at a pre-trial or post-trial stage; (iii)The financial benefit derived by one par- ty at the cost of other party should be properly calculated in terms of money and the costs be awarded accordingly. (iv) The imposition of costs should not be symbolic but realistic; (v) The delay and

inconvenience caused to the opposite side must be clearly evaluated in terms of additional and extra court hearings compelling the opposite party to bear the extra costs. (vi) In case of appeal to higher courts, the victim of amendment is compelled to bear considerable additional costs. All these aspects must be carefully taken into considera- tion while awarding the costs.

The purpose of imposing costs is to: a) Discourage malafide amendments designed to delay the legal proceedings; b) Compensate the other party for the de- lay and the inconvenience caused; c) Compensate the other party for avoid- able expenses on the litigation which had to be incurred by opposite party for opposing the amendment; and d) To send a clear message that the par- ties have to be careful while drafting the original pleadings.

FACTORS TO BE TAKEN INTO CONSIDERATION WHILE DEALING WITH APPLICATIONS FOR AMENDMENTS: 67. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment. (1) Whether the amendment sought is im- perative for proper and effective adjudication of the case? (2) Whether the application for amend- ment is bona fide or mala fide? (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money; (4) Refusing amendment would in fact lead to injustice or lead to multi- ple litigation; (5) Whether the proposed amendment con- stitutionally or fundamentally changes the nature and character of the case? and (6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

In similar circumstances, in a subsequent case Ganesh Trading Co. v. Moji Ram (1978) 2 SCC 91, this Court reiterated the law laid down in Pursuhottam Umedbhai & Co. v. Manilal & Sons AIR 1961 SC 325. The Court observed: "It is true that, if a plaintiff seeks to alter the cause of action itself and to introduce indirectly, through an amendment of his pleadings, an entirely new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in place of what was originally there, the Court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have accrued in its favour due to lapse of time. But, mere failure to set out even an essential fact does not, by itself, constitute a new cause of action. A cause of action is constituted by the whole bundle of essential facts which the plaintiff must prove before he can succeed in his suit. It must be antecedent to the institution of the suit. If any essential fact is lacking from averments in the plaint the cause of action will be defective. In that case, an attempt to supply the omission has been and could sometime be viewed as equivalent to an introduction of a new cause of action which, cured of its shortcomings, has really become a good cause of action. This, however, is not the only possible interpretation; to be put on every defective state of pleadings. Defective pleadings are generally curable, if the cause of action sought to be brought out was not ab initio completely absent. Even very defective pleadings may be permitted to be cured, so as to constitute cause of action where there was none, provided necessary conditions, such as payment of either any additional court fees, which may be payable, or, of costs of the other side are complied with. It is only if lapse of time has barred the remedy on a newly constituted cause of action that the Courts should, ordinarily, refuse prayers for amendment of pleadings."

In Jai Jai Ram Manohar Lal v. National Building Material Supply (1969) 1 SCC 869, A sued B in his individual name but afterward soughts leave to amend the plaint to sue as the proprietor of a Hindu Joint Family business. The amendment was granted and the suit was decreed. The High Court, however, reversed the decree observing that the action was brought by a `non-existing person'. Reversing the order of the High Court, Supreme Court (per Shah, J., as he then was) made the following oft- quoted observations: "Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party Applying, was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However negligent or careless may have been the first omission, and, however late

the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side."

In Haridas Aildas Thadani & Others v. Godraj Rustom Kermani (1984) 1 SCC 668 this Court said that "It is well settled that the court should be extremely liberal in granting prayer for amendment of pleading unless serious injustice or irreparable loss is caused to the other side. It is also clear that a revisional court ought not to lightly interfere with a discretion exercised in allowing amendment in absence of cogent reasons or compelling circumstances.

In Suraj Prakash Bhasin v. Raj Rani Bhasin & Others, (1981) 3 SCC 652 this Court held that liberal principles which guide the exercise of discretion in allowing amendment are that multiplicity of proceedings should be avoided, that amendments which do not totally alter the character of an action should be readily granted while care should be taken to see that injustice and prejudice of an irremediable character are not inflicted on the opposite party under pretence of amendment, that one distinct cause of action should not be substituted for anther and that the subject- matter of the suit should not be changed by amendment.

HARDSHIP TO PUBLIC AND PLANNED DEVELOPMENT

AIR 2007 SC 2458, Chairman, Indore Vikas Pradhikaran' VS M/s Pure Industrial Cock & Chem. Ltd. & Ors

A statute should be considered in such a manner as a result whereof greater hardship is not caused to the citizens than actually contemplated thereby. Whereas an attempt should be made to prevent unplanned and haphazard development, the same would not mean that the court would close its eyes to the blatant illegalities committed by the State and/or the statutory authorities in implementation thereof. Implementation of such land development as also building laws should be in consonance with public welfare and convenience. The public authority may have general considerations, safety or general welfare in mind, but the same would become irrelevant, since statutory rights of a party cannot be taken away. The Courts must make an endeavour to strike a balance between public interest on the one hand and protection of a constitutional right of a citizen to hold property on the other.

An endeavour should be made to find out as to whether the statute takes care of public interest in the matter as against the private interest, on the one hand, and the effect of lapse and/or positive inaction on the part of the State and other planning authorities, on the other. The courts cannot also be oblivious of the fact that the owners who are subject to the embargos placed under the statute are deprived of their valuable rightful use of the property for a long time. When a public authority is asked to perform statutory duties within the time stipulated, it is directory in nature but when it involves valuable rights of the citizens and provides for the consequences therefore, it would be mandatory in character. The courts should, therefore, strive to find a balance of the competing interest

The Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam (No. 23 of 1973) (Act), being regulatory in nature as by reason thereof the right of an owner of property to use and develop stands restricted, requires strict construction. An owner of land ordinarily would be entitled to use or develop the same for any purpose unless there exists certain regulation in a statute or a statutory rules. Regulations contained in such statute must be interpreted in such a manner so as to least interfere with the right of property of the owner of such land. Restrictions are made in larger public interest. Such restrictions, indisputably must be a reasonable one. The statutory scheme contemplates that a person and owner of land should not ordinarily be deprived from the user thereof by way of reservation or designation. Expropriatory legislations must be given a strict construction

A draft development plan which has not attained finality cannot be held to be determinative of the rights and obligations of the parties and, thus, it can never be implemented. Section 50 of the Act explicitly states that the authority may declare its intention to prepare a town development scheme which having regard to Section 2(u) of the Act must be read to mean declaration of its implementation to prepare a scheme for the implementation of the provisions of a development plan. Had the legislature thought of implementation of a draft development plan, they could have also provided for an interim development plan which ipso facto would have been enforceable. A development plan can be implemented only when it is final and not when it is at the draft stage, i.e., susceptible to changes.

A meaning assigned to a term as defined in the interpretation clause unless the context otherwise requires should be given the same meaning. In the absence of any context indicating a contrary intention, the same meaning would be attached to the word used in the latter as is given to them in the earlier statute. The words or expression used in a statute before and after amendment should be given the same meaning.

Land use, development plan and zonal plan provided for the plan at macro level whereas the town planning scheme is at a micro level and, thus, would be subject to development plan. A purpose which is otherwise not contemplated under Chapter IV would be brought in by side door in Chapter VII of the Act. That which cannot be done directly cannot be permitted to be done indirectly.

The purpose of declaring the intent under Section 50(1) of the Act is to implement a development plan. Section 53 of the Act freezing any other development is an incidence arising consequent to the purpose, which purpose is to implement a development plan. If the purpose of declaring such an intention is merely to bring into play Section 53 of the Act, and thereby freeze all development, it would amount to exercise of the power of Section 50(1) for a collateral purpose, i.e., freezing of development rather than implementation of a development plan. The collateral purpose also will be to indirectly get over the fact that an owner of land pending finalization of a development plan has all attendant rights of ownership subject to the restraints under Section 16 of the Act. If the declaration of intent to formulate a town development scheme is to get over Section 16 and freeze development activities under Section 53, it would amount to exercise of power for a collateral purpose.

A bare perusal of Sections 17 and 49 of the Act would show that it is development plan which determines the manner of usage of the land and the town development scheme enumerates the manner in which such proposed usage can be implemented. It would follow that until the usage is determined through a development plan, the stage of manner of implementation of such proposed usage cannot be brought about. It would also, therefore, follow that what is contemplated is the final development plan and not a draft development plan, since until the development plan is finalized it would have no statutory or legal force and the land use as existing prior thereto with the rights of usage of the land arising therefrom would continue.

To accept that it is open to the town development authority to declare an intention to formulate a town development scheme even without a development plan and ipso facto bring into play a freeze on usage of the land under Section 53 would lead to complete misuse of powers and arbitrary exercise thereof depriving the citizen of his right to use the land subject to the permitted land use and laws relating to the manner of usage thereof. This would be an unlawful deprivation of the citizen's right to property which right includes within it the right to use the property in accordance with the law as it stands at such time.

The essence of planning in the Act is the existence of a development plan. It is a development plan, which under Section 17 of the Act will indicate the areas and zones, the users, the open spaces, the institutions and offences, the special purposes, etc. Town planning would be based on the contents of the development plan. It is only when the development plan is in existence, can a town development scheme be framed.

The words "at any time" under section 50(1) of the Act do not confer upon any statutory authority an unfettered discretion to frame the town development scheme whenever it is so pleases. The words "at any time" are not charter for the exercise of an arbitrary decision as and when a scheme has to be framed. The

words "at any time" have no exemption from all forms of limitation for unexplained and undue delay. Such an interpretation would not only result in the destruction of citizens' rights but would also go contrary to the entire context in which the power has been given to the authority. The words "at any time" have to be interpreted in the context in which they are used. Since a town development scheme in the context of the Act is intended to implement the development plan, the declaration of intention to prepare a scheme can only be in the context of a development plan. The starting point of the declaration of the intention has to be upon the notification of development plan and the outer limit for the authority to frame such a scheme upon lapsing of the plan. Unless such a construction is to be given to the words "at any time" appearing in section 50(1) of the Act, it would lead to manifest injustice and absurdity which is not contemplated by the statute. For giving an effective meaning to the provisions of Section 50 of the Act, the same is required to be read in the context of other provisions of the statute. The rule of purposive construction has to be applied.

The appellant-authority was created for a definite purpose. Its jurisdiction was limited to the area notified. When so creating, although the earlier notification was referred to, the same was only for the purpose of limiting the area of operation of the appellant-authority. The principle of legislation by incorporation was applied and not the principle of legislation by reference. A delegatee must exercise its jurisdiction within the four-corners of its delegation. If it could not exercise its delegated power for the purpose of creation of the appellant authority or extention its jurisdiction it cannot be done by amendment of a notification issued under Section 13(1) of the Act. Admittedly, the villages in question had been included by the State by a subsequent notification. Prior thereto, the said villages having not been included within the area of operation of the appellant authority, any action taken either by way of its intention to frame a town planning scheme or otherwise shall by wholly illegal and without jurisdiction. It would render its act in relation to the said villages a nullity.

In T. Vijayalakshmi v. Town Planning Member [(2006) 8 SCC 502], this Court held: "The law in this behalf is explicit. Right of a person to construct residential houses in the residential area is a valuable right. The said right can only be regulated in terms of a regulatory statute but unless there exists a clear provision the same cannot be taken away. It is also a trite law that the building plans are required to be dealt with in terms of the existing law. Determination of such a question cannot be postponed far less taken away. Doctrine of legitimate expectation in a case of this nature would have a role to play." It was further observed: "It is, thus, now well-settled law that an application for grant of permission for construction of a building is required to be decided in accordance with law applicable on the day on which such permission is granted. However, a statutory authority must exercise its jurisdiction within a reasonable time.

What would be a public purpose in such a matter has been stated in Prakash Amichand Shah v. State of Gujarat & Others [(1986) 1 SCC 581], whereupon the State itself relied upon, in the following terms : "19. In order to appreciate the contentions of the appellant it is necessary to look at the object of the legislation in question as a whole. The object of the Act is not just acquiring a bit of land here or a bit of land there for some public purpose. It consists of several activities which have as their ultimate object the orderly development of an urban area. It envisages the preparation of a development plan, allocation of land for various private and public uses, preparation of a Town Planning Scheme and making provisions for future development of the area in question. The various aspects of a Town Planning Scheme have already been set out. On the final Town Planning Scheme coming into force under Section 53 of the Act there is an automatic vesting of all lands required by the local authority, unless otherwise provided, in the local authority. It is not a case where the provisions of the Land Acquisition Act, 1894 have to be set in motion either by the Collector or by the Government."

In State of Rajasthan & Ors. v. Basant Nahata [JT 2005 (8) SC 171], it was opined : "In absence of any substantive provisions contained in a parliamentary or legislative act he cannot be refrained from dealing with his property in any manner he likes. Such statutory interdict would be opposed to one's right of property as envisaged under Article 300A of the Constitution of India."

Rajendra Babu, J (as the learned Chief Justice then was) in Sri Krishnapur Mutt, Udupi v. N. Vijayendra Shetty and Anr. [1992 (3) Kar.L.J. 326] observed : "The restrictions imposed in the planning law though in public interest should be strictly interpreted because they make an inroad into the rights of a private persons to carry on his business by construction of a suitable building for the purpose and incidentally may affect his fundamental right if too widely interpreted"

The question has also been addressed by a decision of the Division Bench of this Court in Pt. Chet Ram Vashist (Dead) by LRs. v. Municipal Corporatiopn of Delhi [(1995) 1 SCC 47], wherein R.M. Sahai, J., speaking for the Bench opined : "Reserving any site for any street, open space, park, school etc. in a layout plan is normally a public purpose as it is inherent in such reservation that it shall be used by the public in general. The effect of such reservation is that the owner ceases to be a legal owner of the land in dispute and he holds the land for the benefit of the society or the public in general. It may result in creating an obligation in nature of trust and may preclude the owner from transferring or selling his interest in it. It may be true as held by the High Court that the interest which is left in the owner is a residuary interest which may be nothing more than a right to hold this land in trust for the specific purpose specified by the coloniser in the sanctioned layout plan. But the question is, does it entitle the Corporation to claim that the land so specified should be transferred to the authority free of cost. That is not made out from any provision in the Act or on any principle of law. The Corporation by virtue of the land specified as open space may get a right as a custodian of public interest to manage it in the interest of the society in general. But the right to manage as a local body is not the same thing as to claim transfer of the property to itself. The effect of transfer of the property is that the transferor ceases to be owner of it and the ownership stands transferred to the person in whose favour it is transferred. The resolution of the Committee to transfer land in the colony for park and school was an order for transfer without there being any sanction for the same in law."

In Commissioner of Police, Bombay vs. Gordhandas Bhanji [AIR 1952 SC 16], it is stated : "We are clear that public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind; or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Yet again in Mohinder Singh Gill (AIR 1978 SC 851), this Court observed : "The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji." Referring to Gordhandas Bhanji, it was further observed : "Orders are not like old wine becoming better as they grow older."

PUBLIC PROPERTY

A.K. Gopalan v. State of Madras, (1950) SCR 88 ; (AIR 1950 SC 27) it was recognised by the Supreme Court that there cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint, for that would lead to anarchy and disorder. It was also recognized that the possession and enjoyment of rights are subject to such reasonable conditions as maybe deemed essential to the safety, health, peace, general order and morals of the community. It was postulated that the question therefore arose in each case for adjusting the conflicting interests of the individual and of the society.

In the case of Delhi Development Authority V. Skipper Construction Co (P) Ltd and Anr. the Apex Court has observed in para 37 as under. "Before parting with this case, we feel impelled to make a few observations. What happened in this case is illustrative of what is happening in our country on a fairly wide scale in diverse forms. Some Persons in the upper strata [which means the rich and the influential class of the society] have made the 'property career' the sole aim of their life. The means have become irrelevant - in a land where its greatest son born in this century said "means are more important than the ends". A sense of bravado prevails; everything can be managed; every authority and every institution can be managed. All it takes is to "tackle" or "manage" it in an appropriate manner. They have developed an utter disregard for law nay, a contempt for it; the feeling that law is meant for lesser mortals and not for them. The courts in the country have been trying to combat this trend, with some success as the recent events show. But how many matters can we handle. How many more of such matters are still there? The real question is how to swing the polity into action, a polity which has become indolent and soft in its vitals? Can the courts alone do it? Even so, to what extent, in the prevailing state of affairs? Not that we wish to launch upon a diatribe against anyone in particular but Judges of this Court are also permitted, we presume, to ask in anguish, "what have we made of our country in less than fifty years"? Where has the respect and regard for law gone? And who is responsible for it?"

The Apex Court has pointed out in Dr. G.N. Khajuria and Ors vs. Delhi Development Authority and Ors as under :- "Before parting, we have an observation to make. The same is that a feeling is gathering ground that where unauthorised constructions are demolished on the force of the order of the courts, the illegality is not taken care of fully inasmuch as the officers of the statutory body who had allowed the unauthorised construction to be made or make illegal allotments go scot free. This should not, however, have happened for two reasons. First, it is the illegal action/order of the officer which lies at the root of the unlawful act of the citizen concerned, because of which the officer is more to be blamed than the recipient of the illegal benefit. It is thus imperative, according to us, that while undoing the mischief which would require the demolition of the unauthorised construction, the delinquent officer has also to be punished in accordance with law. This however, seldom happens. Secondly, to take care of the injustice completely, the officer who had misused his power has also to be properly punished. Otherwise, what happens is that the officer, who made the hay when the sun shined, retains the hay, which tempts others to do the same. This really gives fillip to the commission of tainted acts, whereas the aim should be opposite."

Supreme Court in ALMITRA H. PATEL AND ANOTHER VS. UNION OF INDIA AND OTHERS (2000) 2 SCC 679 dealing with disposal of solid waste for cleaning up Delhi to protect environment from pollution on large scale slum colonies coming up in cities like Delhi, the following observations keeping in view the societal needs came to be made:- "Establishment or creating of slums, it seems, appears to be good business and is well organised. The number of slums has multiplied in the last few years by geometrical proportion. Large areas of public land, in this way, are usurped for private use free of cost. It is difficult to believe that this can happen in the capital of the country without passive or active connivance of the land- owning agencies and/or the municipal authorities. The promise of free land, at the taxpayers' cost, in place of a jhuggi, is a proposal which attracts more land-grabbers. Rewarding an encroacher on public land with a free alternative site is like giving a reward to a pickpocket. The Department of Slum Clearance does not seem to have cleared any slum despite its being in existence for decades. In fact more and more slums are coming into existence. Instead of "slum Clearance" there is "slum creation" in Delhi. This in turn gives rise to domestic waste being strewn on open land in and around the slums. This can best be controlled at least, in the first instance, by preventing the growth of slums. The authorities must realise that there is a limit to which the population of a city can be increased, without enlarging its size. In other words the density of population per square kilometer cannot be allowed to increase beyond the sustainable limit. Creation of slums resulting in increase in density has to be prevented. What the Slum Clearance Department has to show, however, does not seem to be visible. It is the garbage and solid waste generated by these slums which require to be dealt with most expeditiously and on the basis of priority."

After giving anxious consideration to the decisions of the Supreme Court in Sadan Singh's case (AIR 1989 SC 1988) as well as Amedabad Municipal Corppration case and others, the following principles emerge:

(1) No one is entitled to construct or build any structure of any nature on the pavement and/or on the roads and that the stalls and structures which have been constructed should be removed but after giving at least 24 hours notice to the stall holders for removing their structures or goods therein by issue of a notice to the stall holders of particular footpaths or area. This may be done by issue of a general notice affixed on the area. If the stall holders do not remove the stalls in that even the same may be removed by the State and Municipal authorities in any manner they like, but before removal notice is required to be given thereof, so that may take away their property. For this purpose in addition to this notice, there should be an announcement in the area concerned where such an action should be taken for removal of the stalls built up by them on footpath. Announcement should be made through microphone by the police and Municipal authority so this may be an additional safeguard in so far as getting notice for removal of stalls and structures that have been made on footpath or by the side on the road and no discrimination should be made between the hawkers of one area from the hawkers of other area. In such matters of removal of unauthorised stalls from footpath things should be made in such manner so that no discrimination or favouritism is shown to any area or group inasmuch as the people in general have legitimate expectation that when operation had been started by the State and Municipality the same should be executed in all areas and there should be no pick and choose policy. But for the purpose of convenience it may be not possible to take action at a time in respect of the areas and for this purpose the authorities should declare a programme in advance that from areas to areas these operations should be undertaken so that everyone may know of the same.

(2) The hawkers have fundamental right to carry on trade or business of their choice but not to do so on a particular spot or place and this fundamental right is subject to reasonable restriction imposable under Art. 19(6) of the Constitution of India. The policy decision should be taken in this behalf by the State as to the articles which would be permitted to sell on the pavements as they are hawkers who are selling very costly luxury articles including sophisticated electronic goods imported or smuggled the State and the Municipal authority would be justified in not extending any benefit or right in favour of such hawkers and the rights and benefits that would be conferred by the State must be in favour of other hawkers dealing with other articles or things.

(3) The municipality as a trustee on behalf of the public is entitled to impose all such limitations on the character and extent of the user as may be requisitie for protecting the rights of the public generally.

(4) The public has a right to pass along the highway for the purpose of legitimate travel. This certaintly does not mean that travellers have to be in perpetual motion and when he is in public street to may be essential for to him stop sometime for various reasons he may have to alight from a vehicle and pick up friend and collect certain articles and unload goods or has to take some rest after a long and strenuous journey.

(5) What is required of him that he should not create any unreasonable obstruction which may cause inconvenience to other persons having similar right to pass he should not make excessive use of rights to the prejudice of others. Liberty of an individual comes to and when the liberty of another commences.

(6) Regarding the right of a hawker to transact business while going from place to place is concerned it has been admittedly recognised for a long period. Of course that also is subject to proper regulation in the interest of general convenience of the public including health and security considerations.

(7) With regard to the right to hawk or squat on the roadside for engaging in trading business is concerned the right should be properly regulated according to the exigencies of the circumstances, small traders on the sidewalks can suitably add to the comfort and convenience of the general public by making available ordinary

articles of everyday use for a comparatively lesser price. An ordinary person not very affluent while hurrying towards his home after day's work can pick up these articles without going out of his way to find out a regular market. If the circumstances are appropriate a small trader can do some business for personnel gain on pavement to the advantage of general public and without any discomfort or annoyance to others there could not be any objection.

(8) Right to carry on trade or business mentioned in Art. 19(1)(g) of the Constitution on street pavements, if properly regulated, cannot be denied on the ground that the streets are made exclusively for passing and repassing and for no other use. Proper regulation is however necessary condition as otherwise the very object of laying out roads to facilitate traffic may be defeated.

(9) Allowing the right to trade of the hawkers without proper control is likely to lead to unhealthy competition and quarrel between the traders and travelling public which would result in chaos. Street trading being a fundamental right has to be made available to the citizens but subject to Art. 19(6) of the Constitution. It is within the domain of the State to make any law imposing reasonable restrictions in the interest of general public on such right.

(10) It is for the Government to take reasonable steps to prevent movement of people from rural areas to urban areas. This is a matter of executive policy than for judicial flat.

(11) Since citizens have no right to choose a particular place in any street for trading it is for the State and the Municipality to designate the streets and earmark the places from where street trading can be done. For this purpose the authorities should as per the recommendations made by the Committee referred to above examine the problem keeping in view the relevant considerations and declare streets or areas as 'no hawking zone' and some as 'hawking zone'.

(12) On the question of rehabilitation as an immediate measure, land which has been vested to the State under the provision of Urban Land Ceiling Act, if found suitable may be used for the purpose of rehabilitation of these hawkers apart from other vacant and suitable lands as may be found by the State Government.

(13) The State and the municipal authorities should make all efforts to see that no encroachment of public streets, footpaths and property is made. Public property is to be preserved and protected and it is duty on the State or local bodies to ensure the same. Encroachers are no exception to constitutional right to judicial redressal.

(14) Everyone including the Govt. and the court in a Welfare State has to realise the hardship and many of the hawkers may die if they are prevented from carrying on business. The only solution for this is the adoption of the policy of full employment which even according to leading unemployment to some extent (sic).

(15) The authorities in devising a scheme must endeavour to achieve the twin objects, viz. to preserve and maintain the beauty and grandeur of this historical city of Calcutta or other towns by way of reducing congestion or public streets by removing all encroachments which would cause obstruction to free flow of traffic and rehabilitation those unfortunate persons who were prevented from carrying on trade on the pavements or public streets. In the words of the Supreme Court, we repeat that we hope and trust that in framing schemes and/or administering the law in force authority will keep in view the human considerations and States will do the needful in this aspect with a reasonable time failing which it would be left to the courts to protect the rights of these citizens.

(16) Though the State is not under obligation to provide alternative accommodation before eviction and removal of the hawkers it is expected and desirable that the State being a welfare State should immediately formulate schemes and policies for the purpose of rehabilitation of the hawkers in such manner as the State may think fit and proper.

In Shantistar Builders v. Narayan Khimalal Toame [(1990) 1 SSC 520], another Bench of three judges had held that basic needs of man have traditionally been accepted to be three food, clothing and shelter. The right to life is guaranteed in any civilised society. That would take within it sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live. The difference between the need of an animal, it is the bare protection of the body; for a human being, it has to be a suitable accommodation which would allow him to grow in every aspect - physical, mental and intellectual. The surplus urban-vacant land was directed to be used to provide shelter to the poor.

AIR 1985 SC 1147 RAM AND SHYAM COMPANY VS STATE OF HARYANA AND ORS (i) There is a clear distinction between the use and disposal of private property and socialist property. Owner of private property may deal with it in any manner he likes without causing injury to any one else. But the socialist or if that word is jarring to some, the community or further the public property has to be dealt with for public purpose and in public interest. Tho marked difference lies in this that while the owner of private property may have a number of considerations which may permit him to dispose of his property for a song. On the other hand, dispose at of public property partakes the character of a trust in that in its disposal their should be nothing hanky panky and that it must be done at the best price so that large revenue coming into the offers of the State administration would serve public purpose viz. the welfare state may be able to expand its beneficient activities by the availability of larger funds. This is subject to one important limitation that socialist property may be disposed at a price lower than the market price or oven for a token price to achieve some defined constitutionally recognised Public purpose, one such being to achieve the goals set out in Part IV of the Constitution. But where disposal is for augmentation of revenue and nothing else, the State is under an obligation to secure the best market price available in a market economy. (ii) The Government is not free like an ordinary individual, in selecting recipient for its largesse and it cannot chose to deal with any person it please a in its absolute and unfettered discretion. The law is now well- settled that the Government need not deal with anyone, but if it does so, it must do so fairly and without discretion and without unfair procedure. Even though the State is not bound to accept the highest bid, this proposition of law has to be read subject to the observation that it can be rejected on relevant and valid considerations, one such being that the concession is to be given to a weaker section of the society who could not outbid the highest bidder. In the absence of it, the approach must be as clearly laid down by the Constitution Bench of
this Court in K. N. Guruswamy v. The State of Mysore and Ors. [19551 SCR 305. Before giving up the auction process and accepting a private bid secretly offered, the authority must be satisfied that such an offer if given in open would not be outmatched by the highest bidder. In the absence of such satisfaction, acceptance of an offer secretly made and sought to be substantiated on the allegations without the verification of their truth, which was not undertaken would certainly amount to arbitrary action in the matter of distribution of State largesse which by the decisions of this Court is
impermissible.

PURCHASER OF UNDIVIDED SHARE

In M.V.S. Manikayala Rao vs. M. Narasimhaswami & Ors. [(AIR 1966 SC 470], this Court held: "Now, it is well settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased. His only right is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased."

Peethani Suryanarayana & Anr. vs. Repaka Venkata Ramana Kishore & Ors. [2009 (2) SCALE 461], this Court held: "It is also not in dispute that the appellants, being purchasers of undivided share in a joint family property, are not entitled to possession of the land that they have purchased. They have in law merely acquired a right to sue for partition"

OFFICE OF PROFIT

The phrase office of profit is not defined in the Constitution. By a series of decisions
Maulana Abdul Shakur Vs. Rikhab Chand & Anr., 1958 SCR 387;
M. Ramappa Vs. Sangappa & Ors., 1959 SCR 1167;
Guru Govinda Basu Vs. Sankari Prasad Ghosal & Ors., (1964) 4 SCR 311 and
Shivamurthy Swami Inamdar & Anr. Vs. Agadi Sanganna Andanappa & Anr., (1971) 3 SCC 870,

Supreme court has laid down the tests for finding out whether the office in question is an office of profit under a Government. These tests are (1) Whether the Government makes the appointment; (2) Whether the Government has the right to remove or dismiss the holder; (3) Whether the Government pays the remuneration; (4) What are the functions of the holder? Does he perform them for the Government; and (5) Does the Government exercise any control over the performance of those functions?

In Guru Gobinda Basu Vs. Sankari Prasad Ghosal & Ors., (1964) 4 SCR 311, the Constitution Bench emphasised the distinction between the holder of an office of profit under the Government and the holder of a post or service under the Government and held that for holding an office of profit under the Government, one need not be in the service of Government and there need be no relationship of master and servant between them. Several factors entering into the determination of question are : (I) the appointing authority (ii) the authority vested with power to terminate the appointment, (iii) the authority which determines the remuneration, (iv) the source from which the remuneration is paid, and (v) the authority vested with power to control the manner in which the duties of the office are discharged and to give directions in that behalf. But all these factors need not co-exist. Mere absence of one of the factors may not negate the over-all test. The decisive test for determining whether a person holds any office of profit under the Government, the Constitution Bench holds, is the test of appointment; stress on other tests will depend on facts of each case. The source from which the remuneration is paid is not by itself decisive or material.

The available case law was reviewed by this Court in Madhuker G.E. Pankakar Vs. Jaswant Chobbildas Rajani & Ors. - (1976) 3 SCR 832. The Court described certain aspects as elementary : (i) for holding an office of profit under Government one need not be in the service of Government and there need be no relationship of master and servant, (ii) we have to look at the substance and not the form; and (iii) all the several factors stressed by this Court (in Guru Gobindas case) as determinative of the holding of an office under Government, need not be conjointly present. The critical circumstances, not the total factors, prove decisive. A practical view, not pedantic basket of tests, should act as guide.

In Satrucharla Chandrasekhar Raju Vs. Vyricherla Pradeep Kumar Dev & Anr., (1992) 4 SCC 404, this Court has articulated the object underlying Articles 102 (1)(a) and 191 (1)(a) of the Constitution in the following words: in order to eliminate or reduce the risk of conflict between the duty and interest amongst the members of the Legislature and to ensure that the Legislature does not contain persons who have received benefits from the Executive and who consequently being under an obligation might be amenable to

its influence. Thus the object is to see that such an elected member can carry on freely and fearlessly his duties without being subjected to any kind of governmental pressure, thereby implying that if such an elected person is holding an office which brings him remunerations and if the Government has a voice in his functions in that office, there is every likelihood of such person succumbing to the wishes of the Government. Therefore this object must be borne in mind in interpreting these Articles. Under these provisions the right to contest is being taken away on the ground of the said disqualification. Such a ban on candidature must have a substantial and reasonable nexus to the object that is to be achieved namely the elimination of possibility of misuse of the position. It is from this point of view that the right to appoint and right to remove the holder of the office in many cases becomes an important and decisive test.

Venkatappa v. S. Subba Rao, AIR 1957 Mys 79 in which a stamp vendor was held not to hold an office of profit. Stamp vendors do not get any profit; a stamp vendor only gets a commission on sales made by him and it was on this ground that his office was held to be not one of profit.

Ravanna Subanna v. G. S. Kaggeerappa, AIR 1954 SC 653 a Chairman of a Taluka Development Committee was held not to bold an office of profit because the only payment that he received was a sitting fee of Rs. 6/- per day for attending meetings. The office held by an extra departmental branch past-master is thus different from the office held by a stamp vendor or a Chairman of a Taluka Development Committee.

JUDICIAL DISCIPLINE

U.P. Gram Panchayat Adhikari Sangh & Ors. VS Daya Ram Saroj & Ors. 2007 (2) SCC 138 , Judicial discipline is self discipline. It is an inbuilt mechanism in the system itself. Judicial discipline demands that when the decision of a co-ordinate Bench of the same High Court is brought to the notice of the Bench, it is respected and is binding, subject of course, to the right to take a different view or to doubt the correctness of the decision and the permissible course then often is to refer the question or the case to a larger Bench. This is the minimum discipline and decorum to be maintained by judicial fraternity.

The doctrine of judicial discipline has been succinctly enunciated by the three Judge Bench of this Court in **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav & Anr. (2005) 2 SCC 42** as under: "The principles of res judicata and such analogous principles although are not applicable in a criminal proceeding, still the courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a higher court or a coordinate Bench must receive serious consideration at the hands of the court entertaining a bail application at a later stage when the same had been rejected earlier. In such an event, the courts must give due weight to the grounds which weighed with the former or higher court in rejecting the bail application. Ordinarily, the issues which had been canvassed earlier would not be permitted to be reagitated on the same grounds, as the same would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting."

INDEPENDENCE OF JUDICIARY

In S.P. Gupta Vs. Union of India 1981 (Supp.) SCC 87, speaking on the independence of the judiciary, a Bench of seven Judges observed as under at page 221-222 :- "The concept of independence of judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity.. But it is necessary to remind ourselves that the concept of independence of judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It has many dimensions,

namely, fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong."

In Jasbir Singh VS State of Punjab, 2006(8)SCC294 "The independence of the subordinate courts in the discharge of their judicial functions is of paramount importance, just as the independence of the superior courts in the discharge of their judicial functions. It is the members of the subordinate judiciary who directly interact with the parties in the course of proceedings of the case and therefore, it is no less important that their independence should be protected effectively to the satisfaction of the litigants. The independence of the judiciary has been considered as a part of the basic structure of the Constitution and such independence is postulated not only from the Executive, but also from all other sources of pressure."

V.K. JAIN v. HIGH COURT OF DELHI THROUGH R.G. AND ORS. Coram: DALVEER BHANDARI, HARJIT SINGH BEDI 23/09/2008

It is the duty and obligation of the higher courts to modify or set aside orders which are contrary to law or the facts of the case. This is one of the most important functions of the superior courts. Indian legal system acknowledges the fallibility of the judges and provides for appeals and revisions. Judges of the superior courts while discharging their duty ought to be extremely careful before passing imputations, strictures and remarks against subordinate judicial officers. There was no justification in passing any imputations, remarks or strictures against the appellant. Even if it is assumed that the order passed by the appellant was wrong or erroneous, even then the High Court ought to have either modified or set aside the order, but the High Court was not justified in passing totally unmerited, derogatory, harsh and castigating remarks against the appellant.

The following principles of law are laid down in the light of decisions spreading over a century. Erosion of credibility of judiciary in the public mind, for whatever reason, is the greatest threat to the independence of judiciary. Judicial discipline and restraint are imperative for the orderly administration of justice. Judicial decorum makes it imperative that the judgments and orders must be confined to the facts and the legal position involved in the cases and the courts should not deviate from propriety, moderation and sobriety.

Majesty of Court is not displayed solely in cracking the whip on mistakes, inadvertent errors of lapses, but by persuasive reasoning so that the similar errors and mistakes are not repeated by the judicial officers. Majesty of Court would be enhanced by practicing discipline and self- restraint in discharging of all judicial functions. The role of superior courts is like a friend, philosopher and guide of the judiciary subordinate to it. The judicial officers have to be treated with parental care and affection. The approach of the superior courts ought to be correctional and not to be intended to harm or ruining the judicial career of the officers. The superior courts should always bear in mind that the judicial officer is not before it and should ordinarily refrain from passing strictures, derogatory remarks and scathing criticism. The passing of such order without affording a hearing to the judicial officer is clearly violative of the principles of natural justice.

The superior courts should always keep in mind that disparaging and derogatory remarks against the judicial officer would cause incalculable harm of a permanent character having the potentiality of spoiling the judicial career of the concerned officer. Even if those remarks are expunged, it would not completely restore the harmed judge from the loss of dignity and honour suffered by him.

The superior courts should convey its messages to the concerned judicial officers through a process of reasoning highlighting the correct provisions of law, precedents and proper analysis of evidence and material on record, but rarely by passing harsh and derogatory remarks. They must always keep in mind that it is a herculean task for the judicial officer to get the derogatory remarks expunged by the superior court. He is compelled to take assistance from lawyers,who may be appearing before him. It is embarrassing, humiliating, time consuming and an expensive exercise.

The superior courts must always keep in mind that much cherished judicial independence must not be presented only from outside but from within, by those who form the integral part of the judicial system. Damage from within has much larger and greater potential for harm than danger from outside.

The superior courts should not use strong derogatory, disparaging and carping language while criticizing the judicial officers. They must always keep in mind that, like all other human beings, the judicial officers are also not infallible. Any remarks passed against them may result in incalculable harm resulting in grave injustice. The superior courts judges should not be, like a loose cannon, ready to inflict indiscriminate damages whenever they function in judicial capacity. They should keep in mind that infliction of uncalled for, unmerited and undeserved remarks clearly amount to abuse of the process of court. It must be remembered that the subordinate judicial officers at times work under charged atmosphere and are constantly under psychological pressure with all the contestants and their lawyers almost breathing down their necks and more correctly upto their nostrils.

To err is human and no one is infallible. A judge who has not committed an error is yet to be born. Judicial decorum has to be maintained at all times and even where criticism is justified. It must be in a language of utmost restraint always keeping in view that the person marking the comment is also fallible. Judges of the superior courts have a duty and obligation to ensure judicial discipline and respect for judiciary from all concerned. The respect for the judiciary is not enhanced when judges at the lower level are criticized intemperately and castigated publicly. It is the duty and obligation of the judges of the superior courts to ensure that independence of judiciary is not compromised and every judicial officer should feel that he can freely and fearlessly give expression to his own opinion. This is absolutely imperative in maintaining the independence of judiciary.

On consideration of the totality of the facts and circumstances, the impugned order passed by Single Judge cannot stand scrutiny of law as far as passing the remarks and strictures against the appellant were concerned and consequently the impugned order is set aside to the extent of expunging the remarks made against the appellant in the said order.

PRINCIPLES LAID DOWN BY COURT

(I) Erosion of credibility of judiciary in the public mind, for whatever reason, is the greatest threat to the independence of judiciary.
(II) Judicial discipline and restraint are imperative for the orderly administration of justice.
(III) Judicial decorum makes it imperative that the courts' judgments and orders must be confined to the facts and the legal position involved in the cases and the courts should not deviate from propriety, moderation and sobriety.
(IV) Majesty of Court is not displayed solely in cracking the whip on mistakes, inadvertent errors or lapses, but by persuasive reasoning so that the similar errors and mistakes are not repeated by the judicial officers.
(V) Majesty of Court would be enhanced by practicing discipline and self-restraint in discharging of all judicial functions. All actions of a judge must be judicious in character.
(VI) The role of superior courts is like a friend, philosopher and guide of the judiciary subordinate to it. The judicial officers have to be treated with parental care and affection.
(VII) The approach of the superior courts ought to be correctional and not to be intended to harm or ruining the judicial career of the officers.
(VIII) The superior courts should always bear in mind that the judicial officer is not before it and should ordinarily refrain from passing strictures, derogatory remarks and scathing criticism. The passing of such order without affording a hearing to the judicial officer is clearly violative of the principles of natural justice.
(IX) The superior courts should always keep in mind that disparaging and derogatory remarks against the judicial officer would cause incalculable harm of a permanent character having the potentiality of spoiling the judicial career of the concerned officer. Even if those remarks are expunged, it would not completely restitute and restore the harmed judge from the loss of dignity and honour suffered by him.

(X) The superior courts should convey its messages to the concerned judicial officers through a process of reasoning highlighting the correct provisions of law, precedents and proper analysis of evidence and material on record, but rarely by passing harsh and derogatory remarks.
(XI) The superior courts must always keep in mind that it is a herculean task for the judicial officer to get the derogatory remarks expunged by the superior court. He is compelled to take assistance from lawyers and such a practitioner may be appearing before him. It is embarrassing, humiliating, time consuming and an expensive exercise.
(XII) The superior courts must always keep in mind that the much cherished judicial independence must not be presented only from outside but from within, by those who form the integral part of the judicial system. Damage from within has much larger and greater potential for harm than danger from outside. We alone in judicial family can take care of it. (XIII) The superior courts should not use strong, derogatory, disparaging and carping language while criticizing the judicial officers. They must always keep in mind that, like all other human beings, the judicial officers are also not infallible. Any remarks passed against them may result in incalculable harm resulting in grave injustice.
(XIV) The superior courts judges should not be, like a loose cannon, ready to inflict indiscriminate damages whenever they function in judicial capacity.
(XV) The superior courts should keep in mind that infliction of uncalled for, unmerited and undeserved remarks clearly amount to abuse of the process of court.
(XVI) The superior courts should not allow themselves even momentarily the latitude of ignoring judicial precaution and propriety.
(XVII) It must be remembered that the subordinate judicial officers at times work under charged atmosphere and are constantly under psychological pressure with all the contestants and their lawyers almost breathing down their necks and more correctly upto their nostrils.
(XVIII) Err is human and no one is infallible. A judge who has not committed an error is yet to be born. Judicial decorum has to be maintained at all times and even where criticism is justified. It must be in a language of utmost restraint always keeping in view that the person making the comment is also fallible.
(XIX) Judges of the superior courts have a duty and obligation to ensure judicial discipline and respect for judiciary from all concerned. The respect for the judiciary is not enhanced when judges at the lower level are criticized intemperately and castigated publicly. Our legal system acknowledges the fallibility of the judges and provides for appeals and revisions.
(XX) It is the duty and obligation of the judges of the superior courts to ensure that independence of judiciary is not compromised and every judicial officer should feel that he can freely and fearlessly give expression to his own opinion. This is absolutely imperative in maintaining the independence of judiciary.
(XXI) The superior courts' judges must always bear in mind that no greater damage can be caused to the administration of justice and to the confidence of people when judges at superior courts express lack of faith either in ability or integrity of subordinate judges.

In Kashi Nath Roy v. State of Bihar (1996) 4 SCC 539, this court had an occasion to deal with a similar matter of expunging of adverse remarks observed thus: "7. It cannot be forgotten that in our system, like elsewhere, appellate and revisional Courts have been set up on the pre- supposition that lower Courts would in some measure of cases go wrong in decision-making, both on facts as also on law, and they have been knit-up to correct those orders. The human element in justicing being an important element, computer-like functioning cannot be expected of the Courts; however, hard they may try ad keep themselves precedent-trodden in the scope of discretions and in the manner of judging. Whenever any such intolerable error is detected by or pointed out to a superior Court, it is functionally required to correct that error that may, here and there, in an appropriate case, and in a manner befitting, maintaining the dignity of the Court and independence of judiciary, convey its message in its judgment to the officer concerned through a process of reasoning, essentially persuasive, reasonable, mellow but clear, and result-orienting, but rarely as a rebuke. Sharp reaction of the kind exhibited in the afore-extraction is not in keeping with institutional functioning. The premise that a Judge committed a mistake or an error beyond the limits of tolerance, is no ground to inflict condemnation on the Judge-Subordinate, unless there existed something else and for exceptional grounds."

Lord Denning in his celebrated book "The Due Process of Law" has observed the importance of independence for judicial officers in the following words: "Every judge of the courts of this land - from the highest to the lowest - should be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment", it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: "If I do this, shall I be liable in damages?" So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction - in fact or in law - but so long as he honestly believes it to be within his jurisdiction, he should not be liable. Once he honestly entertains this belief nothing else will make him liable. He is not to be plagued with allegations of malice or ill-will or bias or anything of the kind. Actions based on such allegations have been struck out and will continue to be struck out. Nothing will make him liable except it to be shown that he was not acting judicially, knowing that he had no jurisdiction to do it."

In Braj Kishore Thakur v. Union of India & Others (1997) 4 SCC 65, this court again dealt with a case of expunging of adverse remarks. The court observed thus: "11. No greater damage can be caused to the administration of justice and to the confidence of people in judicial institutions when Judges of higher Courts publicly express lack of faith in the subordinate Judges. It has been said, time and again, that respect for judiciary is not in hands by using intemperate language and by casting aspersions against lower judiciary. It is well to remember that a Judicial Officer against whom aspersions are made in the judgment could not appear before the higher Court to defend his order. Judges of higher Courts must, therefore, exercise greater judicial restraint and adopt greater care when they are tempted to employ strong terms against lower judiciary."

Chagla, C.J. in State v. Nilkanth Shripad AIR 1954 Bom. 65 observed as under:- "It is very necessary, in order to maintain the independence of the judiciary, that every Magistrate, however junior, should feel that he can fearlessly give expression to his own opinion in the judgment which he delivers. If our Magistrates feel that they cannot frankly and fearlessly deal with matters that come before them and that the High Court is likely to interfere with their opinions, the independence of the judiciary might be seriously undermined. This Court further observed: "that every judicial officer must be free to express his mind in the matter of the appreciation of evidence before him. The phraseology used by a particular Judge depends upon his inherent reaction to falsehood, his comparative command of the English language and his felicity of expression. There is nothing more deleterious to the discharge of judicial functions than to create in the mind of a Judge that he should conform to a particular pattern which may, or may not be, to the liking of the appellate Court. Sometimes he may overstep the mark. When public interests conflict, the lesser should yield to the larger one. An unmerited and undeserved insult to a witness may have to be tolerated in the general interests of preserving the independence of the judiciary. Even so, a duty is cast upon the judicial officer not to deflect himself from the even course of justice by making disparaging and undeserving remarks on persons that appear before him as witnesses or otherwise. Moderation in expression lends dignity to his office and imparts greater respect for judiciary. But occasions do arise when a particular Judge, without any justification, may cast aspersions on a witness or any other person not before him affecting the character of such witness or person. Such remarks may affect the reputation or even the career of such person. In my experience I find such cases are very rare. But if it happens, I agree with the Full Bench of the Bombay High Court that the appellate Court in a suitable case may judicially correct the observations of the lower Court by pointing out that the observations made by that Court were not justified or were without any foundation were wholly wrong or improper. This can be done under its inherent power preserved under s. 561- A of the Code of Criminal Procedure. But that power must be exercised only in exceptional cases where the interest of the Party concerned would irrevocably suffer."

In Anjani K. Verma v. State of Bihar and Anr. (2004) 11 SCC 188, the court observed as under:- "....at the same time, while passing strictures against a member of the subordinate judiciary utmost care and caution is required to be taken, also having regard to the stress and conditions under which, by and large, the judicial officers have to render justice."

In A.M. Mathur v. Pramod Kumar Gupta & Ors. AIR 1990 SC 1737 this court has held as under:- "Judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint, this humility of function should be a constant theme of our judges. This quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary. Judicial restraint in this regard might better be called judicial respect; that is, respect by the judiciary. Respect to those who come before the Court as well to other co-ordinate branches of the State, the Executive and Legislature. There must be mutual respect. When these qualities fail or when litigants and public believe that the Judge has failed in these qualities, it will be neither good for the judge nor for the judicial process. "

In yet another case of similar nature, this court in the case of **Niranjan Patnaik v. Sashibhusan Kar and Anr., AIR 1986 SC 819** again reminded that the higher the forum and greater the need for restraint and the more mellowed the reproach should be. The court again reiterated the settled law that harsh or disparaging remarks are not to be made against persons and authorities whose conduct comes into consideration before Courts of law unless it is really necessary for the decision of the case, as an integral part thereof to animadvert on that conduct.

In State of M.P. & Others v. Nandlal Jaiswal & Others (1986) 4 SCC 566, the Chief Justice P.N. Bhagwati (as he then was) observed that Judges should not use strong and carping language while criticising the conduct of parties or their witnesses. They must act with sobriety, moderation and restraint. They must have the humility to recognise that they are not infallible and any harsh and disparaging strictures passed by them against any party may be mistaken and unjustified and if so, they may do considerable harm and mischief and result in injustice. Chief Justice Bhagwati further observed that sweeping observations attributing mala fides, corruption and underhand dealing to the State Government made by the High Court Judge were unwarranted and not justified on record.

In K.P. Tiwari v. State of M.P. 1994 Supp. (1) SCC 540, this court while dealing with a similar matter of expunging of remarks observed thus: "4. We are, however, impelled to remind the learned Judge of the High Court that however anguished he might have been over the unmerited bail granted to the accused, he should not have allowed himself the latitude of ignoring judicial precaution and propriety even momentarily. The higher Courts every day come across orders of the lower courts which are not justified either in law or in fact and modify them or set them aside. That is one of the functions of the superior courts. Our legal system acknowledges the fallibility of the judges and hence provides for appeals and revisions. A judge tries to discharge his duties to the best of his capacity. While doing so, sometimes, he is likely to err. It is well said that a judge who has not committed an error is yet to be born. And that applies to judges at all levels from the lowest to the highest. Sometimes, the difference in views of the higher and the lower courts is purely a result of a difference in approach and perception. On such occasions, the lower courts are not necessarily wrong and the higher courts always right. It has also to be remembered that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks more correctly up to their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every error, however gross it may look, should not therefore, be attributed to improper motive. It is possible that a

particular judicial officer may be consistently passing orders creating a suspicion of judicial conduct which is not wholly or even partly attributable to innocent functioning. Even in such cases, the proper course for the higher court to adopt is to make note of his conduct in the confidential record of his work and to use it on proper occasions. The judges in the higher courts have also a duty to ensure judicial discipline and respect for the judiciary from all concerned. The respect for the judiciary is not enhanced when judges at the lower level are criticised intemperately and castigated publicly, no greater damage and be done to the administration of justice and to the confidence of the people in the judiciary can when the judges of the higher courts publicly express lack of faith in the subordinate judges for one reason or the other. It must be remembered that the officers against whom such strictures are publicly passed stand condemned for ever in the eyes of their subordinates and of the members of the public. No better device can be found to destroy the judiciary from within. The judges must, therefore, exercise self- restraint. There are ways and ways of expressing disapproval of the orders of the subordinate courts but attributing motives to them is certainly not one of them. That is the surest way to take the judiciary downhill."

A three-Judge Bench of this court again dealt with a similar issue In re: `K' A Judicial Officer (2001) 3 SCC 54. In this case, the court passed a comprehensive order which reads thus: "15. In the case at hand we are concerned with the observations made by the High Court against a judicial officer who is a serving member of subordinate judiciary. Under the constitutional scheme control over the district courts and courts subordinate thereto has been vested in the High Courts. The control so vested is administrative, judicial and disciplinary. The role of High Court is also of a friend, philosopher and guide of judiciary subordinate to it. The strength of power is not displayed solely in cracking a whip on errors, mistakes or failures; the power should be so wielded as to have propensity to prevent and to ensure exclusion of repetition if committed once innocently or unwittingly. "Pardon the error but not its repetition". The power to control is not to be exercised solely by wielding a teacher's cane; the members of subordinate judiciary look up to the High Court for the power to control to be exercised with parent-like care and affection." This Court further observed that: "The exercise of statutory jurisdiction, appellate or revisional and the exercise of constitutional power to control and supervise the functioning of the district courts and courts subordinate thereto empowers the High Court to formulate an opinion and place it on record not only on the judicial working but also on the conduct of the judicial officers. The existence of power in higher echelons of judiciary to make observations even extending to criticism incorporated in judicial orders cannot be denied, however, the High Courts have to remember that criticisms and observations touching a subordinate judicial officer incorporated in judicial pronouncements have their own mischievous infirmities. Firstly, the judicial officer is condemned unheard which is violative of principles of natural justice. A member of subordinate judiciary himself dispensing justice should not be denied this minimal natural justice so as to shield against being condemned unheard. Secondly, the harm caused by such criticism or observation may be incapable of being undone. Such criticism of the judicial officer contained in a judgment, reportable or not, is a pronouncement in open and therefore becomes public. The same Judge who found himself persuaded, sitting on judicial side, to make observations guided by the facts of a single case against a Subordinate Judge may, sitting on administrative side and apprised of overall meritorious performance of the Subordinate Judge, may irretrievably regret his having made those observations on judicial side, the harming effect whereof even he himself cannot remove on administrative side. Thirdly, human nature being what it is, such criticism of a judicial officer contained in the judgment of a higher court gives the litigating party a sense of victory not only over his opponent but also over the Judge who had decided the case against him. This is subversive of judicial authority of the deciding Judge. Fourthly, seeking expunging of the observations by a judicial officer by filing an appeal or petition of his own reduces him to the status of a litigant arrayed as a party before the High Court or Supreme Court -- a situation not very happy from the point of view of the functioning of the judicial system. May be for the purpose of pleading his cause he has to take the assistance of a legal practitioner and such legal practitioner may be one practising before him. Look at the embarrassment involved. And last but not the least, the possibility of a single or casual aberration of an otherwise honest, upright and righteous Judge being caught unawares in the net of adverse observations cannot be ruled out. Such an incident would have a seriously demoralising effect not only on him but also on his colleagues. If all this is avoidable why should it not be avoided?"

Chief Justice K. G. Balakrishnan in a three-Judge Bench of this Court in Ramesh Chander Singh v. High Court of Allahabad and Anr. (2007) 4 SCC 247 observed as under:- "The higher court should convey its message in the judgment to the officer concerned through a process of reasoning, essentially persuasive, reasonable, mellowed but clear and result oriented and rarely a rebuke."

DOCTRINE OF PRECEDENT

KRISHENA KUMAR AND ANR. ETC. ETC. VS UNION OF INDIA AND ORS. AIR 1990 SC 1782

Apart from Article 141 of the Constitution the policy of courts is to stand by precedent and not to disturb settled point. When court has once laid down a principle of law as applicable to certain state of facts, it will adhere to that principle, and apply it to all future cases where facts are substantially the same.

The doctrine of precedent, that is, being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. It does not mean that this Court is bound by the various reasons given in support of it, especially when they contain "propositions wider than the case itself required."

The Hon'ble Apex Court further observed that a caution need to be taken while applying the principle of judicial precedents as decision of the Court and its observations must be read in context in which they appear. In a judgment discussion is meant to explain and not to define. In this regard, reference can be made to the case of Haryana Financial Corporation and anr. vs. M/s. Jagdamba Oil Mills and anr., J.T. 2002(1) SC 484." "In order to apply a judgment as a precedent, the relevant laws and earlier judgment should be brought to the notice of the Court and they should be correctly applied. Mere observations in a previous judgment may not be binding on a subsequent Bench if they are not truly applicable to the facts and controversies in a subsequent case as per settled principle of "ratio decidendi". ..."

"In the case of Commissioner of Customs (Fort) vs. Toyota Kirloskar Motor (P) Ltd., (2007) 5 SCC 371, the Supreme Court stated the law relating to precedents and held that a decision, as is well known, is an authority for what it decides and not what can logically be deduced therefrom. The ratio of a decision must be culled out from the facts involved in a given case and need not be an authority in generality without reference to the reasons, discussions and facts of the case."

"Furthermore, ratio decidendi of a judgment has to be found out only on reading the entire judgment. The ratio of the judgment is what is set out in the judgment itself. Answer to the question necessarily would have to be read in the context what is set out in the judgment and not in isolation. In case of any doubt as regards any observations, reasons or principles, the other part of the judgment must be looked into. By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment. The reasoning could be deciphered upon reading the judgment in its entirety and then applying these principles to the subsequent cases. (Reference : (i) Union of India vs. Godfrey Philips India Ltd., AIR 1996 SC 806, (ii) Union of India vs. Dhanwanti Devi, (1996) 6 SCC 44, (iii) State of Tripura vs. Tripura Bar Association, AIR 1999 SC 1494 and (iv) Islamic Academy of Education vs. State of Karnatake, (2003) 6 SCC 697)."

MUNICIPAL CORPORATION OF DELHI Vs. GURNAM KAUR AIR 1989 SC 38 Precedents sub silentio and without argument are of no moment. This rule has ever since been followed. One of the chief reasons for the doctrine of precedents is that a matter that has once been fully argued and decided should not be allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a Judge, however eminent, can be treated as an ex cathedra

statement. having the weight of authority. It is axiomatic that when a direction or order is made by consent of the parties, the Court does not adjudicate upon the rights of the parties nor lay down any principle. Quotability as 'law' applies to the principle of a case, its ratio decidendi. The only thing in a Judge'sdecision binding as an authority upon a subsequent Judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative.

In Prakash Amichand Shah -v.-State of Gujarat and ors., the Supreme Court in para 26 has ruled as follows : "Before embarking upon the examination of these decisions we should bear in mind that what is under consideration is not a statute or a legislation but a decision of the Court. A decision ordinarily is a decision on the case before the Court while the principle underlying the decision should be binding as a precedent in a case which conies up for decision subsequently. Hence while applying the decision to a later case, the Court which is dealing with it should carefully try to ascertain the true principle laid down by the previous decision. A decision often takes its colour from the questions involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation."

In Union of India & Ors. Vs. E.G. Nambudiri, as reported in (1991) 3 SCC 38, the Apex Court held that the competent authority has no licence to act arbitrarily. It must act in a fair and just manner. It is required to consider the questions raised and examine the same. The administrative authority does not have liberty to pass orders without there being any reasons for the same. Right to reasons is an indispensable part of a sound system of judicial review. Since under our Constitution an administrative decision is subject to judicial review if it affects the right of a citizen, it is desirable that reasons should be stated.

In the case between Union of India Vs. Mohan Lal Capoor & Ors., as reported in (1973) 2 SCC 836, it was held that 'reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable.'

In the case between Indian Railway Construction Co. Ltd. Vs. Ajay Kumar, as reported in (2003) 4 SCC 579, the Apex Court held that judicial review is open is cases of failure to exercise discretion and excess or abuse of discretionary power or illegality, irrationality and procedural impropriety. Non-consideration or non-application of mind to relevant factors renders exercise of discretion manifestly erroneous calling for judicial interference. Discretion must be exercised reasonably.

Principal Secretary, Govt. of A.P. & Anr. Vs. M. Adinarayana, as reported in (2004) 12 SCC 579, it was contended that the truth or otherwise of the charge is a matter for the disciplinary authority to go into. Judicial review cannot extend to the examination of the correctness of the charges as it is not an appeal but only a review of the manner in which the decision was made.

State Bank of India & Anr. Vs. Bela Bagchi & Ors., as reported in (2005) 7 SCC 435. The Apex Court in the said case held that 'a bank officer is required to exercise higher standards of honesty and integrity. He deals with money of the depositors and the customers. Every officer/employee of the bank is required to take all possible steps to protect the interests of the bank and to discharge his duties with utmost integrity,

honesty, devotion and diligence and to do nothing which is unbecoming of a bank officer. Good conduct and discipline are inseparable from the functioning of every officer/employee of the bank. **Even acting beyond one's authority is a misconduct.**'

DEPUTATION

Once we hold that the respondents were on deputation to Gram Panchayats, the position of deputation in service is well settled by a catena of decisions of this Court. Avoiding multiplicity, we refer **to Kunal Nanda v. Union of India and another (2005) 5 SCC 362** as under: "The basic principle underlying deputation itself is that the person concerned can always and at any time be repatriated to his parent department to serve in his substantive position therein at the instance of either of the departments and there is no vested right in such a person to continue for long on deputation or get absorbed in the department to which he had gone on deputation."

POLICY DECISION

As held by the Supreme Court in P.T.R. Exports (Madras) (P) Ltd. v. Union of India, (1996) 5 SCC 268, the policy can be executive as well as legislative and that the Government is free to decide upon its policy and the Courts will not interfere in such policy matters. It has been further held therein that there can be no question of legitimate expectation with reference to the old policy after the old policy has been changed and the rights of the parties will have to be angulated with regard to the changed policy. In matters of economic policy, the Courts give a large leeway to the executive and the legislature. A prior decision would not bind the Government for all times to come. When the Government is satisfied that change in the policy is necessary in public interest, it would be entitled to revise the policy and lay down a new policy.

The Apex Court, in Narmada Bachao Andolan v. Union of India , (2000) 10 SCC 664, has also held that the Courts, in exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the Courts are ill-equipped to adjudicate on a policy decision, so undertaken. At the same time, in exercise of their enormous power, the Courts should not be called upon to undertake governmental duties or functions. The Courts cannot run the Government nor can the administration indulge in abuse or non-use of power and get away with it. The Courts must, therefore, act within their judicially permissible limitations to uphold the rule of law and harness their power in public interest. It is precisely for this reason, in matters of policy, the Courts will not interfere. When there is a valid law, requiring the Government to act in a particular manner, the Courts ought not to, without striking down the law, give any direction, which is not in accordance with law.

In BALCO Employees Union (Regd.) v. Union of India and Others, AIR 2002 SC 350, it is held by the Supreme Court that in the case of policy decision on economic matters, the Courts should be very circumspect in conducting any enquiry or investigation and must be most reluctant to impugn the judgment of the experts, who may have arrived at a conclusion, unless the Courts are satisfied that there is illegality in the decision itself.

In D. Navinchandra & Co. v. Union of India, (1987) 3 SCC 66, the Apex Court has held that policies are high public policies formulated by the Government in public interest and there can be no question of principle of estoppel being involved in the application of such policies.

ACT FAIRLY

A new horizon has been opened in the Administrative Law by evolving the principle of doctrine of fairness and reasonableness in all governmental function in the case **Maneka Gandhi vs. Union of India, reported in AIR 1978 SC 597** (para 56), a basic case and duty to act fairly and reasonably has now got a deep root in administrative action. To give reasons mandatory and in absence of such reasons, the condition precedent of passing any administrative decision and/or quasi judicial decision by complying with the principle of fairness and reasonableness doctrine renders the action arbitrary and unreasonable exercise
of power, which otherwise attracts the constitutional provisions of Article 14, 19 and 21. Reliance may be placed to the judgment passed in the case The State of West Bengal vs. Anwar Ali Sarkar & Anr., reported in AIR 1952 SC 75, S.G. Jaisinghani vs. Union of India & Ors., reported in AIR 1967 SC 1427, E.P. 35

Royappa vs. State of Tamil Nadu & Anr., reported in (1974) 4 SCC 3, Maneka Gandhi (supra), Mohinder Singh Gill & Anr. Vs. Chief Election Commissioner, New Delhi & Ors., reported in (1978)1 SCC 405, Union of India & Anr. Vs. Tulsiram Patel, reported in (1985) 3 SCC 398. So acting fairly is an additional weapon in the armory of the Court to identify an issue. Acting fairly is within the domain of natural justice principle.

The Apex Court of India looked into the matter in the case Management of M/s. M.S. Nally Bharat Engineering Co. Ltd. Vs. State of Bihar & Ors., reported in (1990) 2 SCC 48 being a case wherein the government on an application by a dismissed workman transferred his case from one Labour Court to another Labour Court without issuing a notice or giving opportunity to the employer. The Court while setting aside the order invoked the doctrine of "acting fairly". The relevant paragraph reads such: "Fairness, in our opinion, is a fundamental principle of good administration. It is a rule to ensure the vast power in the modern State is not abused but properly exercised. The State power is used for proper and not for improper purposes. The authority is not misguided by extraneous or irrelevant considerations. Fairness is also a principle to ensure that statutory authority arrives at a just decision either in promoting the interest or affecting the rights of persons. To use the time hallowed phrase "that justice should not only be done but be seen to be done" is the essence of fairness equally applicable to administrative authorities. Fairness is thus a prime test for proper and good administration. It has no set form or procedure. It depends upon the facts of each case. As Lord Pearson said in Pearlberg v. Varty (at p. 547), fairness does not necessarily require a plurality of hearings or representations and counter- representations. Indeed, it cannot have too mush elaboration or procedure since wheels of administration must move quickly."

It is a settled legal position that all state action must be non- arbitrary otherwise Article 14 of the Constitution will be violated. Reliance may be placed to the Constitution Bench judgment passed in Maneka Gandhi (supra), which has been followed and relied with reference to a case regarding communication of confidential reports, which was not adverse but 'good', inviting objection on issue of upgradation of such entry as 'very good', in the case Dev Dutt vs. Union of India & Ors., reported in (2008) 8 SCC 725.

The right to reason and the relevancy of the reason, is a sine-qua-non of exercising of such power and condition precedent to identify the decision as non- arbitrary, opposite thereof will be attracted by Article 14 of the Constitution of India. Even in absence of any statutory provision to assign reason, the Court has evolved the doctrine of fairness and reasonableness in every state action in the case Maneka Gandhi (supra).

It is pertinent to reproduce the observations of the Supreme Court in Gurdev Kaur & ors. v. Kaki & ors., (2007) 1 SCC 546 : "Judges must administer law according to the provisions of law. It is the bounden

duty of judges to discern legislative intention in the process of adjudication. Justice administered according to individual's whim, desire, inclination and notion of justice would lead to confusion, disorder and chaos."

INAM LANDS / TENANTS/ POSSESSION/ PROTECTION:-

The law on the subject is clearly laid down in The Full Bench of Karnataka High Court in **SRI RANGACHAR v. STATE OF MYSORE, 1966(1) Mys.LJ. 655**, which is further quoted in Judgement of Doddamma vs Muniyamma ILR 2005 KAR 568 by Justice V.G. Sabhahit "Section 3 of the Inams Abolition Act enumerates the consequences of vesting of an Inam in the State of publication of a notification under Sub-section(4) of Section 1 of the Act in the Mysore Gazette. All rights, title and interest vested in the Inamdar cease and stand vested absolutely in the State Government, free from all encumbrances…….. Sections 4 and 5 respectively confer rights on the Kadim tenants and permanent tenants to be registered as occupants. Sections 7 and 8 provide for the recognition of the rights of holders of minor inams and for their registration. Section 9 specifies the kinds of lands and buildings to which the inamdar is entitled to be registered as occupant. Section 9A confers an identical right on the tenants of the inamdar other than the tenants entitled to be registered as occupants under Sections 4, 5 and 6 of the Act. Section 10 deals with the determination of claims under Sections 4,5,6,7,8,9 and 9A and lays down……..A tenant found to be in possession of any land on the first day of July, 1948, shall be presumed to be a quasi-permanent tenant, unless the Inamdar proves that such tenant is not a quasi-permanent tenant as defined in Clause(14) of Sub-section (1) of Section 2"

TENANTS UNDER INAM LAND AND LAND REFORMS:- In Doddamma vs Muniyamma ILR 2005 KAR 568 by Justice V.G. Sabhahit observed that "It is clear from the above said provisions of the Inams Abolition Act and the provisions of the Land Reforms Act that so far as the rights of the tenants are concerned, the provisions of the Karnataka Land Reforms Act are similar to the provisions of the Inams Abolition Act though the provisions may not be similar in respect of the owners of the lands under Karnataka Land Reforms Act and Inam holders and inamdars under the Inams Abolition Act. However, so far as the tenants are concerned, the effect of the above said proceedings is that from the appointed date, the relationship of the landlord and tenant ceases and the property vests with the Government and the tenant is entitled to conferment of occupancy right as per the provisions of the Inams Abolition Act.

The Karnataka Land Reforms Act, 1961, came into force on 2-10-1965. The object of the said Act, inter alia, is to terminate the relationship of landlord and tenant and to confer ownership rights on the tenants. Landlords are prohibited from evicting their tenants. Section 25 provides for surrender of lands held by a tenant. In Thunga Bai And Ors. vs Vishalakshi Heggadthi And Anr ILR 1975 KAR 739 it is observed that: " By Section 25 a bar was imposed against surrender of any land held by a tenant without the previous permission in writing of the 'court'. The Court can grant permission after making enquiry if it is satisfied that the proposed surrender is bona fide and the land surrendered does not exceed the extent of land which the landlord could have resumed from his tenant under Section 14. The section further barred the landlords from entering upon the land surrendered by their tenants without the previous permission in writing obtained from the Court. Thus there is a prohibition against surrender of any land by a tenant and a further prohibition against the landlord from entering upon the land surrendered by the tenant, without the previous permission in writing of the Court."

A Division Bench of Karnataka High court in MUNIYALLAPPA v. KRISHNAMURTHY 1977 (1) KAR LJ 700 while pronouncing on the scope and applicability of the Act in respect of agricultural lands in former inam villages, observed: "Agricultural lands in former Inam villages are not excluded from the purview of the Land Reforms Act. The consequence vesting of inam lands in the State under the Inams Abolition Act is that the lands absolutely vested in the State and all rights of inamdar and tenants under him are extinguished and the only right of the inamdar and his tenants, whether Kadim tenant, permanent tenant or quasi - permanent tenant, is

to make applications for grant of occupancy. The State thereafter when it grants occupancy under Sections 4, 5 and 6 or 9 of the Inams Abolitions Act, confers fresh title on the grantees of occupancy. All prior rights are extinguished, except as provided under Section 9A, where under in the case of other tenants they are entitled to continue as tenants of the lands of which they were tenants immediately before the date of vesting."

In Thunga Bai And Ors. vs Vishalakshi Heggadthi And Anr ILR 1975 KAR 739 it is observed that: "The possession of the suit lands in the eye of law always remained with the tenants. The entry of defendant 1 on the suit lands is prohibited by Section 25(1) of the Act. That prohibition is an injunction against landlords not to enter upon the lands held by tenants without the previous permission in writing of the Court. Each entry by defendant 1 upon the suit lands constitutes an act of trespass and a clear invasion of the legal rights of the plaintiffs. When the plaintiffs have shown that they have a legal right and that legal right is invaded by the unlawful acts of the defendants, they are entitled to the relief of injunction at the hands of the Civil Court."

STATE RESPONSIBILITY TO ACT FAIRLY:-

Every action of the State or its instrumentalities should not only be fair, legitimate and above-board but should be without any affection or aversion. It should neither be suggestive of discrimination nor even apparently give an impression of bias, favouritism and nepotism. The decision should be made by the application of known principle and rules and in general such decision should be predictable and the citizen should know where he is, but if a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law **(vide S.G.Jaisinghani Vs. Union of India & ors., AIR 1967 SC 1427; Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation, AIR 1988 SC 157).**

OBJECT OF INTERIM ORDER:-

Interim order is passed on the basis of prima facie findings, which are tentative. Such order is passed as a temporary arrangement to preserve the status quo till the matter is decided finally, to ensure that the matter does not become either infructuous or a fait accompli before the final hearing. The object of the interlocutory injunction is, to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. **(vide Anand Prasad Agarwalla v. State of Assam vs. Tarkeshwar Prasad & Ors. AIR 2001 SC 2367; and Barak Upatyaka D.U. Karmachari Sanstha (2009) 5 SCC 694)**

LONG POSSESSION:-

In the decision reported in 1982 (2) Kant LJ 301 in the case of Venkatarayappa, M. v B.V. Lakshminarayana this Court referring to Section 38 of the Specific Relief Act in a suit for injunction based on possession has held that plaintiffs suit for permanent in junction to restrain the defendant from interfering with the possession and enjoyment, the finding was that plaintiff was in possession of the disputed portion since a considerable period of time. Held that finding was sufficient for the Court to presume that the plaintiff was in lawful possession and it was not necessary for the Court to go into the question of title. It further held that if a party has proved that he was in possession of a piece of land over a considerable period peacefully enjoying the same, the inference is that he has been in lawful possession.

POLICE CAN BE DIRECTED TO IMPLIMENT CIVIL COURT ORDERS:-

In PAPANNA v. NAGACHARI ILR 1996 KAR 127 "When the Court has prima facie considered the matter and has granted a temporary injunction in favour of the plaintiff after hearing the defendant, the Court has to enforce the same and the contention of the defendant that he is in possession, cannot be accepted at this stage. If the Court had no power to implement its own orders, then there is no purpose in the Courts passing orders in matters coming before them. The remedy under Order 39 Rule 2(a) is not exhaustive and Court can

pass appropriate orders to see that its orders are enforced. In necessary cases, even the police can be directed to enforce the orders of the Court."

INHERENT POWERS:- A bare perusal of Section 151 of the Code of Civil Procedure, it cannot be said to be in dispute that Section 151 confers wide powers on the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. The power of Section 151 to pass order of injunction in the form of restoration of possession of the code is not res integra now. In Manohar vs. Hira Lal [AIR 1962 SC 527] while dealing with the power of the Court to pass orders for the ends of justice or to prevent the abuse of the process of the Court, this Court held that the courts have inherent jurisdiction to issue temporary order of injunction in the circumstances which are not covered under the provisions of Order 39 of the Code of Civil Procedure. However, it was held by this Court in the aforesaid decision that the inherent power under Section 151 of the Code of Civil Procedure must be exercised only in exceptional circumstances for which the Code lays down no procedure.

WHEN INTERIM ORDER VIOLATED:-

In Meera Chauhan v. Harsh Bishnoi and another 2007 (1) RCR (Civil) 597. , 2006(10)Suppl.SCR965 , , 2006(13)SCALE 581 , 2007(1) JT458 It is observed that: ***"At the same time, it is also well settled that when parties violate order of injunction or stay order or act in violation of the said order the Court can, by exercising its inherent power, put back the parties in the same position as they stood prior to issuance of the injunction order or give appropriate direction to the police authority to render aid to the aggrieved parties for the due and proper implementation of the orders passed in the suit and also order police protection for implementation of such order. It is also well settled that when in the event of utter violation of the injunction order, the party forcibly dispossesses the other, the Court can order restoration of possession to the party wronged. Keeping the aforesaid principles in mind for exercising of power under Section 151 of Code of Civil Procedure, we proceed to consider the facts and circumstances of the case and decide whether the High Court as well as the trial court was justified in the facts and circumstances of the case to direct restoration of possession."***

WHEN JUDGE HIMSELF CORRUPT

In K. VEERASWAMI v. UNION OF INDIA AND OTHERS 1991 SCC (3) 655, by Majority Judgement of full Bench consisting of five Judges Justice K. Jagannath Shetty, Justice M.N. Venkatachalaiah, Justice B.C. Ray, Justice L.M. Sharma held that: The society's demand for honesty in a Judge is exacting and absolute. The standards of judicial behaviour, both on and off the Bench, are normally extremely high. For a judge to deviate from such standards of honesty and impartiality is to betray the trust reposed on him. No excuse or no legal relativity can condone such betrayal. From the standpoint of justice the size of the bribe or scope of corruption cannot be the scale for measuring a judge's dishonour. A single dishonest judge not only dishonours himself and disgraces his office but jeopardises the integrity of the entire judicial system. A judicial scandal has always been regarded as far more deplorable than a scandal involving either the Executive or a member of the Legislature. The slightest hint of irregularity or impropriety in the Court is a cause for great anxiety and alarm…….. The expression "public servant" used in the Prevention of Corruption Act, 1947 is undoubtedly wide enough to denote every Judge, including the Judges of the High Courts and the Supreme Court…….. No person is above the law. In a proceeding under Article 124 of the Constitution, a Judge can merely be removed from his office. He cannot be convicted and punished. In a case where there is a positive finding recorded in such a proceeding against the Judge and on that ground he is removed from his office, it cannot be said that he will escape the criminal liability. In a civilised society the law cannot be assumed to be leading to such disturbing results…….. It is not safe to assume that the Prevention of Corruption Act intended to make in its application any discrimination between the lower and the higher judiciary. There cannot be any rational ground on the basis of which a member of a higher judiciary may be allowed to escape prosecution while in identical circumstances a member of the subordinate judiciary is tried and convicted. Such an interpretation of the Act will militate against its constitutional validity and should not, therefore, be preferred…….. Section 5(1)(e) does not contemplate a notice to be

served on the accused. If the prosecuting authority after making a suitable enquiry, by taking into account the relevant documents and questioning relevant persons, forms the opinion that the accused cannot satisfactorily account for the accumulation of disproportionate wealth in his possession the section is attracted.

FACTS OF THE CASE AS OBSERVED BY JUSTICE K.JAGANNATH SHETTY:- This appeal by certificate under Articles 132(1) and 134(1)(e) of the Constitution has been filed by the former Chief Justice of the Madras High Court against the Full Bench decision of the same High Court refusing to quash the criminal proceedings taken against him. The appeal raises the questions of singular importance and consequence to Judges of the High Courts and this Apex Court. The central issue is whether the Judges could be prosecuted for offence under the Prevention of Corruption Act, 1947 ('the Act').

The background of the case in the barest outline is as follows: The appellant started his life as an Advocate in the High Court of Madras. He joined the Madras Bar in 1941. In 1953 he was appointed as Assistant Government Pleader. In 1959 he became Government Pleader. He held that post till 20 February 1960 when he was elevated to the Bench as a permanent Judge of the Madras High Court. On 1 May 1969, he became the Chief Justice of the Madras High Court. During his tenure as the Judge and Chief Justice he was said to have acquired assets disproportionate to the known source of income. The complaint in this regard was made to the Delhi Special Police Establishment ("CBI"). On 24 February 1976, the CBI registered a case against him with issuance of a First Information Report which was filed in one of the Courts at New Delhi. It was alleged in the First Information Report that taking into consideration the sources of income of the appellant as a Judge and Chief Justice of the High Court and the mode and style of his living with the probable expenses required during the period of his Judgeship/Chief Justiceship, it is reasonably believed that the appellant cannot satisfactorily account fox the possession of assets which are far disproportion he to his known source of income. It was further alleged that he has committed offences under Section 5(2) read with clauses (b)(d) and (e) of Section 5(1) of the Act. On 28 February 1976, a copy of the First Information Report was personally taken by the Investigating Officer to Madras and it was filed before the Court of Special Judge, Madras. The appellant on coming to know of these developments proceeded on leave from 9 March 1976 and subsequently retired on 8 April 1976 on attaining the age of superannuation. The investigation of the case by CBI was however, continued with the culmination of filing a final report. On 15 December 1977, a final report under Section 173(2) of the Code of Criminal 'Procedure (Cr. P.C.) was filed against the appellant before the Special Judge, Madras. The report under Section 173(2) is generally called as the charge sheet, and we would also prefer to term it as the charge sheet. The charge sheet inter alia states that the appellant after assuming. office as the Chief Justice of Madras gradually commenced accumulation of disproportionate assets etc. That for the period between 1 May 1969 to 24 February 1976, he was in possession of the pecuniary resources and property disproportionate by Rs.6.41,416.36 to the known sources of income over the same period. It was in his own name and in the names of his wife Smt. Eluthai Ammal and his two sons Shri V. Suresh and Shri V. Bhaskar. The appellant cannot satisfactorily account for such disproportionate assets. The appellant has thereby committed the offence of criminal misconduct under clause (e) of Section 5(1) which is punishable under Section 5(2) of the Act. The particulars of the disproportionate assets and the income of the appellant during the aforesaid period have been fully set out in the charge sheet. On perusing the charge sheet the learned Special Judge appears to have issued process for appearance of the appellant but the appellant did not appear there. He moved the High Court of Madras under Section 482 of the Cr.
P.C. to quash that criminal proceedings before the High Court he contended that the proceedings initiated against him were unconstitutional, wholly without jurisdiction, illegal and void. The Full Bench of the High Court by majority view has dismissed his case. However, in view of the importance of the Constitutional questions involved in the case the High Court granted certificate for appeal to this Court. It may be noted that before the High Court every conceivable point was argued. They are various and varied. We may briefly refer to those contentions not for the purpose of examining them, since most of them have not been pressed before us, but only to indicate as to how the appellant projected his case. It was inter alia, contended that the Judges of the High Court and Supreme Court shall not be answerable before the ordinary criminal courts but only answerable to Parliament. The Parliament alone could deal with their misbehaviour under the provisions of Articles 124(4) and (5) read with Articles 217 and 218 of the Constitution. The Judge shall hold office until

the age of superannuation subject to earlier removal for proved misbehaviour or incapacity. This protection to Judges will be defeated if they are compelled to stand trial for offence committed while discharging duties of their office even before retirement. Even the Parliament or the State Legislatures are not competent to make laws creating offences in matters relating to discharge of Judge's duties. Any such law would vitiate the scheme and the federal structure of the Constitution particularly the scheme of Article 124(4) read with Article 2 17 and 2 18. If the Legislatures are held to have powers to create offence for which Judges could be tried in ordinary criminal Courts then, it may affect the very independence of the Judiciary and the basic structure of the Constitution. Though the definition of "public servant" under Section 21 of the Indian Penal Code may include a Judge of the Higher Judiciary, since the Judge is not 'employed in connection with the affairs of the Union or State', the definition Should be narrowed down only to Judges other man the Judges of the Higher Judiciary. The jurisdiction of the CBI to register the case against the appellant and to investigate the offence was also questioned. The issuance of the First Information RepOrt and the subsequent filing of the charge sheet were impeached. It was alleged that they were actuated by collateral considerations. Alternatively, it was claimed that even assuming that all the allegations against the appellant are true, it will not constitute an offence under clause (e) of Section 5(1) of the Act since ingredients of the offence are not present in the case. The last and perhaps the most important contention urged before the High Court was regarding the necessity to obtain prior sanction from the competent authority for prosecution of the appellant as required under Section 6 of the Act. And since there was no such sanction obtained the Court has no jurisdiction to take cognizance of the case. Mr. Justice Mohan, with whom Mr. Justice Natarajan, (as he then was) joined rejected all the contentions in a well considered judgment. The views expressed by Mohan, J., on all the issues except on the last one need not be set out here since all those issues have not been raised before us. On the last aspect relating to the requirement of prior sanction for prosecution of the appellant, the learned Judge, held that since the appellant has retired from service and was no longer a 'public servant' on the date of filing the charge sheet, the sanction for his prosecution required under Section 6 of the Act is not warranted. The third Judge Mr. Justice Balasubramanyan in a separate judgment has concurred with the majority views on most of the questions. He has however, differed on three points out of which one alone need be mentioned. The other two have not been supported before us by counsel for the appellant. The learned Judge has dealt with the ingredients of the offence under clause (e) of Section 5(1) with which the appellant was charged. While analysing ingredients of the offence, he went on to state that the gist of the offence is not the possession of assets merely. Nor even the sheer excess of assets over income, but the inability of the public servant in not being able to satisfactorily account for the excess. He observed that clause (e) of Section 5(1) of the Act places the burden of establishing unsatisfactory accounting squarely on the prosecution. In order to properly discharge this burden cast by the section, it Would be necessary for the Investigating Officer first of all to call upon the public servant to account for the disproportionate assets. He must then proceed to record his own finding on the explanation of the public servant. He must state whether it is satisfactory or not. And the offence complained of under clause (e) of Section 5(1) is not made out without such exercise and finding by the Investigating Officer. The learned Judge, however, was careful enough to modulate his reasoning so that it may be in conformity with the constitutional protection guaranteed to the accused under Article 20(3) of the Constitution, Article 20(3) provides that no person accused of any offence shall be compelled to be a witness against himself. The learned Judge said that in view of Article 20(3) the Investigating Officer has no power to compel the accused to give his explanation for his disproportionate assets, but he must necessarily ask the public servant for an account. In this case. the accused-appellant has voluntarily submitted his statement of assets and income to the Investigating Officer in the course of investigation. Balasubramanyan, J., however, seems to have ignored that statement and focussed his attention on the default of the Investigating Officer in not calling upon the appellant to account for the disproportionate assets.' In that view, he held that the chargesheet could not be sustained and accordingly quashed the prosecution. Before us, counsel for the appellant advanced only two propositions. The first concerns with the ingredients of the offence alleged and the requirements of the charge-sheet filed against the appellant. It also involves the duties of the Investigating Officer. In this regard counsel sought to support the views expressed by Balasubramanyan, J., in his dissenting judgment. The second proposition relates to the inapplicability of the Act to Judges of the High Courts and Supreme Court. The essence of the submissions made on this aspect is based on the special status and role of Judges of the higher judiciary and in the need to safeguard judicial independence consistent with the constitutional provisions.

Justice SHARMA, J. Observed that: "The State is an organisation committed to public good; it is not an end in itself. Its different branches including the legislature, judiciary and the executive are intended to perform different assigned important functions. Judiciary has a duty to dispense justice between person and person as also between person and State itself. To be able to perform its duties effectively the Judges have to act "without fear or favour, affection or ill will". They must, therefore, be free from pressure from any quarter. Nobody can deny this basic essence of independence of judiciary. But for the judiciary to be really effective, the purity in the administration of justice and the confidence of the people in the courts are equally essential. It is to achieve this end that the higher judiciary has been vested with the power to punish for its own contempt. This has become necessary so that an aggrieved or misdirected person may not cast aspersions on the court which may adversely affect the public confidence. If the community loses its faith in the courts, their very existence will cease to have any meaning. A person with a just cause shall not approach the court for a legal remedy, if according to his belief the decision of the court would be given on extreneous consideration and not on the merits of his claim. People will return to the law of the jungle for settling their dispute on the streets. These aspects are common for the entire judiciary, whether Higher or Subordinate, and to my mind no classification is permissible separating one category from another.

RAY, J. observed that: The same view about the independence of the judiciary from the control of the executive has been spelt out by the observations of the Constitution Bench of Seven Judges in the case of S.P. Gupta & Ors. v. President of India and Ors., AIR 1982 (SC) 149. "The concept of independence of judiciary is a noble concept which inspires the Constitutional Scheme and constitute the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in armoury of the law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse of abuse of power by the State or its officers. The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse or power by the executive and there it is absolutely essential that the judiciary must be free from executive pressure or influence and this has been secured by the Constitution makers by making elaborate provisions in the Constitution to which detailed reference has been made in the judgments in Sankalchand Sheth's case (AIR 1977 SC 2326) (supra). But it is necessary to remind ourselves that the concept of independence of the judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It has many dimensions. Namely fearlessness of other power centres economic or political, and freedom from prejudices acquired and nourished by the class of which the Judges belong. If we may again quote the eloquent words of Justice Krishna Iyer: "Independence of the judiciary is not genuflexion; nor is it opposition to every proposition of Government. It is neither judiciary made to opposition measure nor Government's pleasure. The tyceon, the communalist, the parochialist, the faddist, the extremist and radical reactionary lying coiled up and subconsciously shaping judicial menrations are menaces to judicial independence when they are at variance with parts III and IV of the Paramount Parchment". Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says "Be you ever so high, the law is above you." This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which we must keep in mind while interpreting the relevant provisions of the Constitution.

Jutice K. JAGANNATHA SHETTY, J. Observed that

The Act was intended to cover all categories of public servants. The apparent policy of the legislation is to insure a clean public administration by weeding out corrupt officials. The Preamble of the Act indicates that the Act was intended to prevent more effectively the bribery and corruption by public servants. This Court

has an occasion to examine the broad outlines of the Act. Imam. J., in S.A. Venkataraman v. The State, [1958] SCR 1040 while, analysing the provisions of the Act observed (at 1048): "that the provisions of the Act indicate that it was intention of the legislature to treat more severely than hitherto corruption on the part of a public servant and not to condone it in any manner whatsoever." Reference may also be made to the observations of Subba Rao. J., as he then was, in M. Narayanan v. State of Kerala, [1963] 2 Suppl. SCR 724. The learned Judge said that the Act is a socially useful measure conceived in the public interest and it should be liberally constured. To quote his own words (at 729): "The Preamble indicates that the Act was passed as it was expedient to make more effective provisions for the prevention of bribery and corruption. The long title as well as the preamble indicate that the Act was passed to put down the said social evil i.e. bribery and corruption by public Servant. Bribery is a form of corruption. The fact that in addition to the word 'bribery' the word 'corruption' is used shows that the legislation was intended to combat also other evils in additon to bribery. The existing law. i.e. Penal Code was found insufficient to eradicate or even to control the growing evil of bribery and corruption corroding the public service of our country. The provisions broadly include the existing offences under ss. 161 and 165 of the Indian Penal Code committed by public servants and enact a new rule of presumptive evidence against the accused. The Act also creates a new offence of criminal misconduct by public servants though to some extent it overlaps on the pre-existing offences and enacts a rebuttable presumption contrary to the well-known principles of Criminal Jurisprudence. It also aims to protect honest public servants from harassment by prescribing that the investigation against them could be made only by police officials of particular status and by making the sanction of the Government or other appropriate officer a pre-condition for their prosecution. As it is a socially useful measure conceived in public interest, it should be liberally construed so as to bring about the desired object i.e. to prevent corruption among public servants and to prevent harassment of the honest among them."

It is inappropriate to state that conviction and sentence are no bar for the Judge to sit in the Court. We may make it clear that if a Judge is convicted for the offence of criminal misconduct or any other
offence involving moral turpitude, it is but proper for him to keep himself away from the Court. He must voluntarily withdraw from judicial work and await the outcome of the criminal prosecution. If he is sentenced in a criminal case he should forthwith tender his resignation unless he obtains stay of his conviction and sentence. He shall not insist on his right to sit on the Bench till he is cleared from the charge by a Court of competent jurisdiction. The judiciary has no power of the purse or the sword. It survives only by public confidence and it is important to the stability of the society that the confidence of the public is not shaken. The Judge whose character is clouded and whose standards of morality and rectitude are in doubt may not have the judicial independence and may not command confidence of the public. He must voluntarily withdraw from the judicial work and administration.

The emphasis on this point should not appear superfluous Prof. Jackson says "Misbehaviour by a Judge, whether it takes place on the bench or off the bench, undermines public confidence in the administration of justice, and also damages public respect for the law of the land; if nothing is seen to be done about it, the damage goes unrepaired. This must be so when the judge commits a serious criminal offence and remains in office".

There are various protections afforded to Judges to preserve the independence of the judiciary. They have protection from civil liability for any act done or ordered to be done by them in discharge of their judicial duty whether or not such judicial duty is performed within the limits of their jurisdiction. That has been provided under Section 1 of the Judicial Officers Protection Act, 1850. Likewise, Section 77 IPC gives them protection from criminal liability for an act performed judicially. Section 77 states that nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law". A discussion on the conduct of Judges of the High Courts and the Supreme Court in the discharge of their duties shall not take place in the State Legislatures or in Parliament (Articles 12 1 and 211). The High Courts and the Supreme Court have been constituted as Courts of record with the power to punish anybody for committing contempt. (Articles 129 and 215). The Contempt of Courts Act, 1971 (Act 7-0-71) provides power to the Court to take civil and criminal contempt proceedings. But we know of no law providing protection for Judges from Criminal prosecution. Article 361(2) confers immunity

from criminal prosecution only to the President and Governors of States and to no others. Even that immunity has been limited during their term of office. The Judges are liable to be dealt with just the same way as any other person in respect of criminal offence. It is only in taking of bribes or with regard to the offence of corruption the sanction for criminal prosecution is required.

BY CONCLUSION LET US QUOTE FROM WORDS OF JUSTICE:- In S.P. Gupta & Ors. etc. etc. v. Union of India & Ors. etc. etc., 1982] 2 SCR 365 it was clearly pointed out that "Not to have a corrupt Judge or a Judge who has misbehaved is unquestionably in public interest but at the same time preserving judicial independence is of the highest public interest. It is a question of choosing the lesser evil and in inevitable course has to' be adopted not for the protection of the corrupt or dishonest judge but for protecting several other honest, conscientious and hard-working Judges by preserving their independence; it is a price which the Society has to pay to avoid the greater evil that will ensue if judicial independence is sacrificed."

QUOTING WRONG PROVISION IN APPLICATION DOES NOT PRECLUDE COURT FROM CONSIDERING IT IN WRIGHT PROVISION:-

Smt. K. Lakshmamma vs T.M. Rangappa And Ors. ILR 2003 KAR 5072 "It is well settled that mere fact that a wrong provision of law has been quoted would not disable the Court from deciding the matter in substance when the intention of parties is clear as it is well settled that though an application is taken out under Order 20 Rule 12 CPC, still it does not necessarily mean that the application should be dealt with by the Court only under that Order and Rule. If a mistake has been committed in mentioning a provision of law under which an application is made, it does not preclude the Court from deciding the matter under the correct provision of law, namely, Order 20 Rule 18……."

PARTITION SUIT

A Division Bench of this Court in the case of GANAPATI SANTARAM BHOSALE v. RAMACHANDRA SUBBA RAO, ILR 1985 KAR 1115 has held that in a 'suit for partition by a Hindu coparcener, it is not necessary to seek a declaration for setting aside the alienation but it is sufficient to seek a share and possession thereof complying with a declaration that he is not bound by alienations or interest of others created in such properties which fall to his share.

In SAVITRI BAI v. DEVENDRA BALAPPA PATIL 1964 Mys.L.J. (Supp) 474 @ 475, dealing with the question as to when a suit for partial partition is maintainable, this Court has held thus at para-5: "It is a well settled rule that a suit for partition of property belonging to a Hindu joint family like a suit for partition of property belonging to more than one co-owner, must comprise all the properties which are available for partition or division. But it should be remembered that during a long period of time there has been a recognition by the Courts of many exceptions to that rule, and those exceptions are what are demanded by reason and justice. While the insistence on a claim for partition in the first suit of a property then unavailable for division or was outside the jurisdiction of the Court cannot have the support of reason, the refusal to entertain, the second suit when the non-inclusion of a property in the first was induced by mistake, accident, fraud or a like reason does not promote justice. The main purpose of the rule that normally there can be only one suit for partition between Hindus is to bestow on a partition the attribute of finality, but if there could be a partial partition by consent, which is permissible, the view that a second suit for partition can never lie cannot be sound."

Dandappa Rudrappa Hampali and Others v Renukappa and Others, AIR 1993 Kant 148, ILR 1993 KAR 1182, 1993 (1) KarLJ 138 wherein it has been held as under: "The initial burden is to establish the existence of some joint family property, capable of being the nucleus from which new property or asset could have been acquired; it is not sufficient to show that the joint family possessed some assets; it is necessary to prove that the assets of the joint family may have formed the nucleus from which the disputed assets, may have been acquired. Whether joint family assets could have formed the nucleus, again, depends upon their nature and

relative value. Existence of such joint family property which could have formed the nucleus for the acquisition of new assets, by itself would not lead that the new assets acquired by any member of the family would be joint family property, because, such a member may not have control or command over the joint family assets. The idea is that the member who acquired the new assets may have utilised the joint family assets to acquire further assets; this is possible only if the said member was in a position to utilise the joint family asset to acquire further asset or assets. In the case of the manager of the joint family or any other member who was in management of the family affairs or in possession of sufficient joint family assets, it is likely that the joint family property or part thereof formed the nucleus from which he acquired other assets and in such a case burden will be on him to prove that the acquisition by him was without the aid of the joint family property. Ordinary presumption is that the eldest member "of the family is its manager; this presumption has to be rebutted by cogent evidence, to be adduced by the person who asserts that the family was being managed by a junior member. The initial burden to prove the existence of sufficient family property which could form a nucleus for other acquisition or for the business carried on by the brothers, is on the plaintiff. Existence of sufficient family asset so as to form a nucleus for further acquisition is a question of fact. Such a fact can be proved by direct evidence or circumstantial evidence. However, circumstantial evidence should be clear, unequivocal and clinching, as otherwise, there is every danger of the self-acquisitions of a person being lost to and other who claims a share in it, based on the past prosperity of the family".

Same principle is found in Krishna Gowda v. Ningegowda . ILR 1987 KAR 2883 At para 7, the Bench observed :"Of course in the case of acquisition by a junior member of a joint family in fact that the joint family possessed considerable nucleus capable of yielding income sufficient to enable acquisition of property is not by itself sufficient to hold that acquisition by a junior member of such joint family is with the aid of the joint family and the presumption to that effect cannot also be drawn. It shall have to be proved either by showing that it was acquired by the joint family funds or by proving that such junior member was in charge or management of the joint family property or business, though not the kartha of the family, capable of yielding income so as to enable him to purchase the property. In the latter case, if such junior member was not able to show that he had independent source of income or the consideration to the acquisition of the property had flown from the particular source not connected with joint family property, a presumption shall have to be drawn that such acquisition of property was with the aid of joint family funds inasmuch as in such a case the junior member being in possession and management of the joint family properly or business, his position will be akin to that of kartha."

The Supreme Court referred to the decision of the Privy Council in Appala-swami's case, with approval, in Srinivas Krishnarao Kango v. Narayan Devji Kango, AIR 1954 SC 379. Supreme Court held that though the joint family owned lands of the extent of 56 acres, there was no satisfactory evidence about the income which those lands are yielding at the material period, when the disputed property was acquired. ……." the Supreme Court further observed that "Siddopant (who acquired the disputed properties) was a Tahsildar and that though there was no precise evidence as to what salary he was drawing, it could not have been negligible, "and salary is the least of the income which Tahsildars generally make". As to the proof of facts, Supreme Court further observed that :"Whether the evidence adduced by the plaintiff was sufficient to shift the burden which initially rested on him of establishing that there was adequate nucleus out of which the acquisitions could have been made is one of fact depending on the nature and the extent of the nucleus. The important thing to consider is the income which the nucleus yields. A building in the occupation of the members of a family and yielding no income could not be a nucleus out of which acquisitions could be made, even though it might be of considerable value. On the other hand, a running business in which the capital invested is comparatively small might conceivably produce substantial income when may well form the foundation of the subsequent acquisitions. These are not abstract questions of law, but question of fact to be determined on the evidence in the case."

In NANI BAI v. GITABAI, , AIR 1958 SC 706 Supreme Court observed that: "Under the Mitakshara School of Hindu Law partition may be either (1) a severance of the joint status of the coparcenary by mere

defining of shares but without specific allotments or (2) partition by allotment of specific properties by metes and bounds according to shares. The latter, if reduced to writing becomes compulsorily registrable under s. I7(1)(b) of the Indian Registration Act but the former does not.

In Subbanna vs Kamaiah ILR 1988 KAR 786 Karnataka High court observed: "In a suit for partition of the property of a Hindu joint family, necessary parties to the suit are : (a) heads of all branches ; (b) females who are entitled to a share on partition ; (c) purchaser of the portion of the plaintiff's share in a case where the plaintiff himself is a coparcener; (d) if the plaintiff himself is a purchaser from a coparcener, his alienor and (e) in case the devolution of interest in Mithakshara coparcenary property has taken place as per Section 6 of the Hindu Succession Act, all those persons on whom the interest in the property has devolved. In a case where the devolution of interest in the property of a male Hindu has taken place in accordance with Section 8 of the Hindu Succession Act, all those heirs on whom the interest in the property has devolved upon."

NANI BAI v. GITABAI, , AIR 1958 SC 706 the Supreme Court has held thus : "Partition in the Mitakshara sense may be only a severance of the joint status of the coparcenary, that is to say, what was once a joint title, has become a divided title though there has been no division of any properties by metes and bounds. Partition may also mean what ordinarily is understood by partition amongst co-sharers who may not be members of a Hindu coparcenary. For partition in the former sense, it is not necessary that all the members of the joint family should agree, because it is a matter of individual volition. If a coparcener expresses his individual intention in unequivocal terms to separate himself from the rest of the family, that effects a partition, so far as he is concerned, from the rest of the family. By this process what was a joint tenancy has been converted into a tenancy in common. For partition in the latter sense of allotting specific properties or parcels to individual coparceners, agreement amongst all the coparceners is absolutely necessary."

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foundation of the subsequent acquisitions. These are not abstract questions of law, but question of fact to be determined on the evidence in the case."

CAUSE OF ACTION

M/S. Kusum Ingots & Alloys Ltd vs Union Of India And Anr [(2004) 6 SCC 254] The Hon'ble Supreme Court observed: "Cause of action implies a right to sue. The material facts which are imperative for the suitor to allege and prove constitutes the cause of action. Cause of action is not defined in any statute. It has, however, been judicially interpreted inter alia to mean that every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Negatively put, it would mean that everything which, if not proved, gives the defendant an immediate right to judgment, would be part of cause of action. Its importance is beyond any doubt. For every action, there has to be a cause of action, if not, the plaint or the writ petition, as the case may be, shall be rejected summarily."

In Om Prakash Srivastava v. Union of India and Another [(2006) 6 SCC 207], Supreme Court held: "12. The expression "cause of action" has acquired a judicially settled meaning. In the restricted sense "cause of action" means the circumstances forming the infraction of the right or the immediate occasion for the reaction. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but also the infraction coupled with the right itself. Compendiously, as noted above, the expression means every fact, which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary to prove each fact, comprises in "cause of action".

In Devasahayam (D) by LRs. v. P. Savithramma and Ors. [(2005) 7 SCC 653], Supreme Court opined:"The pleadings as are well-known must be construed reasonably. The contention of the parties in their pleadings must be culled out from reading the same as a whole. Different considerations on construction of pleadings may arise between pleadings in the mofussil court and pleadings in the Original Side of the High Court."

OWNERSHIP OF IMMOVEABLE PROPERTY

AIR 2005 SC 3708 Union of India vs Pramod Gupta (D) by LRs. & Ors.. "Ownership" in respect of an immovable property would mean a bundle of rights. Only a proprietor of a surface land will have the sub-soil right. But such rights may also have certain limitations. Tenure holder or sub-tenure holder and / or an agricultural tenant created for carrying out agricultural operation per se would not become the owner of the sub-soil right. The right granted in favour of such sub-tenure holder, tenure holder or the agricultural tenant would, thus, depend upon the concerned statute and/ or the relevant covenants contained in the grant.

DETERMINATION OF COMPENSATION IN LAQ MATTERS

In Delhi Development Authority vs. Bali Ram Sharma and Others [(2004) 6 SCC 533], 5% increase in the market value was granted having regard to the fact that the notification in question was issued about five years after the notification involved in the earlier judgment. In Land Acquisition Officer, **Kammarapally Village, Nizamabad District, A.P. vs. Nookala Rajamallu and Others [(2003) 12 SCC 334**], it was observed : "Where large area is the subject-matter of acquisition, rate at which small plots are sold cannot be said to be a safe criterion" It was further observed: "While determining the market value of the land acquired it has to be correctly determined and paid so that there is neither unjust enrichment on the part of the acquirer nor undue deprivation on the part of the owner. It is an accepted principle as laid down in the case of **Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer** that the compensation must be determined by reference to the price which a willing vendor might reasonably expect to receive from the willing purchaser..."

In Lila Ghosh (Smt.) (Dead) Through LR Tapas Chandra Roy vs. State of W.B. [(2004) 9 SCC 337], a Division Bench of the Court has observed that if a plot is large, then there must be depreciation for largeness, as large plots always fetch less than small plots.

In V. Hanumantha Reddy (Dead) by Lrs. vs. Land Acquisition Officer & Mandal R. Officer [(2003) 12 SCC 642], the law is stated in the following terms : "It is now a well-established principle of law that the land abutting the national highway will fetch far more higher price than the land lying interior"

It is also well-settled that for the purpose of determining the market value of the acquired lands, the comparable sales method i.e. the lands sought to be compared must be similar in potentiality and nature may be adopted**. [Panna Lal Ghosh and Others vs. Land Acquisition Collector and Others (2004) 1 SCC 467].**

It is also trite to state that the market value of agricultural land is lower than that of land suitable for commercial purposes **[Om Prakash (Dead) By LRs. and Others vs. Union of India and Another (2004) 10 SCC 627] .**

In Shaji Kuriakose and Another Vs. Indian Oil Corpn. Ltd. and Others [(2001) 7 SCC 650], the court observed: "It is no doubt true that courts adopt comparable sales method of valuation of land while fixing the market value of the acquired land. While fixing the market value of the acquired land, comparable sales method of valuation is preferred than other methods of valuation of land such as capitalisation of net income method or expert opinion method. Comparable sales method of valuation is preferred because it furnishes the evidence for determination of the market value of the acquired land at which a willing purchaser would pay for the acquired land if it had been sold in the open market at the time of issue of notification under Section 4 of the Act. However, comparable sales method of valuation of land for fixing the market value of the acquired land is not always conclusive. There are certain factors which are required to be fulfilled and on fulfilment of those factors the compensation can be awarded, according to the value of the land reflected in the sales. The factors laid down inter alia are: (1) the sale must be a genuine transaction, (2) that the sale deed must have been executed at the time proximate to the date of issue of notification under Section 4 of the Act, (3) that the land covered by the sale must be in the vicinity of the acquired land, (4) that the land covered by the sales must be similar to the acquired land, and (5) that the size of plot of the land covered by the sales be comparable to the land acquired. If all these factors are satisfied, then there is no reason why the sale value of the land covered by the sales be not given for the acquired land. However, if there is a dissimilarity in regard to locality, shape, site or nature of land between land covered by sales and land acquired, it is open to the court to proportionately reduce the compensation for acquired land than what is reflected in the sales depending upon the disadvantages attached with the acquired land."

The Courts will also have to take into consideration the enormity of the financial implication of enhancement in view of the size of the land acquired for a particular project. **In Viluben Jhalejar Contractor case, Supreme Court held** : "One of the principles for determination of the amount of compensation for acquisition of land would be the willingness of an informed buyer to offer the price therefor. It is beyond any cavil that the price of the land which a willing and informed buyer would offer would be different in the cases where the owner is in possession and enjoyment of the property and in the cases where he is not. ……. Market value is ordinarily the price the property may fetch in the open market if sold by a willing seller unaffected by the special needs of a particular purchase. Where definite material is not forthcoming either in the shape of sales of similar lands in the neighbourhood at or about the date of notification under Section 4(1) or otherwise, other sale instances as well as other evidences have to be considered. …….. The amount of compensation cannot be ascertained with mathematical accuracy. A comparable instance has to be identified having regard to the proximity from time angle as well as proximity from situation angle. For determining the market value of the land under acquisition, suitable adjustment has to be made having regard to various positive and negative factors vis-a-vis the land under acquisition by placing the two in juxtaposition. The positive and negative factors are as under:

Positive factors (i) smallness of size (ii) proximity to a road (iii) frontage on a road (iv) nearness to developed area (v) regular shape (vi) level vis-a-vis land under acquisition (vii) special value for an owner of an adjoining property to whom it may have some very special advantage

Negative factors (i) largeness of area (ii) situation in the interior at a distance from the road (iii) narrow strip of land with very small frontage compared to depth (iv) lower level requiring the depressed portion to be filled up (v) remoteness from developed locality (vi) some special disadvantageous factors which would deter a purchaser

DEDUCTION TOWARDS DEVELOPMENT CHARGES

Whereas a smaller plot may be within the reach of many, a large block of land will have to be developed preparing a layout plan, carving out roads, leaving open spaces, plotting out smaller plots, waiting for purchasers and the hazards of an entrepreneur. Such development charges may range between 20% and 50% of the total price." It was further observed : "The purpose for which acquisition is made is also a relevant factor for determining the market value. In Basavva v. Spl. Land Acquisition Officer deduction to the extent of 65% was made towards development charges."

The Court noticed a large number of decisions wherein deductions had been made at different rates varying from 20% to 53%. The Court also noticed an earlier decision of this Court in K.S. Shivadevamma vs. Assistant Commissioner and Land Acquisition Officer [(1996) 2 SCC 62], wherein it was opined : "It is then contended that 53% is not automatic but depends upon the nature of the development and the stage of development. We are inclined to agree with the learned counsel that the extent of deduction depends upon development need in each case. Under the Building Rules 53% of land is required to be left out. This Court has laid as a general rule that for laying the roads and other amenities 33-1/3% is required to be deducted. Where the development has already taken place, appropriate deduction needs to be made. In this case, we do not find any development had taken place as on that date. When we are determining compensation under Section 23(1), as on the date of notification under Section 4(1), we have to consider the situation of the land development, if already made, and other relevant facts as on that date. No doubt, the land possessed potential value, but no development had taken place as on the date. In view of the obligation on the part of the owner to hand over the land to the City Improvement Trust for roads and for other amenities and his requirement to expend money for laying the roads, water supply mains, electricity etc., the deduction of 53% and further deduction towards development charges @ 33-1/3%, as ordered by the High Court, was not illegal."

SUB-REGISTRAR VALUE IS NOT THE BASIS

In Jawajee Nagnatham vs. Revenue Divisional Officer, Adilabad, A.P. and Others [(1994) 4 SCC 595], the Court observed : "The market value of the land for proper stamp duty has to be determined as per the law under Section 47-A itself. That view was followed by another learned Single Judge in P. Sasidar v. Sub-Registrar It is, therefore, clear that the Basic Valuation Register prepared and maintained for the purpose of collecting stamp duty has no statutory base or force. It cannot form a foundation to determine the market value mentioned thereunder in instrument brought for registration. Equally it would not be a basis to determine the market value under Section 23 of the Act, of the lands acquired in that area or town or the locality or the taluk etc. Evidence of bona fide sales between willing prudent vendor and prudent vendee of the lands acquired or situated near about that land possessing same or similar advantageous features would furnish basis to determine market value."

OWNERS ADMISSION OF MARKET VALUE

In Shakuntalabai (Smt.) and Others vs. State of Maharashtra [(1996) 2 SCC 152], the Court categorically held that if the owner himself has purchased some lands, the same should be taken into consideration having regard to the admission on market value of the land made by him stating : "It is seen that the reference court blissfully overlooked the admission of the owner on the surmise that it is an estimate made by the claimant

and the evidence of the sale deeds under Exs. 38 and 44 being prevailing prices, it acted thereon and determined the compensation. The approach of the reference court is clearly illegal and that of the High Court is quite correct and it was the only way in which the market value could be determined on the face of the evidence on record. The reference court committed manifest error in determining the compensation on the basis of sq. ft. When lands of an extent of 20 acres are offered for sale in an open market, no willing and prudent purchaser would come forward to purchase that vast extent of land on sq. ft. basis. Therefore, the reference court has to consider the valuation sitting on the armchair of a willing prudent hypothetical vendee and to put a question to itself whether in given circumstances, he would agree to purchase the land on sq. ft. basis. No feat of imagination is necessary to reach the conclusion. The answer is obviously no. This aspect of the matter was totally ignored by the reference court and mechanically accepted the two sale deeds to enhance the compensation at a value of nearly Rs 35,000 per acre. In State of M.P. v. Shantabhai and V.M. Salgoacar & Brother Ltd. v. Union of India, this Court had accepted the principle that when the owner himself has purchased the land under acquisition, the consideration mentioned in the sale deed would form the basis to determine the market value. Though the High Court has relied on the sale deeds under Exs. 65 and 66 relating to the lands in Nityanand Nagar Colony, it is also necessary to go into that aspect of the matter in the view we have stated above."

DOCTRINE OF ESTOPPEL

It is not in dispute that if a person alters its position pursuant to the representation made by the other side, the principles of estoppel would be applicable and by reason thereof, the person making the representation would not be allowed to raise a plea contra thereto. **In Krishna Bahadur Vs. Purna Theatre and Others [(2004) 8 SCC 229]** the Court held: "The principle of waiver although is akin to the principle of estoppel; the difference between the two, however, is that whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration…… A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct."

Yet again recently in State of Karnataka and Another Vs. Sangappa Dyavappa Biradar and Others [(2005) 4 SCC 264], the principles of estoppel was applied in relation to a consent award holding that once a consent award had been passed, the claimants were precluded from applying for a reference under Section 18 of the Act.

Suptd. Of Taxes, Dhubri and others Vs. M/s. Onkarmal Nathmal Trust [AIR 1975 SC 2065 : (1976) 1 SCC 766]. In that case the proceedings were not stayed pursuant to any undertaking or representation made by the claimant. The order of interim injunction was passed whereunder the claimants enjoyed certain benefits and in that fact situation the plea of waiver was raised. The Constitution Bench observed: " The third contention of the Solicitor-General is that the respondents waived service of a notice within two years of the expiry of the return period by reason of the order of injunction obtained by them. Waiver is either a form of estoppel or an election. The doctrine of estoppel by conduct means that where one by words or conduct wilfully causes another to believe in the existence of certain state of things and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at that time. The fundamental requirement as to estoppel by conduct is that the estoppel must concern an existing state of facts. There is no common law estoppel founded on a statement of future intention. The doctrine of promissory estoppel is applied to cases where a promiser has been estopped from acting inconsistently with a promise not to enforce an existing legal obligation. This doctrine differs from estoppel properly so called in that the presentation relied upon need not be one of present fact. The second requirement of an estoppel by conduct is that it should be unambiguous. Finally, an estoppel cannot be relied on if the result of giving effect to it would be something that is prohibited by law. Estoppel is only a rule of evidence. One cannot found an action upon estoppel. Estoppel is important as a step

towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said."

It is, therefore, not correct to contend that there cannot be any waiver of the right to claim interest. Statutory provisions are made for payment of interest with a view to compensate a party who had suffered damages owing to a positive action or inaction of the other resulting in blockade of money which he would otherwise have received. A party who himself represents before the court of law that he would not claim interest with a view to obtain an order of stay which would be for his own benefit, in our opinion, could not be permitted to take advantage of his own wrong. **[Sushil Kumar Vs. Rakesh Kumar, (2003) 8 SCC 673 and Laxminarayan R. Bhattad and Others Vs. State of Maharashtra and Another (2003) 5 SCC 413]**

PERSON CANNOT SUFFER OWING TO INACTION OF THE COURT

Even otherwise it is now well-settled that a person cannot be made to suffer owing to an action by the Court. (Actus curiae neminem gravabit) **[Ram Chandra Singh Vs. Savitri Devi and Ors., (2003) 8 SCC 319 and Board of Control For Cricket in India and Another Vs. Netaji Cricket Club and Others [(2005) 4 SCC 741]**

LAQ AND OBJECTIONS HEARING

In Hindustan Petroleum Corpn. Ltd. VS Darius Shapur Chenai & Ors. AIR 2005 SC 3520, HELD AS FOLLOWS:

Section 5-A of the Act confers a valuable right in favour of a person whose lands are sought to be acquired. Having regard to the provisions contained in Article 300A of the Constitution of India it has been held to be akin to a fundamental right. The State in exercise of its power of `eminent domain' may interfere with the right of property of a person by acquiring the same but the same must be for a public purpose and reasonable compensation therefore must be paid. Hearing given to a person must be an effective one and not a mere formality. Formation of opinion as regard the public purpose as also suitability thereof must be preceded by application of mind as regard consideration of relevant factors and rejection of irrelevant ones.

The definition of public purpose is of wide amplitude and takes within its sweep the acquisition of land for a corporation owned or controlled by the State, as envisaged under Sub-clause (iv) of Clause (f) of Section 3 of the Act. But the same would not mean that the State is the sole judge therefore and no judicial review shall lie.

The conclusiveness contained in Section 6 of the Act indisputably is attached to a need as also the purpose and in this regard ordinarily, the jurisdiction of the court is limited but it is equally true that when an opportunity of being heard has expressly been conferred by a statute, the same must scrupulously be complied with. For the said purpose, Section 4, 5-A, and 6 of the Act must be read conjointly. The Court in a case, where there has been total non-compliance or substantial non-compliance of the provisions of Section 5-A of the Act, cannot fold its hands and refuse to grant a relief to the writ petitioner. Sub-section (3) of Section 6 of the Act renders a declaration to be a conclusive evidence. But when the decision making process itself is in question, the power of judicial review can be exercised by the court in the event the order impugned suffers from well known principles, viz., illegality, irrationality and procedural impropriety. Moreover, when a statutory authority exercises such enormous power it must be done in a fair and reasonable manner.

Section 5-A of the Act is in two parts. Upon receipt of objections, the Collector is required to make such further enquiry as he may think necessary whereupon be must submit a report to the appropriate Government in respect of the land which is the subject matter of notification under Section 4(1) of the Act. The said Report would also contain recommendations on the objections filed by the owner of the land. He is required to forward the records of the proceedings held by him together with the report. On receipt of such a Report together with the records of the case, the Government is to render a decision thereupon. The

declaration made under Section 6 of the Act need not contain any reason, but such a notification must precede the decision of the government. When a decision is required to be taken after giving an opportunity of hearing to a person who may suffer civil or evil consequences by reason thereof, the same would mean an effective hearing. Considerations of the objections by the owner of the land and the acceptance of the recommendations by the Government must precede a proper application of mind on the part of the Government. As and when a person aggrieved questions the decision making process, the court in order to satisfy itself as to whether one or more grounds for judicial review exists, may call for the records whereupon such records must be produced. When a rule nisi was issued the State was required to produce the records and file a counter-affidavit. If it did not file any counter-affidavit, it may, subject to just exceptions, be held to have admitted the allegations made in the writ petition. In view of the fact that the action required to be taken by the State Government is distinct and different from the action required to be taken by the Collector, when the ultimate order is in question it was for the State to satisfy the court about the validity thereof and for the said purpose the counter-affidavit filed on behalf of a Collector cannot be held to be sufficient compliance of the requirements of law. The job of the Collector in terms of Section 5-A would be over once he submits his report. The Land Acquisition Collector would not know the contents of the proceedings before the State and, therefore, he would be incompetent to affirm an affidavit on its behalf. When an order is passed by a statutory authority, the same must be supported either on the reasons stated therein or the grounds available thereof in the record. A statutory authority cannot be permitted to support its order relying on or on the basis of the statements made in the affidavit de'hors the order or for that matter de'hors the records. The Act is an expropriatory legislation, should be strictly construed as it deprives a person of his land without consent.

Section 5-A of the Act is in two parts. Upon receipt of objections, the Collector is required to make such further enquiry as he may think necessary whereupon he must submit a report to the appropriate Government in respect of the land which is the subject matter of notification under Section 4(1) of the Act. The said Report would also contain recommendations on the objections filed by the owner of the land. He is required to forward the records of the proceedings held by him together with the report. On receipt of such a Report together with the records of the case, the Government is to render a decision thereupon. It is now well-settled in view of a catena of decisions that the declaration made under Section 6 of the Act need not contain any reason.

However, considerations of the objections by the owner of the land and the acceptance of the recommendations by the Government, it is trite, must precede a proper application of mind on the part of the Government. As and when a person aggrieved questions the decision making process, the court in order to satisfy itself as to whether one or more grounds for judicial review exists, may call for the records whereupon such records must be produced.

Furthermore, the State is required to apply its mind not only on the objections filed by the owner of the land but also on the Report which is submitted by the Collector upon making other and further enquiries therefor as also the recommendations made by him in that behalf. The State Government may further inquire into the matter, if any case is made out therefore, for arriving at its own satisfaction that it is necessary to deprive a citizen of his right to property. It is in that situation production of records by the State is necessary.

Although assignment of reasons is the part of principles of natural justice, necessity thereof may be taken away by a statute either expressly or by necessary implication. A declaration contained in a notification issued under Section 6 of the Act need not contain any reason but such a notification must precede the decision of the appropriate Government. When a decision is required to be taken after giving an opportunity of hearing to a person who may suffer civil or evil consequences by reason thereof, the same would mean an effective hearing.

The Act is an expropriatory legislation. This Court in **State of Madhya Pradesh and Ors. Vs. Vishnu Prasad Sharma and Ors. [1966 (3) SCR 557]** observed that in such a case the provisions of the statute should be strictly construed as it deprives a person of his land without consent.

In State of Punjab and Another Vs. Gurdial Singh and Others [(1980) 2 SCC 471], it was held : "Hearing him before depriving him is both reasonable and pre-emptive of arbitrariness, and denial of this administrative fairness is constitutional anathema except for good reasons……., inquiry under Section 5-A is not merely statutory but also has a flavour of fundamental rights under Articles 14 and 19 of the Constitution though right to property has now no longer remained a fundamental right, at least observation regarding Article 14, vis-`-vis, Section 5-A of the Land Acquisition Act would remain apposite. "

The object and importance of Section 5-A inquiry was noticed by this Court in the case of **Munshi Singh v. Union of India** wherein this Court held thus: (SCC p. 342, para 7) "Section 5-A embodies a very just and wholesome principle that a person whose property is being or is intended to be acquired should have a proper and reasonable opportunity of persuading the authorities concerned that acquisition of the property belonging to that person should not be made. ... The legislature has, therefore, made complete provisions for the persons interested to file objections against the proposed acquisition and for the disposal of their objections. It is only in cases of urgency that special powers have been conferred on the appropriate Government to dispense with the provisions of Section 5-A:"

Such an opportunity of being heard is necessary to be granted with a view to show that the purpose for which the acquisition proceeding is sought to be made is not a public purpose as also the suitability of land therefor**. Madhya Pradesh Housing Board Vs. Mohd. Shafi and Others, (1992) 2 SCC 168,**

NATURAL JUSTICE, ADMINISTRATIVE DECISIONS AND CASE LAW

In Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and others [(1978) 1 SCC 405], this Court observed: "Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes it, applies when people are affected by acts of authority. It is the hone of healthy government, recognised from earliest times and not a mystic testament of judge-made law. Indeed, from the legendary days of Adam and of Kautilya's Arthasastra the rule of law has had this stamp of natural justice which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case-law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system."

In Cholan Roadways Ltd. Vs. G. Thirugnanasambandam [(2005) 3 SCC 241], this Court observed: "It is now well settled that a quasi-judicial authority must pose unto itself a correct question so as to arrive at a correct finding of fact. A wrong question posed leads to a wrong answer.

In Commissioner of Police, Bombay vs. Gordhandas Bhanji [AIR 1952 SC 16], it is stated : "We are clear that public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind; or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

ENCROACHMENT AND PLANNED DEVELOPMENT

The question came up for consideration, in Friends Colony Development Committee v. State of Orissa and Others [(2004) 8 SCC 733] wherein the Court observed: "In all developed and developing countries there is emphasis on planned development of cities which is sought to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalisation of laws by way of legislative enactments and rules and regulations framed thereunder. Zoning and planning do result in hardship to individual property owners

as their freedom to use their property in the way they like, is subjected to regulation and control. The private owners are to some extent prevented from making the most profitable use of their property. But for this reason alone the controlling regulations cannot be termed as arbitrary or unreasonable. The private interest stands subordinated to the public good. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the State. The exercise of such governmental power is justified on account of it being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable intermeddling with the private ownership of the property may not be justified. The municipal laws regulating the building construction activity may provide for regulations as to floor area, the number of floors, the extent of height rise and the nature of use to which a built-up property may be subjected in any particular area. The individuals as property owners have to pay some price for securing peace, good order, dignity, protection and comfort and safety of the community. Not only filth, stench and unhealthy places have to be eliminated, but the layout helps in achieving family values, youth values, seclusion and clean air to make the locality a better place to live. Building regulations also help in reduction or elimination of fire hazards, the avoidance of traffic dangers and the lessening of prevention of traffic congestion in the streets and roads. Zoning and building regulations are also legitimised from the point of view of the control of community development, the prevention of overcrowding of land, the furnishing of recreational facilities like parks and playgrounds and the availability of adequate water, sewerage and other governmental or utility services."

Yet again in N.D. Jayal and Another v. Union of India and Others [(2004) 9 SCC 362], a 3-Judge Bench of the Court noticed that several factors including flora and fauna, water quality maintenance and impact on health and rehabilitation are relevant factors for the purpose of maintenance of ecology. Emphasising the need of adherence to sustainable development principle for the maintenance of the symbiotic balance between the rights to environment and development, it was observed: "Right to environment is a fundamental right. On the other hand, right to development is also one. Here the right to "sustainable development" cannot be singled out. Therefore, the concept of "sustainable development" is to be treated as an integral part of "life" under Article 21. Weighty concepts like intergenerational equity (State of H.P. v. Ganesh Wood Products), public trust doctrine (M.C. Mehta v. Kamal Nath) and precautionary principle (Vellore Citizens), which we declared as inseparable ingredients of our environmental jurisprudence, could only be nurtured by ensuring sustainable development."

In Sushanta Tagore and Others v. Union of India and Others [(2005) 3 SCC 16], the Court was concerned with interpretation of the provisions of Visva-Bharati Act, 1951 which was enacted to preserve and protect the uniqueness, tradition and special features of Visva-Bharati University. Therein, this Court opined: "It may be true that the development of a town is the job of the Town Planning Authority but the same should conform to the requirements of law. Development must be sustainable in nature. A land use plan should be prepared not only having regard to the provisions contained in the 1979 Act and the Rules and Regulations framed thereunder but also the provisions of other statutes enacted therefor and in particular those for protection and preservation of ecology and environment. As Visva-Bharati has the unique distinction of being not only a university of national importance but also a unitary one, SSDA should be well advised to keep in mind the provisions of the Act, the object and purpose for which it has been enacted as also the report of the West Bengal Pollution Control Board. It is sui generis."

In Vellore Citizens' Welfare Forum v. Union of India and Others [(1996) 5 SCC 647], the Court laid down the salient principles of sustainable development consisting of the Precautionary Principle and the Polluter Pays Principle being its essential features stating: "The "Precautionary Principle" in the context of the municipal law means: (i) Environmental measures by the State Government and the statutory authorities must anticipate, prevent and attack the causes of environmental degradation. (ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. (iii) The "onus of proof" is on the actor or the developer/industrialist to show that his action is environmentally benign.

"The Polluter Pays Principle" has been held to be a sound principle by this Court in Indian Council for Enviro-Legal Action v. Union of India. The Court observed: (SCC p. 246, para 65) "... we are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country". The Court ruled that: (SCC p. 246, para 65) "... once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on". Consequently the polluting industries are "absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas". The "Polluter Pays Principle" as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology."

In Intellectual Forum, Tirupathi v. State of A.P. & Ors. [JT 2006 (2) SC 568], it was stated: "In light of the above discussions, it seems fit to hold that merely asserting an intention for development will not be enough to sanction the destruction of local ecological resources. What this Court should follow is a principle of sustainable development and find a balance between the developmental needs which the respondents assert, and the environmental degradation, that the appellants allege."

In A.P. Pollution Control Board v. Prof. M.V. Nayudu (Retd.) and Others [(1999) 2 SCC 718], the Court reiterated the necessity of institutionalizing scientific knowledge in policy-making or using it as a basis for decision-making by agencies and courts.

In Narmada Bachao Andolan v. Union of India and Others, [(2000) 10 SCC 664], the Court emphasized the exercise which is required to be undertaken by the committees before policy decisions are taken.

In M.C. Mehta v. Union of India and Others [(1996) 4 SCC 351], the Court directed shifting of industries which are not in conformity with the provisions of the Master Plan.

Yet again in M.C. Mehta v. Union of India and Others [(2004) 6 SCC 588], the Court negatived the attempt on the part of the State for in situ regularization by way of change of policy. The court emphasized that in terms of Article 243-W of the Constitution of India, the Municipalities have constitutional responsibilities of town planning stating: "The Municipal Corporation has the responsibility in respect of matters enumerated in the Twelfth Schedule of the Constitution of India, regulation of land use, public health, sanitation, conservancy, solid-waste management being some of them"

In M.C. Mehta v. Union of India and Others [(2005) 2 SCC 186], the Court issued further directions stating that the Government must have due regard in letter and spirit to aspects that have been mentioned in the earlier place including rights of individuals who are residents of the localities under consideration for in situ regularization by amendment of the Master Plan.

In M.C. Mehta v. Kamal Nath and Others [(1997) 1 SCC 388], it was stated: "The resolution of this conflict in any given case is for the legislature and not the courts. If there is a law made by Parliament or the State Legislatures the courts can serve as an instrument of determining legislative intent in the exercise of its powers of judicial review under the Constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership, or for commercial use. The aesthetic use and the pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources."

In Consumer Education & Research Society v. Union of India and Others [(2000) 2 SCC 599], the Court issued certain directions directing the State to constitute a committee consisting of experts for study of the relevant environmental aspects as also for study of the effects of the present limited mining operation permitted by this Court. The State Government was further directed to take steps to monitor air and water pollution in that area.

In Sushanta Tagore and Others v. Union of India and Others [(2005) 3 SCC 16], the Court was concerned with interpretation of the provisions of Visva-Bharati Act, 1951 which was enacted to preserve and protect the uniqueness, tradition and special features of Visva-Bharati University. Therein, this Court opined: "It may be true that the development of a town is the job of the Town Planning Authority but the same should conform to the requirements of law. Development must be sustainable in nature. A land use plan should be prepared not only having regard to the provisions contained in the 1979 Act and the Rules and Regulations framed thereunder but also the provisions of other statutes enacted therefor and in particular those for protection and preservation of ecology and environment. As Visva-Bharati has the unique distinction of being not only a university of national importance but also a unitary one, SSDA should be well advised to keep in mind the provisions of the Act, the object and purpose for which it has been enacted as also the report of the West Bengal Pollution Control Board. It is sui generis."

In Indian Handicrafts Emporium and Others v. Union of India and Others [(2003) 7 SCC 589], wherein one of us was a party, this Court opined: "The provisions of the said Act must be construed having regard to the purport and object it seeks to achieve. Not only, inter alia, wild animal is to be protected but all other steps which are necessary therefor so as to ensure ecological and environmental security of the country must be enforced. "

In Virender Gaur and Others v. State of Haryana and Others [(1995) 2 SCC 577], it was stated: "It is seen that the open lands, vested in the Municipality, were meant for the public amenity to the residents of the locality to maintain ecology, sanitation, recreation, playground and ventilation purposes. The buildings directed to be constructed necessarily affect the health and the environment adversely, sanitation and other effects on the residents in the locality. Therefore, the order passed by the Government and the action taken pursuant thereto by the Municipality would clearly defeat the purpose of the scheme"

Lahoti, J. (as the learned Chief Justice then was) speaking for a Division Bench of this Court in Friends Colony Development Committee v. State of Orissa and Others [(2004) 8 SCC 733] stated the law in the following terms: "In all developed and developing countries there is emphasis on planned development of cities which is sought to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalisation of laws by way of legislative enactments and rules and regulations framed thereunder. Zoning and planning do result in hardship to individual property owners as their freedom to use their property in the way they like, is subjected to regulation and control. The private owners are to some extent prevented from making the most profitable use of their property. But for this reason alone the controlling regulations cannot be termed as arbitrary or unreasonable. The private interest stands subordinated to the public good. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the State. The exercise of such governmental power is justified on account of it being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable intermeddling with the private ownership of the property may not be justified."

Bombay Dyeing & Mfg. Co. Ltd VS Bombay Environmental Action Group & Ors AIR 2006 SC 1489 While considering the environmental aspect, we must not forget that before constructions are allowed to be commenced and completed, the exercise for environmental impact assessment is mandatorily required to be done by the competent authority. An expert body albeit within the fourcorners of the regulatory provisions would be entitled to consider the entire question from the environmental aspect of the matter which would undoubtedly take into consideration all relevant factors including the question as to whether the same is

likely to have adverse effects on ecology or not. Consideration of ecological aspects from the court's point of view cannot be one sided. It depends on the fact situation in each case. Whereas the court would take a very strict view as regard setting up of an industry which is of a harazardous nature but such a strict construction may not be resorted to in the case of town planning.

Padma v. Hiralal Motilal Desarda and Others [(2002) 7 SCC 564], wherein it was stated: "The significance of a development planning cannot therefore be denied. Planned development is the crucial zone that strikes a balance between the needs of large-scale urbanization and individual building. It is the science and aesthetics of urbanization as it saves the development from chaos and uglification. A departure from planning may result in disfiguration of the beauty of an upcoming city and may pose a threat for the ecological balance and environmental safeguards."

CHILD RIGHTS

In Sheela Barse v. Secretary, Children's Aid Society [(1987) 3 SCC 50] which dealt with the working of an Observation Home that was maintained and managed by the Children's Aid Society, Bombay, it was said: " Children are the citizens of the future era. On the proper bringing up of children and giving them the proper training to turn out to be good citizens depends the future of the country. In recent years, this position has been well realised. In 1959, the Declaration of all the rights of the child was adopted by the General Assembly of the United Nations and in Article 24 of the International Covenant on Civil and Political Rights, 1966. The importance of the child has been appropriately recognised. India as a party to these International Charters having ratified the Declaration, it is an obligation of the Government of India as also the State machinery to implement the same in the proper way. The Children's Act, 1948 has made elaborate provisions to cover this and if these provisions are properly translated into action and the authorities created under the Act become cognizant of their role, duties and obligation in the performance of the statutory mechanism created under the Act and they are properly motivated to meet the situations that arise in handing the problems, the situation would certainly be very much eased."

GIFT OF UNDIVIDED CO-PARCENARY PROPERTY VOID

In Thamma Venkata Subbamma (dead) by Lrs. V. Thamma Rattamma and Others (1987 (3) SCC 294) it was observed as follows: "There is a long catena of decisions holding that a gift by a coparcener of his undivided interest in the coparcenary property is void. It is not necessary to refer to all these decisions Instead, we may refer to the following statement of law in Mayne's Hindu Law, eleventh Edn., Article 382: "It is now equally well settled in all the Provinces that a gift or devise by a coparcener in a Mitakshara family of his undivided interest is wholly invalid....A coparcener cannot make a gift of his undivided interest in the family property, movable or immovable, either to a stranger or to a relative except for purposes warranted by special texts. ……We may also refer to a passage from Mulla's Hindu Law, fifteenth edn., Article 258, which is as follows: Gift of undivided interest. - (1) According to the Mitakshara law as applied in all the States, no coparcener can dispose of his undivided interest in coparcenary property by gift. Such transaction being void altogether there is no estoppel or other kind of personal bar which precludes the donor from asserting his right to recover the transferred property. He may, however, make a gift of his interest with the consent of the other coparceners.

2008(11)SCR904 Baljinder Singh . Vs Rattan Singh It is, however, a settled law that a coparcenary can make a gift of his undivided interest in the coparcenary property to another coparcener or to a stranger with the prior consent of all other coparceners. Such a gift would be quite legal and valid

In Sunil Kumar and Anr. v. Ram Parkash and Ors. (AIR 1988 SC 576) it was noted in paras 23 and 24 as follows: The managing member or karta has not only the power to manage but also power to alienate joint

family property. The alienation may be either for family necessity or for the benefit of the estate. Such alienation would bind the interests of all the undivided members of the family whether they are adults or minors. The oft quoted decision in this aspect, is that of the Privy Council in Hanuman Parshad v. Mt. Babooee, [1856] 6 M.I.A. 393. There it was observed at p. 423: (1) "The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in case of need, or for the benefit of the estate." This case was that of a mother, managing as guardian for an infant heir. A father who happens to be the manager of an undivided Hindu family certainly has greater powers to which I will refer a little later. Any other manager however, is not having anything less than those stated in the said case. Therefore, it has been repeatedly held that the principles laid down in that case apply equally to a father or. other coparcener who manages the joint family estate.. Although the power of disposition of joint family property has been conceded to the manager of joint Hindu family for the reasons aforesaid, the law raises no presumption as to the validity of his transactions. His acts could be questioned in the Court of law. The other members of the family have a right to have the transaction declared void, if not justified. When an alienation is challenged as being unjustified or illegal it would be for the alienee to prove that there was legal necessity in fact or that he made proper and bona fide enquiry as to the existence of such necessity. It would be for the alienee to prove that he did all that was reasonable to satisfy himself as to the existence of such necessity. If the alienation is found to be unjustified, then it would be declared void. Such alienations would be void except to the extent of manager's share in Madras, Bombay and Central Provinces. The purchaser could get only the manager's share. But in other provinces, the purchaser would not get even that much. The entire alienation would be void. [Mayne's Hindu Law 11th ed. para 396].

In Sadasivam v. K. Doraisamy (AIR 1996 SC 1724) it was found that when the father has executed sale deed in favour of a near relative and the intention to repay debt or legal necessity has not been proved as a sham transaction.

In Words and Phrases by Justice R.P. Sethi the expression `void' and `'voidable' read as under: "Void- Black's Law Dictionary gives the meaning of the word "void" as having different nuances in different connotations. One of them is of course "null or having no legal force or binding effect". And the other is "unable in law, to support the purpose for which it was intended". After referring to the nuances between void and voidable the lexicographer 26 pointed out the following: "The word `void' in its strictest sense, means that which has no force and effect, is without legal efficacy, is incapable of being enforced by law, or has no legal or binding force, but frequently the word is used and construed as having the more liberal meaning of `voidable'. The word `void' is used in statute in the sense of utterly void so as to be incapable of ratification, and also in the sense of voidable and resort must be had to the rules of construction in many cases to determine in which sense the legislature intended to use it. An act or contract neither wrong in itself nor against public policy, which has been declared void by statute for the protection or benefit of a certain party, or class of parties, is voidable only". **(Pankan Mehra and Anr. v. State of Maharashtra and Ors. (2000 (2) SCC 756).**

Per Fazal Ali, J- The meaning of the word "void" is stated in Black's Law Dictionary (3rd Edn.) to be as follows: "Null and void; ineffectual; nugatory; having no legal force or binding effect; unable in law to support the purpose for which it was intended; nugatory and ineffectual so that nothing can cure it; not valid". Keshavan Madhava Menon v. State of Bombay (1951 SCR 228).

The expression "void" has several facets. One type of void acts, transactions, decrees are those which are wholly without jurisdiction, ab initio void and for avoiding the same no declaration is necessary, law does not take any notice of the same and it can be disregarded in collateral proceeding or otherwise. Judicial Review of Administration Action, 5th Edn., para 5-044 (See also Judicial Remedies in Public Law at page 131**; Dhurandhar Prasad Singh v. Jai Prakash University and Ors. (2001 (6) SCC 534)**

The other type of void act, e.g. may be transaction against a minor without being represented by a next friend. Such a transaction is a good transaction against the whole world. So far as the minor is concerned, if he decides to avoid the same and succeeds in avoiding it by taking recourse to appropriate preceding the

transaction becomes void from the very beginning. Another type of void act may be one, which is not a nullity, but for avoiding the same, a declaration has to be made**. (Government of Orissa v Ashok Transport Agency and Ors (2002 (9) SCC 28)**

The meaning to be given to the word "void" in Article 13 of the Constitution is no longer res integra, for the matter stands concluded by the majority decision of the Court in Keshavan Madhava Menon v. The State of Bombay (1951) SCR 228. We have to apply the ratio decidendi in that case to the facts of the present case. The impugned Act was a existing law at the time when the Constitution came into force. That existing law imposed on the exercise of the right guaranteed in the citizens of the India by Article 19(1)(g) restrictions which could not be justified as reasonable under clause (6) as it then stood and consequently under Article 13, that existing Law became void "to the extent of such inconsistency". As explained in Keshavan Madhava Menon's case (supra) the Law became void in toto or for all purposes or for all times or for all persons but only "to the extent of such inconsistency", that is to say, to the extent it became inconsistent with the provisions of Part III which conferred the fundamental rights on the citizens.

It did not become void independently of the existence of the rights guaranteed by Part III. **(Bhikaji Narain Dhakras and Ors. v. The State of Madhya Pradesh and Anr. (1955 (2) SCR 589).**

The word "void" has a relative rather than an absolute meaning. It only conveys the idea that the order is invalid or illegal. In Halsbury's Laws of England, 4th Edn. (Re- issue) Vol. 1(1) in para 26, p.31 it is stated thus: "If an act of decision, or an order or other instrument is invalid, it should, in principle, be null and void for all purposes; and it has been said that there are no degrees of nullity. Even though such an act is wrong and lacking in jurisdiction, however, it subsists and remains fully effective unless and until it is set aside by a court of competent jurisdiction. Until its validity is challenged, its legality is preserved". **(State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (dead) and ors. (1996 (1) SCC 435).**

"Voidable act" is that which is a good act unless avoided, e.g. if a suit is filed for a declaration that a document is fraudulent, it is voidable as the apparent state of affairs is the real state of affairs and a party who alleges otherwise is oblige to prove it. If it is proved that the document is forged and fabricated and a declaration to that effect is given, a transaction becomes void from the very beginning. There may be voidable transaction which is required to be set aside and the same is avoided from the day it is so set aside and not any day prior to it. In cases, where legal effect of a document cannot be taken away without setting aside the same, it cannot be treated to be void but would be obviously voidable. **Government of Orissa v. Ashok Transport Agency and Ors. (2002 (9) SCC 28)".**

SUB-LETTING OF TENANCY

In the case of Associated Hotels of India Ltd., Delhi v. S.B. Sardar Ranjit Singh AIR 1968 SC 933, this Court held that when eviction is sought on the ground of subletting, the onus to prove subletting is on the landlord. It was further held that if the landlord prima facie shows that the third party is in exclusive possession of the premises let out for valuable consideration, it would then be for the tenant to rebut the evidence.

In Helper Girdharbhai v. Saiyed Mohmad Mirasaheb Kadri & Others (1987) 3 SCC 538, this Court held that in a case where a tenant becomes a partner of a partnership firm and allows the firm to carry on business in the demised premises while he himself retains legal possession thereof, the act of the landlord does not amount to subletting. It was held that whether there is genuine partnership or not must be judged in the facts of each case in the light of the principles applicable to partnership.

Shalimar Tar Products Ltd. v. H.C. Sharma[(1988) 1 SCC 70] where it was held that to constitute a sub-letting, there must be a parting of legal possession, i.e., possession with the right to include and also right to exclude others and whether in a particular case there was sub-letting was substantially a question of fact.

A three-Judge Bench of this Court in Parvinder Singh v. Renu Gautam and Others (2004) 4 SCC 794 "The rent control legislations which extend many a protection to the tenant, also provide for grounds of eviction. One such ground, most common in all the legislations, is sub-letting or parting with possession of the tenancy premises by the tenant. Rent control laws usually protect the tenant so long as he may himself use the premises but not his transferee inducted into possession of the premises, in breach of the contract or the law, which act is often done with the object of illegitimate profiteering or rack-renting. To defeat the provisions of law, a device is at times adopted by unscrupulous tenants and sub-tenants of bringing into existence a deed of partnership which gives the relationship of tenant and sub-tenant an outward appearance of partnership while in effect what has come into existence is a sub-tenancy or parting with possession camouflaged under the cloak of partnership. Merely because a tenant has entered into a partnership he cannot necessarily be held to have sub-let the premises or parted with possession thereof in favour of his partners. If the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him, maybe along with the partners, the tenant may not be said to have parted with possession. However, if the user and control of the tenancy premises has been parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration for creation of sub-tenancy or for providing a cloak or cover to conceal a transaction not permitted by law, the court is not estopped from tearing the veil of partnership and finding out the real nature of transaction entered into between the tenant and the alleged sub-tenant. A person having secured a lease of premises for the purpose of his business may be in need of capital or finance or someone to assist him in his business and to achieve such like purpose he may enter into partnership with strangers. Quite often partnership is entered into between the members of any family as a part of tax planning. There is no stranger brought on the premises. So long as the premises remain in occupation of the tenant or in his control, a mere entering into partnership may not provide a ground for eviction by running into conflict with prohibition against 1 sub-letting or parting with possession. This is a general statement of law which ought to be read in the light of the lease agreement and the law governing the tenancy. There are cases wherein the tenant sub-lets the premises or parts with possession in defiance of the terms of lease or the rent control legislation and in order to save himself from the peril of eviction brings into existence, a deed of partnership between him and his sub-lessee to act as a cloak on the reality of the transaction. The existence of deed of partnership between the tenant and the alleged sub-tenant would not preclude the landlord from bringing on record material and circumstances, by adducing evidence or by means of cross-examination, making out a case of sub- letting or parting with possession or interest in tenancy premises by the tenant in favour of a third person. The rule as to exclusion of oral by documentary evidence governs the parties to the deed in writing. A stranger to the document is not bound by the terms of the document and is, therefore, not excluded from demonstrating the untrue or collusive nature of the document or the fraudulent or illegal purpose for which it was brought into being. An enquiry into reality of transaction is not excluded merely by availability of writing reciting the transaction....."

In Parvinder Singh v. Renu Gautam 1 [(2004) 4 SCC 794] a three-Judge Bench of this Court devised the test in these terms: (SCC p. 799, para 8) "If the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him, maybe along with the partners, the tenant may not be said to have parted with possession. However, if the user and control of the tenancy premises has been parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration for creation of sub-tenancy or for providing a cloak or cover to conceal a transaction not permitted by law, the court is not estopped from tearing the veil of partnership and finding out the real nature of transaction entered into between the tenant and the alleged sub- tenant"."

Ms. Celina Coelho Pereira & Ors. Vs Ulhas Mahabaleshwar Kholkar & Ors. JUSTICE Tarun Chatterjee & JUSTICE R. M. Lodha DD 30-10-2009, The legal position was quoted by the court after discussing several decisions and summarised as follows:

(i) In order to prove mischief of subletting as a ground for eviction under rent control laws, two ingredients have to be established, (one) parting with possession of tenancy or part of it by tenant in favour of a third

party with exclusive right of possession and (two) that such parting with possession has been done without the consent of the landlord and in lieu of compensation or rent.

(ii) Inducting a partner or partners in the business or profession by a tenant by itself does not amount to subletting. However, if the purpose of such partnership is ostensible and a deed of partnership is drawn to conceal the real transaction of sub-letting, the court may tear the veil of partnership to find out the real nature of transaction entered into by the tenant.

(iii) The existence of deed of partnership between tenant and alleged sub-tenant or ostensible transaction in any other form would not preclude the landlord from bringing on record material and circumstances, by adducing evidence or by means of cross-examination, making out a case of sub-letting or parting with possession in tenancy premises by the tenant in favour of a third person.

(iv) If tenant is actively associated with the partnership business and retains the control over the tenancy premises with him, may be along with partners, the tenant may not be said to have parted with possession.
(v) Initial burden of proving subletting is on landlord but once he is able to establish that a third party is in exclusive possession of the premises and that tenant has no legal possession of the tenanted premises, the onus shifts to tenant to prove the nature of occupation of such third party and that he (tenant) continues to hold legal possession in tenancy premises.

(vi) In other words, initial burden lying on landlord would stand discharged by adducing prima facie proof of the fact that a party other than tenant was in exclusive possession of the premises. A presumption of sub-letting may then be raised and would amount to proof unless rebutted.

PUBLIC AUTHORITY AND TECHNICAL PLEAS

In Madras Port Trust v. Hymanshu International by its Proprietor v. Venkatadri (Dead) by L.Rs. [(1979) 4 SCC 176] held: "2... It is high time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens. Of course, if a government or a public authority takes up a technical plea, the Court has to decide it and if the plea is well founded, it has to be upheld by the court, but what we feel is that such a plea should not ordinarily be taken up by a government or a public authority, unless of course the claim is not well-founded and by reason of delay in filing it, the evidence for the purpose of resisting such a claim has become unavailable...."

In a three Judge Bench judgment of Bhag Singh & Ors. v. Union Territory of Chandigarh through LAC, Chandigarh [(1985) 3 SCC 737]: 6 "3... The State Government must do what is fair and just to the citizen and should not, as far as possible, except in cases where tax or revenue is received or recovered without protest or where the State Government would otherwise be irretrievably be prejudiced, take up a technical plea to defeat the legitimate and just claim of the citizen."

FRIVILOUS LITIGATIONS ON THE PART OF AUTHORITIES ON INCREASE

Urban Improvement Trust, Bikaner Vs. Mohan Lal DD 30-10-2009 BENCH JUSTICE R.V. RAVEENDRAN & JUSTICE G.S. SINGHVI it is observed by court "It is a matter of concern that such frivolous and unjust litigation by governments and statutory authorities are on the increase. Statutory Authorities exist to discharge statutory functions in public interest. They should be responsible litigants. They cannot raise frivolous and unjust objections, nor act in a callous and highhanded manner. They can not behave like some private litigants with profiteering motives. Nor can they resort to unjust enrichment. They are expected to show remorse or regret when their officers act negligently or in an overbearing manner. When glaring wrong acts by their officers is brought to their notice, for which there is no explanation or excuse, the least that is

expected is restitution/restoration to the extent possible with appropriate compensation. Their harsh attitude in regard to genuine grievances of the public and their indulgence in unwarranted litigation requires to be corrected."

CO-OWNERS RIGHTS

In Sri Ram Pasricha Vs. Jagannath and Ors. - (1976) 4 SCC 184, it has been held that a co-owner is as much an owner of the entire property as any sole owner. In coming to the said finding, the learned Judges relied on the proposition laid down in Salmond on Jurisprudence (13th edition). The relevant principles in Salmond on Jurisprudence are set out herein below: "...It is an undivided unity, which is vested at the same time in more than one person....The several ownership of a part is a different thing from the co- ownership of the whole. So soon as each of two co-owners begins to own a part of the thing instead of the whole of it, the co-ownership has been dissolved into sole ownership by the process known as partition. Co-ownership involves the undivided integrity of what is owned. "Jurisprudentially it is not correct to say that a co-owner of a property is not its owner. He owns every part of the composite property along with others and it cannot be said that he is only a part-owner or a fractional owner of the property. The position will change only when partition takes place..."

The principles which have been affirmed in Mohinder Prasad Jain Vs. Manohar Lal Jain - (2006) 2 SCC 724. are that one co-owner filing a suit for eviction against the tenant does so on his own behalf in his own right and as an agent of the other co- owners. In this matter, the consent of other co-owners is assumed as taken unless it is shown that the other co- owners were not agreeable to eject the tenant and the suit was filed in spite of their disagreement.

NOMINATION IN INSURANCE POLICY AND SUCCESSION MATTERS

Section 39 of the Insurance Act, 1938 enables the holder of a policy, while effecting the same, to nominate a person to whom the money secured by the policy shall be paid in the event of his death. The effect of such nomination was considered by this Court in Vishin N. Khanchandani & Anr. Vs. Vidya Lachmandas Khanchandani & Anr. [(2000) 6 SCC 724] wherein the law has been laid down in the following terms: "....The nomination only indicated the hand which was authorised to receive the amount on the payment of which the insurer got a valid discharge of its liability under the policy. The policy-holder continued to have an interest in the policy during his lifetime and the nominee acquired no sort of interest in the policy during the lifetime of the policy-holder. On the death of the policy-holder, the amount payable under the policy became part of his estate which was governed by the law of succession applicable to him. Such succession may be testamentary or intestate. Section 39 did not operate as a third kind of succession which could be styled as a statutory testament. A nominee could not be treated as being equivalent to an heir or legatee. The amount of interest under the policy could, therefore, be claimed by the heirs of the assured in accordance with the law of succession governing them."

COURT MAY PRESUME EXISTENCE OF CERTAIN FACTS

In Tulsa v. Durghatiya [(2008) 4 SCC 520], this court held: "11. At this juncture reference may be made to Section 114 of the Evidence Act, 1872 (in short "the Evidence Act"). The provision refers to common course of natural events, human conduct and private business. The court may presume the existence of any fact which it thinks likely to have occurred. Reading the provisions of Sections 50 and 114 of the Evidence Act

together, it is clear that the act of marriage can be presumed from the common course of natural events and the conduct of parties as they are borne out by the facts of a particular case.

REFERENCE TO ARBITRATION WHEN THERE IS CLAUSE IN AGREEMENT

Hindustan Petroleum Corpn. Ltd. vs. Pinkcity Midway Petroleums [2003 (6) SCC 503], wherein this Court in Para 14 observed: "If in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator. In the instant case the existence of an arbitral clause in the Agreement is accepted by both the parties as also by the courts below. Therefore, in view of the mandatory language of section 8 of the Act, the courts below ought to have referred the dispute to arbitration."

Abdul Kadir Shamsuddin Bubere vs. Madhav Prabhakar Oak and Another,[AIR 1962 SC 406] in which this court under para 17 held as under: "There is no doubt that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference....."

Haryana Telecom Ltd. vs. Sterlite Industries (India) Ltd.[AIR 1999 SC 2354], wherein this court under para 4 observed : "Sub-section (1) of section 8 provides that where the judicial authority before whom an action is brought in a matter, will refer the parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates, in our opinion, that what can be referred to the Arbitrator is only that dispute or matter which the Arbitrator is competent or empowered to decide."

PROCEDURAL DEFECT

In uday Shankar Triyar v. Ram Kalewar Prasad Singh & Anr. [(2006) 1 SCC 75], it was observed : "Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a hand-maiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well recognized exceptions to this principle are :

i) where the Statute prescribing the procedure, also prescribes specifically the consequence of non-compliance.

ii) where the procedural defect is not rectified even after it is pointed out and due opportunity is given for rectifying it;

iii) where the non-compliance or violation is proved to be deliberate or mischievous;

iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court.

v) in case of Memorandum of Appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant."

ALLEGATION OF MALIFIDES

In Tara Chand Khatri vs. Municipal Corporation of Delhi & Ors. [AIR 1977 SC 567]; E.P. Royappa v. State of Tamil Nadu & Anr. [AIR 1874 SC 555] and M/s. Sukhwinder Pal Bipan Kumar & Ors. v. State of Punjab & Ors. [AIR 1982 SC 65] held that the burden of establishing mala fide is very heavy on the person who alleges it.

The Court, would, therefore, be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in administration. Such is the judicial perspective in evaluating charges of unworthy conduct against ministers and other, not because of any special status, but because otherwise, functioning effectively would become difficult in a democracy.

In M. Sankaranarayanan, IAS v. State of Karnataka & Ors. [AIR 1993 SC 763], Court observed that the Court may "draw a reasonable inference of mala fide from the facts pleaded and established. But such inference must be based on factual matrix and such factual matrix cannot remain the realm of institution, surmise or conjecture."

In N.K. Singh v. Union of India and Ors. [(1994) 6 SCC 98], Court held that the inference of mala fides be drawn by reading in between the lines and taking into account the attendant circumstances.

JUDICIAL CONDUCT

In S.P. Gupta vs. Union of India [(1981) Supp. SCC 87] in paragraph 27, this Court held that if there is one principle which runs through the entire fabric of the Constitution it is the principle of the rule of law, and under the Constitution it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. Judicial review is one of the most potent weapons in the armoury of law. The judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers. The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse of power by the executive. It is, therefore, absolutely essential that the judiciary must be free from executive pressure or influence which has been secured by making elaborate provisions in the Constitution with details. The independence of judiciary is not limited only to the independence from the executive pressure or influence; it is a wider concept which takes within its sweep independence from any other pressure and prejudices. It has many dimensions, viz., fearlessness of other power centers, economic or political, and freedom from prejudices acquired and nourished by the class to which the judges belong. Judicial individualism - whether needs protection? Independent judiciary is, therefore, most essential when liberty of citizen is in danger. It then becomes the duty of the judiciary to poise the scales of justice unmoved by the powers (actual or perceived) undisturbed by the clamour of the multitude. The heart of judicial independence is judicial individualism. The judiciary is not a disembodied abstraction. It is composed of individual men and women who work primarily on their own. Judicial individualism, in the language of Justice Powell of the Supreme Court of United States in his address to the American Bar Association, Labour Law Section on August 11, 1976, is "perhaps one of the last citadels of jealously preserved individualism....". Justice Douglas in his dissenting opinion in Stephen S. Chandler v. Judicial Council of the Tenth Circuit of the United States [398 US 74:26 L.Ed. 2d 100] stated: "No matter how strong an individual judge's spine, the threat of punishment the greatest peril to judicial independence would project as dark a shadow whether cast by political strangers or by judicial colleagues. A federal judge must be independent of every other judge... Neither one alone nor any number banded together can act as censor and place sanctions on him. It is vital to preserve the opportunities for judicial individualism."

In Sub- Committee on Judicial Accountability etc. etc. v. Union of India & Ors. etc. [(1991) Supp. 2 SCR, 1], Court at page 54 held that the removal of a Judge culminating in the presentation of an address by different Houses of Parliament to the President, is committed to the Parliament alone and no initiation of any investigation is possible without the initiative being taken by the Houses themselves. At page 71 it was further held that the constitutional scheme envisages removal of a Judge on proved misbehaviour or incapacity and the conduct of the Judge was prohibited to be discussed in the Parliament by Article 121. Resultantly, discussion of the conduct of a judge or any evaluation or inferences as to its merit is not

permissible elsewhere except during investigation before the Inquiry Committee constituted under the Act for this purpose.

No mandamus or direction would be issued to the Speaker of Lok Sabha or Chairman of Rajya Sabha to initiate action for impeachment. It is true, as contended by the petitioner, that in K. Veeraswami v. Union of India [(1991) 3 SCC 655], majority of the Constitution Bench upheld the power of the police to investigate into the disproportionate assets alleged to be possessed by a Judge, an offence under Section 5 of the Prevention of Corruption Act, 1947 subject to prior sanction of the Chief Justice of India to maintain independence of the judiciary.

C. Ravichandran Iyer vs Justice A.M. Bhattacharjee & Ors 1995 SCC (5) 457, Duty of the Judge to maintain high standard of conduct. Its judicial individualism - whether protection imperative? Judicial office is essentially a public trust. Society is, therefore, entitled to except that a Judge must be a man of high integrity, honesty and required to have moral vigour, ethical firmness and impervious to corrupt or venial influences. He is required to keep most exacting standards of propriety in judicial conduct. Any conduct which tends to undermine public confidence in the integrity and impartiality of the court would be deleterious to the efficacy of judicial process. Society, therefore, expects higher standards of conduct and rectitude from a Judge. Unwritten code of conduct is writ large for judicial officers to emulate and imbibe high moral or ethical standards expected of a higher judicial functionary, as wholesome standard of conduct which would generate public confidence, accord dignity to the judicial office and enhance public image, not only of the Judge but the court itself. It is, therefore, a basic requirement that a Judge's official and personal conduct be free from impropriety; the same must be in tune with the highest standard of propriety and probity. The standard of conduct is higher than expected of a layman and also higher than expected of an advocate. In fact, even his private life must adhere to high standards of probity and propriety, higher than those deemed acceptable for others. Therefore, the Judge can ill-afford to seek shelter from the fallen standard in the society.

In Krishna Swami v. Union of India & Ors. [(1992) 4 SCC 605 at 650-51], one of us (K. Ramaswamy, J). held that the holder of office of the Judge of the Supreme Court or the High Court should, therefore, be above the conduct of ordinary mortals in the society. The standards of judicial behaviour, both on and off the Bench, are normally high. There cannot, however, be any fixed or set principles, but an unwritten code of conduct of well-established traditions is the guidelines for judicial conduct. The conduct that tends to undermine the public confidence in the character, integrity or impartiality of the Judge must be eschewed. It is expected of him to voluntarily set forth wholesome standards of conduct reaffirming fitness to higher responsibilities……..To keep the stream of justice clean and pure, the Judge must be endowed with sterling character, impeccable integrity and upright behaviour. Erosion thereof would undermine the efficacy of the rule of law and the working of the Constitution itself. The Judges of higher echelons, therefore, should not be mere men of clay with all the frailties and foibles, human failings and weak character which may be found in those in other walks of life. They should be men of fighting faith with tough fibre not susceptible to any pressure, economic, political or any sort. The actual as well as the apparent independence of judiciary would be transparent only when the office holders endow those qualities which would operate as impregnable fortress against surreptitious attempts to undermine the independence of the judiciary. In short, the behaviour of the Judge is the bastion for the people to reap the fruits of the democracy, liberty and justice and the antithesis rocks the bottom of the rule of law.

CIVIL PROCEDURE

Gurunath Manohar Pavaskar & Ors VS Nagesh Siddappa Navalgund & Ors AIR 2008 SC 901 , "It was for the plaintiffs to prove that the land in suit formed part of their lands. It was not for the defendants to do so. It was, therefore, not necessary for defendants to file an application for appointment of a Commissioner nor was it necessary for them to adduce any independent evidence to establish that the report of the Advocate-Commissioner was not correct. The Advocate-Commissioner who filed the report could not be cross-examined. His report therefore could not have been taken into consideration. The suit could not have been, therefore, decreed on the basis of Ex.P-35 alone, which was allegedly produced by the defendants but was used by the plaintiffs. In a case of this nature, even s.83 of the Evidence Act would not have any application. ……Furthermore, the High Court committed an error in also throwing the burden of proof upon the defendants-appellants without taking into consideration the provisions of s.101 of the Evidence Act. …… A revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof both forward and backward can also be raised under s.110 of the Evidence Act. The courts below, were, therefore, required to appreciate the evidence keeping in view the correct legal principles in mind. …….. The courts below appeared to have taken note of the entries made in the revenue records wherein the name of the Municipal Corporation, appeared in respect of CTS No. 4823/A-1. However, the trial judge proceeded on the basis that the said property may be belonging to the defendants appellants. The courts below not only passed a decree for prohibitory injunction but also passed a decree for mandatory injunction. The High Court opined that the Trial Court could exercise discretion in this behalf. It is again one thing to say that the courts could pass an interlocutory order in the nature of mandatory injunction in exercise of its jurisdiction under s.151 CPC on the premise that a party against whom an order of injunction was passed, acted in breach thereof; so as to relegate the parties to the same position as if the order of injunction has not been violated, but it is another thing to say that the courts shall exercise the same power while granting a decree of permanent injunction in mandatory from without deciding the question of title and/or leaving the same open…….. It has not been spelt out by the High Court as to how, in the event the structures are demolished, it would be possible for the appellants to work out their remedies in accordance with law in regard to the title of the property. ……The interest of justice would be subserved if the impugned judgments are set aside and the matter is remitted to the Trial Judge for consideration of the matter afresh. The plaintiffs may, if they so desire, file an application for amendment of plaint praying for declaration of their title as also for damages as against the respondents for illegal occupation of the land. It would also be open to the parties to adduce additional evidences. The trial judge may also appoint a Commissioner for the purpose of measurement of the suit land whether an Advocate-Commissioner or an officer of the Revenue Department. …….. Plaintiff-respondents filed a suit for permanent and mandatory injunction on the ground that they were owners of suit land and the appellants, who were the owners of the abutting land, had encroached upon a portion of their land, and prayed for direction to demolish the structure erected thereon. During the pendency of the said suit, an application for interim injunction was filed. Allegedly the appellants raised construction upon the suit land in violation of order of injunction. The Trial Judge decreed the suit. On appeal, the High Court upheld the finding of lower court that it was unnecessary to give any decision on the title of the property as the suit was for permanent injunction and that it was open to appellants to work out their remedy in accordance with law. Hence the present appeal.

AIR 2005 SC 3353,

Section 26(2) and Order 6 Rules 15(4) and 17-Pleadings-Affidavit in support of-Effect of-Held: Has the effect of fixing additional responsibility on the deponent as to the truth of the facts stated in the pleadings-However, such an affidavit would not be evidence for the purpose of the trial-Further, on amendment of the pleadings, a fresh affidavit shall have to be filed in consonance thereof.

Order 18 Rule 4(1) and proviso (as amended by Act 22 of 2002 w.e.f. 1.7.2002)-Examination-in-chief-To be on affidavit in every case-Validity of-Held: Requirement is valid-In the light of O.18 R. 4(1) proviso, there is no question of inadmissible documents being read into evidence-Further, in appropriate cases the trial Court can permit the examination-in-chief to be recorded in open Court.

Order 18 Rule 4(2) and proviso (as amended by Act 22 of 2002 w.e.f. 1.7.2002) and Order 26 Rule 4-A (as inserted by Act 46 of 1999 w.e.f. 1.7.2002)-Witnesses-Cross-examination or re-examination of-By the Commissioner-Additional burden on the litigant-Validity-Held: The power is valid-However, in complex cases prayer for recording of evidence by the Commissioner may be declined by the Court-The fee payable to the Commissioner is likely to be less than the expenditure incurred towards attending Court on various dates and, thus, there would be no additional burden on the litigant.

Order 18 Rule 4 (as amended by Act 22 of 2002 w.e.f. 1.7.2002)-Recording of evidence-By Commissioner-Original documents-Safe custody of-Held: Duties of Commissioner laid down-In this regard, High Courts directed to frame necessary rules, regulations or issue practice directions.

Order 18 Rule 4(4)-Recording of evidence-By Commissioner-Demeanour of witnesses-Benefit of watching of-Held: Although the Court is deprived of the benefit of watching the demeanour of the witnesses yet the Court would have the benefit of the Commissioner's observations in this regard-Hence, power of the Commissioner to record evidence valid.

Order 18 Rule 4-Recording of evidence-By Commissioner-Empanelling of advocates for-On the basis of tests in the subjects of CPC and Evidence Act-Validity-Held: It is a good practice-However, High Courts to examine this aspect and decide to adopt or not such a procedure.

Order 18 Rule 4-Recording of evidence-By Commissioner-Appelable cases-Power to appoint Commissioner-Held: In view of the overriding effect of O. 18 R. 19 (as inserted by Amendment Act 46 of 1999) the Court is empowered to appoint a Commissioner in appealable case as well.

Order 18 Rule 4-Recording of evidence-By Commissioner-Hostile witness-Power of Commissioner to declare-Held: The discretion to declare a witness hostile has not been conferred on the Commissioner-Such a power can be exercised by the Commissioner after obtaining permission from the Court under S. 154 of the Evidence Act-Evidence Act, 1872, S. 154.

Order 18 Rule 17-A-Deletion of-By Amendment Act 46 of 1999 w.e.f. 1.7.2002-Effect of-Production of evidence at a later stage-Held: Even before insertion of O. 18 R. 17-A, the Court had inherent power under S. 151 to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence-Therefore, deletion of O. 18 R. 17-A does not disentitle production of evidence at a later stage.

Order 8 Rule 1 and proviso-Written statement-Upper limit for filing of-Maximum period of 90 days-Extension of-Permissibility-Held: The provision is directory-Court is empowered to grant further time after expiry of 90 days in accordance with O. 8 R. 10-However, such extension of time should be granted only in exceptionally hard cases and not in a routine manner.

Order 6 Rule 17 proviso-Amendment of pleadings-"At any stage"-Power of Court-Curtailment of-Held: The provision to some extent curtails absolute discretion to allow amendment at any stage-If amendment is sought after commencement of trial it has to be shown that in spite of due diligence, such amendment could not have been sought earlier-The object is to prevent frivolous application which are filed to delay the trial-There is no illegality in the provision.

Order 5 Rules 9(3) and 9-A-Service of summons-Through courier-Validity-Held: Provision valid and permissible-However, there is a danger of false reports of service-High Courts directed to issue expeditiously requisite guidelines to the trial Courts by framing appropriate rules, order, regulations or practice directions.

Order 17 Rule 1(2)-Costs of adjournment-Mandatory or directory-Held: Awarding of costs is mandatory-However, the same should be realistic and as far as possible actual cost incurred by the other party should be awarded where the adjournment is found to be avoidable.

Order 17 Rule 1(1) proviso-Number of adjournments-Upper limit of three adjournments-Validity of-Held: It cannot be said that though circumstances may be beyond the control of a party, further adjournment cannot be granted because of restriction of three adjournments-In some extreme cases (natural calamities or hospitalization) adjournments beyond three may be granted-Ultimately, it would depend upon the facts and circumstances of each case-However, grant of adjournment is not a right of a party-The grant of adjournment by a Court has to be on the party showing special and extraordinary circumstances-It cannot be in routine-While granting adjournment legislative intent to restrict number of adjournments to be kept in mind.

Order 18 Rule 2(4)-Deletion of-By Amendment Act 46 of 1999 w.e.f. 1.7.2002-Effect-Power of Court to call for any witness at any stage-Held: Is not affected by the deletion-Court has inherent power to call any witness at any stage suo moto or on the prayer of a party.

Order 18 rule 2(3-A) to (3-D)-Written and oral arguments-Time limit-Fixing of-Held: Is fixed to save time of Court-The object is to help in administering fair and speedy justice.

Order 7 Rule 14-Production of documents-"Plaintiff's witnesses"-Held: The words "plaintiff's witnesses" have been mentioned as a result of mistake committed by the legislature-The words ought to be "defendant's witnesses"-Till the mistake is corrected by the legislature, the words "plaintiff's witnesses" would be read as "defendant's witnesses".

Order 9 Rule 5-Dismissal of suit after summons returned unserved-Plaintiff to apply for fresh summons within seven days-Mandatory or directory-Held: The period of seven days is clearly directory.

Order 11 Rule 15-Inspection of documents-"At or before the settlement of issues"-Held: This stipulation is directory-It does not mean that the inspection cannot be allowed after the settlement of issues.

Section 39(4) Order 21 Rules 3 and 48-Transfer of decree-Power of Court to execute decree outside its jurisdiction-Held: S. 39(4) does not dilute the provisions of O. 21 Rules 3 and 48, which allow such execution of decree subject to fulfilment of conditions mentioned therein.

Section 64(2)-Private transfer of property-After attachment-Prohibition-Scope and validity of-Held: There is no ambiguity in S. 64(2).

Sections 35, 35-A, 35-B and 95-Costs-Held: When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the Court in its discretion may direct otherwise by recording reasons therefor-The costs have to be actual reasonable costs like (i) cost of time spent by the successful party; (ii) incidental cost, if any; (iii) payment of Court fee; (iv) lawyer's fee; and (v) typing and other costs in relation to the litigation-High Courts to examine these aspects and, wherever necessary, make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate Courts to follow.

Section 80-Notice-Two months' period under-Object of-Held: Notice period of two months is provided for the Government to send a suitable reply-The object is to curtail delay-The practice of Government Officers giving evasive and vague replies deprecated-All concerned Governments, Central or State or other authorities directed to nominate, within three months, an Officer who should be made responsible to ensure that replies

are sent within the period stipulated after due application of mind-Despite such nomination, in case of failure to send proper replies, Court should ordinarily award heavy cost against the Government and direct it to take appropriate action against the concerned Officer including recovery of costs from him.

Section 115 (as amended by Act 46 of 1999 w.e.f. 1.7.2002)-Effect of-Power of revision-Held: The power of High Court under Arts. 226 and 227 remains untrammeled by the amendment in S. 115 and is available to be exercised subject to rules of self-discipline and practice which are well settled.

Section 148-(as amended by Act 46 of 1999 w.e.f. 1.7.2002)-Enlargement of time-Upper limit of 30 days-Effect of-Held: Extension of time beyond 30 days can be permitted where sufficient cause exists or events are beyond the control of the party-However, S. 148 does not apply to cases to which Limitation Act is applicable-Limitation Act, 1963.

Section 89 and Order 10 Rule 1-A (as amended by Act 46 of 1999 w.e.f. 1.7.2002)-Alternative Dispute Resolution (ADR)-Held: If there exists an element of a settlement which may be acceptable to the parties, they should be made to apply their minds so as to opt for one or the other of the four ADR methods mentioned in S. 89.

Section 89 and Order 10 Rules 1-A to 1-C-Resolution of disputes by Lok Adalat-Applicability of ADR Rules-Held: Rules framed under Part X of CPC are applicable and not the Rules framed under the Arbitration and Conciliation Act, 1996 or the Legal Services Authority Act, 1987-High Courts directed to examine Draft Civil Procedure ADR and Mediation Rules and finalise the same expeditiously-The Registrar Generals, the Central Government and the State/Union Territories shall file the progress reports in regard to the action taken within a period of four months-Legal Services Authority Act, 1987.

Section 89(2)(a) [inserted by Act 46 of 1999 w.e.f. 1.7.2002]-Settlement of disputes outside the Court-Arbitration and Conciliation Act, 1996-Applicability of-To disputes referred to under S. 89(2)(a)-Held: Is applicable only after the stage of reference to arbitration or conciliation and not before the stage of reference-Arbitration and Conciliation Act, 1996.

Section 89(2)(a)-Settlement of disputes outside the Court-Legal Services Authority Act, 1987-Applicability of-To disputes referred to Lok Adalat under S. 89(2)(a)-Held: Is applicable only after the stage of reference to Lok Adalat and not before the stage of reference.

Section 89(2)(d) and Order 10 Rule 1-C-Mediation-Compromise between the parties-Terms of-Fixation of-Held: If mediation succeeds Court to effect the compromise and pass a decree in accordance with the terms of settlement accepted by the parties-But the Court is not involved in the actual mediation/conciliation-However, where settlement is not arrived at the referring Court is not debarred from hearing the matter afresh.

Section 89(2)-Settlement of disputes outside the Court-Nature of proceedings-Held: The four alternatives, namely, arbitration, conciliation, judicial settlement including settlement through Lok Adalat and mediation are meant to be actions of persons or institutions outside the Court and not before the Court.

Section 89(2)(a) and (d)-Mediation and conciliation-Difference between-Held: In `conciliation' there is a little more latitude and conciliator can suggest some terms of settlements too.

Section 89(2)(a) and (d)-Panel of mediators/conciliators-Rules regarding-Held: Where parties are unable to reach a consensus on an agreed name, the Court may make a reference to panel of mediators/conciliators-High Courts and district Courts directed to take appropriate steps in preparation of the requisite panels.

Section 89(2)(a) and (d)-Compulsory reference to mediation/conciliation-Commission under-Expenditure on-Held: The Central Government is directed to examine the suggestion that such expenditure be borne by

the Government and, if it is agreed, it should request the Planning and Financial Commissions to make specific financial allocation for the judiciary-In case Central Government has any reservations, the same should be placed before Supreme Court within four months.

Section 89-ADR rules-Applicability of-To disputes arising under the Family Courts Act-Held: The Family Court Act applies the CPC for all proceedings before it and, therefore, ADR rules made under CPC could be applied to supplement the rules made under the Family Court Act-Family Court Act, 1984.

Section 89-Reference to ADR-Settlement of matter-Refund of Court fee-Held: State Governments directed to amend the laws on the lines of the amendment made in the Central Court Fee Act by Act 46 of 1999.

Constitution of India, 1950:

Article 247 Schedule VII List I-Courts subordinate to High Court-Funds for establishment of-Judicial impact assessment-Held: Financial memorandum to be attached to each bill indicating the budgetary requirement for meeting the expenses of the additional cases that may arise out of the new bill if it is passed by the legislature-Central Government directed to examine the above suggestion and submit a report to Supreme Court within four months.

Article 21-Fair, speedy and inexpensive justice-Right to-Model Case Flow Management Rules-Adoption of-Held: High Courts directed to examine the said Rules and consider the question of adopting the said Rules with or without modification-The Registrar Generals, the Central Government and the State/Union Territories shall file the progress reports in regard to the action taken within a period of four months.

Words & Phrases:

"Conciliation" and "mediation"-Meaning of-In the context of Section 89(1)(b) and (d) of the Code of Civil Procedure, 1908.

The challenge made to the constitutional validity of amendments made to the Code of Civil Procedure, 1908 by Amendment Acts of 1999 and 2002 was rejected by this Court in Salem Advocates Bar Association, T.N. v. Union of India, [2003] 1 SCC 49, but it was noticed in that judgment that modalities have to be formulated for the manner in which Section 89 of the Code and, for that matter, the other provisions which have been introduced by way of amendments might have to be operated. For this purpose, a Committee was constituted so as to ensure that the amendments become effective and result in quicker dispensation of justice. It was further observed that the Committee might consider devising a model case management formula as well as rules and regulations which should be followed while taking recourse to the Alternate Dispute Resolution referred to in Section 89.

Disposing of the petition, the Court

HELD: 1. The affidavit required to be filed under the amended Section 26(2) and Order VI Rule 15(4) of the Code of Civil Procedure, 1908 has the effect of fixing additional responsibility on the deponent as to the truth of the facts stated in the pleadings. It is, however, made clear that such an affidavit would not be evidence for the purpose of the trial. Further, on amendment of the pleadings, a fresh affidavit shall have to be filed in consonance thereof.

2.1. The Court has already been vested with the power to permit affidavits to be filed as evidence as provided in Order XIX Rules 1 and 2 of the Code. It has to be kept in view that the right of cross-examination and re-examination in open Court has not been disturbed by Order XVIII Rule 4 inserted by amendment. It is true that after the amendment cross-examination can be before a Commissioner but no exception can be taken in regard to the power of the legislature to amend the Code and provide for the examination-in-chief to be on affidavit or cross-examination before a Commissioner. The scope of Order XVIII Rule 4 had been examined

and its validity upheld in Salem Advocates Bar Association's case. There is also no question of inadmissible documents being read into evidence merely on account of such documents being given exhibit numbers in the affidavit filed by way of examination-in-chief. Further the trial Court in appropriate cases can permit the examination-in-chief to be recorded in the Court. The proviso to Order XVIII Rule 4(2) clearly suggests that the Court has to apply its mind to the facts of the case, nature of allegations, nature of evidence and importance of the particular witness for determining whether the witness shall be examined in Court or by the Commissioner appointed by it. The power under Order XVIII Rule 4(2) is required to be exercised with great circumspection having regard to the facts and circumstances of the case. It is not necessary to lay down hard and fast rules controlling the discretion of the Court to appoint a Commissioner to record cross-examination and re-examination of witnesses. The purpose would be served by noticing some illustrative cases which would serve as broad and general guidelines for the exercise of discretion. For instance, a case may involve complex question of title, complex question in partition or suits relating to partnership business or suits involving serious allegations of fraud, forgery, and serious disputes as to the execution of the Will etc. In such cases, as far as possible, the Court may prefer to itself record the cross-examination of the material witnesses.

2.2. Although when evidence is recorded by the Commissioner, the Court would be deprived of the benefit of watching the demeanour of witnesses yet the will of the legislature, which has, by amending the Code, provided for recording evidence by the Commissioner for saving Court's time taken for the said purpose, cannot be defeated merely on the ground that the Court would be deprived of watching the demeanour of the witnesses. Further, in some cases, which are complex in nature, the prayer for recording evidence by the Commissioner may be declined by the Court. In any case Order XVIII Rule 4, specifically provided that the Commissioner may record such remarks as it thinks material in respect of the demeanour of any witness while under examination. The Court would have the benefit of the observations if made by the Commissioner.

3.1. In some States, advocates are being required to pass a test conducted by the High Court in the subjects of Civil Procedure Code and Evidence Act for the purpose of empanelling them on the panels of Commissioners. It is a good practice. However, it is for the High Courts to examine this aspect and decide to adopt or not such a procedure.

3.2. Regarding the apprehension that the payment of fee to the Commissioner will add to the burden of the litigant, generally the expenses incurred towards the fee payable to the Commissioner is likely to be less than the expenditure incurred for attending the Courts on various dates for recording of evidence besides the harassment and inconvenience to attend the Court again and again for the same purpose and, therefore, in reality in most of the cases, there could be no additional burden.

4. Order XVIII Rule 19 which was inserted by the Amendment Act of 1999 overrides Order XVIII Rule 5 which provides the Court to record evidence in all appealable cases. The Court is, therefore, empowered to appoint a Commissioner for recording of evidence in appealable cases as well.

5.1. The discretion to declare a witness hostile has not been conferred on the Commissioner. The powers delegated to the Commissioner under Order XXVI Rules 16, 16-A, 17 and 18 do not include the discretion that is vested in Court under Section 154 of the Evidence Act, 1872, to declare a witness hostile.

5.2. If a situation as to declaring a witness hostile arises before a Commission recording evidence, the concerned party shall have to obtain permission from the Court under Section 154 of the Evidence Act and it is only after grant of such permission that the Commissioner can allow a party to cross-examine his own witness. Having regard to the facts of the case, the Court may either grant such permission or even consider to withdraw the Commission so as to itself record the remaining evidence or impose heavy costs if it finds that permission was sought to delay the progress of the suit or harass the opposite party.

6. Undoubtedly, the Commissioner has to take proper care of the original documents handed over to him either by Court or filed before him during recording of evidence. In this regard, the High Courts may frame necessary rules, regulations or issue practice directions so as to ensure safe and proper custody of the documents when the same are before the Commissioner. It is the duty and obligation of the Commissioners to keep the documents in safe custody and also not to give access of the record to one party in absence of the opposite party or his counsel. The Commissioners can be required to redeposit the documents with the Court in cases long adjournments are granted and for taking back the documents before the adjourned date.

7. Even before insertion of Order XVIII Rule 17-A, the Court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. Order XVIII Rule 17-A did not create any new rights but only clarified the position. Therefore, deletion of Order XVIII Rule 17-A does not disentitle production of evidence at a later stage. On a party satisfying the Court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the Court may permit leading of such evidence at a later stage on such terms as may appear to be just.

8.1. The use of the word `shall' in Order VIII Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. The object which is required to be served by this provision and its design and context in which it is enacted has to be ascertained. The use of the word `shall' is ordinarily indicative of the mandatory nature of the provision but having regard to the context in which is used or having regard to the intention of the legislation, the same can be construed as directory. The Rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.

8.2. In construing Order VIII Rule 1, support can also be had from Order VIII Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the Court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to suit as it thinks fit. In the context of the provision, despite use of the word `shall', the Court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provision of Order VIII Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 of Order VIII, the Court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided in Order VIII Rule 1. There is no restriction in Order VIII Rule 10 that after expiry of ninety days, further time cannot be granted. The Court has wide power to `make such order in relation to the suit as it thinks fit'. Clearly, therefore, the provision of Order VIII Rule 1 providing for upper limit of 90 days to file written statement is directory.

8.3. However, it is made clear that the order extending time to file the written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time limit of 90 days. The discretion of the Court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order VIII Rule 1.

9.1. Section 39 of the Code does not authorize the Court to execute the decree outside its jurisdiction but it does not dilute the other provisions giving such power on compliance of conditions stipulated in those provisions. Thus, the provisions, such as, Order XXI Rule 3 or Order XXI Rule 48 which provide differently, would not be affected by Section 39(4) of the Code.

9.2. The concept of registration has been introduced in Section 64(2) of the Code to prevent false and frivolous cases of contracts being set up with a view to defeating the attachments. If the contract is registered and there is subsequent attachment, any sale deed executed after attachment will be valid. If it is unregistered, the subsequent sale after attachment would not be valid. Such sale would not be protected. There is no ambiguity in Section 64(2).

10. The proviso to Order VI Rule 17, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if an application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision.

11. The problem in respect of service of summons has been one of the major causes of delay in the due progress of the case. It is common knowledge that the defendants have been avoiding to accept summons. There have been serious problems in process-serving agencies in various Courts. There can, thus, be no valid objection in giving opportunity to the plaintiff to serve the summons on the defendant or get it served through courier as provided in Order V Rule 9. There is, however, a danger of false reports of service. It is required to be adequately guarded. The Courts shall have to be very careful while dealing with a case where orders for deemed service are required to be made on the basis of endorsement of such service or refusal. The High Courts can make appropriate rules and regulations or issue practice directions to ensure that such provisions of service are not abused so as to obtain false endorsements. In this regard, the High Courts can consider making a provision for filing of affidavit setting out details of events at the time of refusal of service. For instance, it can be provided that the affidavit of person effecting service shall state as to who all were present at the time and also that the affidavit shall be in the language known to the deponent. It can also be provided that if the affidavit or any endorsement as to service is found to be false, the deponent can be summarily tried and punished for perjury and the courier company can be black-listed. The guidelines as to the relevant details to be given can be issued by the High Courts. The High Courts, it is hoped, would issue as expeditiously as possible, requisite guidelines to the trial Courts by framing appropriate rules, order, regulations or practice directions.

12.1. The awarding of cost under Order XVII Rule 1(2) has been made mandatory. Costs that can be awarded are of two types. First, cost occasioned by the adjournment and second such higher cost as the Court deems fit. The provision for costs and higher costs has been made because of practice having been developed to award only a nominal cost even then adjournment on payment of costs is granted. Ordinarily, where the costs or higher costs are awarded, the same should be realistic and as far as possible actual cost that had to be incurred by the other party shall be awarded where the adjournment is found to be avoided but is being granted on account of either negligence or casual approach of a party or is being sought to delay the progress of the case or on any such reason.

12.2. The provisos to Order XVII Rule 1 and Order XVII Rule 2 have to be read together. So read, Order XVII does not forbid grant of adjournment where the circumstances are beyond the control of the party. In such a case, there is no restriction on the number of adjournments to be granted. It cannot be said that even if the circumstances are beyond the control of a party, after having obtained third adjournment, no further adjournment would be granted. There may be cases beyond the control of a party despite the party having obtained three adjournments. For instance, a party may be suddenly hospitalized on account of some serious ailment or there may be serious accident or some act of God leading to devastation. It cannot be said that though circumstances may be beyond the control of a party, further adjournment cannot be granted because of restriction of three adjournments as provided in proviso to Order XVII Rule 1. In some extreme case, it may become necessary to grant adjournment despite the fact that three adjournments have already been granted (take the example of Bhopal Gas Tragedy, Gujarat earthquake and riots, devastation on account of Tsunami). Ultimately, it would depend upon the facts and circumstances of each case, on the basis whereof the Court would decide to grant or refuse adjournment.

13.1. Further, to save the proviso to Order XVII Rule 1 from the vice of Article 14 of the Constitution it is necessary to read it down so as not to take away the discretion of the Court in the extreme hard cases as noted above. The limitation of three adjournments would not apply where adjournment is to be granted on account of circumstances beyond the control of a party. Even in cases which may not strictly come within the category of circumstances beyond the control of a party, the Court by resorting to the provision of higher cost which can also include punitive cost in the discretion of the Court, adjournment beyond three can be granted having regard to the injustice that may result on refusal thereof, with reference to peculiar facts of a case.

13.2. However, grant of any adjournment let alone first, second or third adjournment is not a right of a party. The grant of adjournment by a Court has to be on a party showing special and extraordinary circumstances. It cannot be in routine. While considering the prayer for grant of adjournment, it is necessary to keep in mind the legislative intent to restrict grant of adjournments.

14.1. The omission of Order XVIII Rule 2(4) by the 1999 amendment does not take away the Court's inherent power to call for any witness at any stage either suo moto or on the prayer of a party invoking the inherent powers of the Court.

14.2. The object of filing written arguments or fixing time limit of oral arguments as laid down in Order XVIII Rule 2 sub-rules (3-A) to (3-D) is with a view to saving time of the Court. The adherence to the requirement of these rules is likely to help in administering fair and speedy justice.

15. In Order VII Rule 14(4) the words `plaintiff's witnesses' have been mentioned as a result of mistake seems to have been committed by the legislature. The words ought to be `defendant's witnesses'. Till the legislature corrects the mistake, the words `plaintiff's witnesses' would be read as `defendant's witnesses' in Order VII Rule 14(4).

16. Sections 35, 35-A and 95 of the Code deal with three different aspects of award of cost and compensation. Under Section 95 cost can be awarded up to Rs. 50,000 and under Section 35-A, the costs awardable are up to Rs. 3,000. The award of the cost of the suit is in the discretion of the Court. In Sections 35 and 35-B, there is no upper limit of amount of cost awardable.

17. Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded on the unsuccessful party. Unfortunately, it has become a practice to direct the parties to bear their own costs. In large number of cases, such an order is passed despite Section 35(2) of the Code. Such a practice also encourages filing of frivolous suits. It also leads to taking up of frivolous defences. Further, wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the Court in its discretion may direct otherwise by recording reasons therefor. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost besides the payment of the Court fee, lawyer's fee, typing and other cost in relation to the litigation. It is for the High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate Courts to follow.

18.1. The two months' period mentioned in Section 80(1) of the Code has been provided for so that the Government shall examine the claim put up in the notice and has sufficient time to send a suitable reply. The underlying object is to curtail the litigation. The object also is to curtail the area of dispute and controversy. Similar provisions also exist in various other legislations as well. Wherever the statutory provision requires the service of notice as a condition precedent for filing of suit and prescribed period therefor, it is not only necessary for the governments or departments or other statutory bodies to send a reply to such a notice but it is further necessary to properly deal with all material points and issues raised in the notice. The Governments, Government departments or statutory authorities are defendants in large number of suits pending in various Courts in the country. Judicial notice can be taken of the fact that in large number of cases

either the notice is not replied or in a few cases where reply is sent, it is generally vague and evasive. The result is that the object underlying Section 80 of the Code and similar provisions gets defeated. It not only gives rise to avoidable litigation but also results in heavy expense and cost to the exchequer as well. Proper reply can result in reduction of litigation between State and the citizens. In case proper reply is sent either the claim in the notice may be admitted or area of controversy curtailed or the citizen may be satisfied on knowing the stand of the State. There is no accountability in the Government, Central or State or the statutory authorities in violating the spirit and object of Section 80.

18.1. These provisions cast an implied duty on all concerned Governments and State and statutory authorities to send appropriate reply to such notices. Having regard to the existing state of affairs, it is directed that all concerned Governments, Central or State or other authorities, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to nominate, within a period of three months, an Officer who shall be made responsible to ensure that replies to notices under Section 80 or similar provisions are sent within the period stipulated in a particular legislation. The replies shall be sent after due application of mind. Despites such nomination, if the Court finds that either the notice has not been replied or reply is evasive and vague and has been sent without proper application of mind, the Court shall ordinarily award heavy cost against the Government and direct it to take appropriate action against the concerned Officer including recovery of costs from him.

19. The power of the High Court under Articles 226 and 227 of the Constitution is always in addition to the revisional jurisdiction conferred on it. Curtailment of revisional jurisdiction of the High Court under Section 115 of the Code as amended by Amendment Act 46 of 1999 does not take away and could not have taken away the constitutional jurisdiction of the High Court. The power exists, untrammeled by the amendment in Section 115 and is available to be exercised subject to rules of self-discipline and practice which are well settled.

20.1. The upper limit of 30 days fixed in Section 148 of the Code cannot take away the inherent power of the Court to pass orders as may be necessary for the ends of justice or to prevent abuse of process of Court. The rigid operation of the Section would lead to absurdity. Section 151 has, therefore, to be allowed to fully operate. Extension beyond the maximum of 30 days, thus, can be permitted if the act could not be performed within 30 days for the reasons beyond the control of the party. However, Section 148 does not apply to cases to which the Limitation Act, 1963 is applicable.

20.2. There can be many cases where non-grant of extension beyond 30 days would amount to failure of justice. The object of the Code is not to promote failure of justice. Section 148, therefore, deserves to be read down to mean that where sufficient cause exists or events are beyond the control of a party, the Court would have inherent power to extend time beyond 30 days.

21.1. The period of seven days mentioned in Order IX Rule 5 is clearly directory. [967-d]

21.2. The stipulation in Rule 15 of Order XI confining the inspection of documents `at or before the settlement of issues' instead of `at any time' is also nothing but directory. It does not mean that the inspection cannot be allowed after the settlement of issues.

22.1. The Committee has suggested that the Central Government has to provide substantial funds for establishing Courts which are subordinate to the High Court and the Planning Commission and the Finance Commission must make adequate provisions therefor.

22.2. The Committee has also suggested that there must be `judicial impact assessment', as done in the United States, whenever any legislation is introduced either in Parliament or State Legislatures. The financial memorandum attached to each Bill must estimate not only the budgetary requirement of other staff but also the budgetary requirement for meeting the expenses of the additional cases that may arise out of the new Bill when it is passed by the legislature. The said budget must mention the number of civil and criminal cases

likely to be generated by the new Act, how many Courts are necessary, how many Judges and staff are necessary and what is the infrastructure necessary. So far in the last fifty years such a judicial impact assessment has never been made by any legislature or by Parliament in our country.

22.3. Having regard to the constitutional obligation to provide fair, quick and speedy justice, the Central Government is directed to examine the aforesaid suggestions and submit a report to this Court within four months.

23. As can be seen from Section 89 of the Code, its first part uses the word `shall' when it stipulates that the `Court shall formulate terms of settlement'. The use of the word `may' in the later part of Section 89 only relates to the aspect of reformulating the terms of a possible settlement. The intention of the legislature behind enacting Section 89 is that where it appears to the Court that there exists an element of a settlement which may be acceptable to the parties, they, at the instance of the Court, shall be made to apply their minds so as to opt for one or the other of the four Alternative Dispute Resolution methods mentioned in the Section and if the parties do not agree, the Court shall refer them to one or the other of the said modes. Section 89 uses both the word `shall' and `may' whereas Order X Rule 1-A uses the word `shall' but on harmonious reading of these provisions it becomes clear that the use of the word `may' in Section 89 only governs the aspect of reformulation of the terms of a possible settlement and its reference to one of the ADR methods. There is no conflict. It is evident that what is referred to one of the ADR modes is the dispute which is summarized in the terms of settlement formulated or reformulated in terms of Section 89.

24.1. The Arbitration and Conciliation Act, 1996 governs a case where arbitration is agreed upon before or pending a suit by all the parties. The 1996 Act, however, does not contemplate a situation as in Section 89 of the Code where the Court asks the parties to choose one or the other ADRs including Arbitration and the parties choose Arbitration as their option. Of course, the parties have to agree for Arbitration. Section 82 of the 1996 Act enables the High Court to make Rules consistent with this Act as to all proceedings before the Court under the 1996 Act. Section 84 enables the Central Government to make rules for carrying out the provisions of the Act. The procedure for option to Arbitration among the four ADRs is not contemplated by the 1996 Act and, therefore, Sections 82 or 84 has no applicability where the parties agree to go for arbitration under Section 89 of the Code. For the purposes of Section 89 and Order X, Rules 1-A, 1-B and 1-C, the relevant Section in Part X of the Code enable the High Court to frame rules. If reference is made to Arbitration under Section 89 of the Code, the 1996 Act would apply only from the stage after reference and not before the stage of reference when options under Section 89 are given by the Court and chosen by the parties. On the same analogy, the 1996 Act in relation to Conciliation would apply only after the stage of reference to Conciliation. The 1996 Act does not deal with a situation where after the suit is filed, the Court requires a party to choose one or the other ADRs including Conciliation. Thus, for Conciliation also rules can be made under Part X of the Code for the purposes of procedure for opting for `Conciliation' and up to the stage of reference to `Conciliation'. Thus, there is no impediment in the ADR rules being framed in relation to Civil Court as contemplated in Section 89 up to the stage of reference to ADR. The 1996 Act comes into play only after the stage of reference up to the award.

24.2. Applying the same analogy, the Legal Services Authority Act, 1987 or the Rules framed thereunder by the State Governments cannot act as impediment in the High Court making rules under Part X of the Code covering the manner in which the option to Lok Adalat can be made being one of the modes provided in Section 89. The 1987 Act also does not deal with the aspect of exercising option to one of the four ADR methods mentioned in Section 89. Section 89 makes applicable the 1996 Act and the 1987 Act from the stage after the exercise of options and making of reference.

25. It is evident that all the four alternatives, namely, Arbitration, Conciliation, judicial settlement including settlement through Lok Adalat and mediation are meant to be the actions of persons or institutions outside the Court and not before the Court. Order X, Rule 1-C speaks of the `Conciliation forum' referring back the dispute to the Court. In fact, the Court is not involved in the actual mediation/conciliation. Section 89(2)(d) only means that when mediation succeeds and parties agree to the terms of settlement, the mediator will

report to the Court and the Court, after giving notice and hearing the parties, `effect' the compromise and pass a decree in accordance with the terms of settlement accepted by the parties. Further, there is no question of the Court which refers the matter to mediation/conciliation being debarred from hearing the matter where settlement is not arrived at. The Judge who makes the reference only considers the limited question as to whether there are reasonable grounds to expect that there will be settlement and on that ground he cannot be treated to be disqualified to try the suit afterwards if no settlement is arrived at between the parties.

26.1. The Central Government is directed to examine the suggestion that expenditure on compulsory reference to conciliation/mediation be borne by the Government and if it is agreed, it shall request the Planning Commission and the Finance Commission to make specific financial allocation for the judiciary for including the expenses involved for mediation/conciliation under Section 89 of the Code. In case, the Central Government has any reservations, the same shall be placed before this Court within four months.

26.2. With a view to enabling the Court to refer the parties to conciliation/mediation, where the parties are unable to reach a consensus on an agreed name, there should be a panel of well trained conciliators/mediators to which it may be possible for the Court to make a reference. It would be necessary for the High Courts and district Courts to take appropriate steps in the direction of preparing the requite panels.

27. The Family Courts Act, 1984 applies the Code for all proceedings before it. Therefore, ADR rules made under the Code can be applied to supplement the rules made under the Family Courts Act and provide for ADR insofar as conciliation/mediation is concerned.
28. There is a fine distinction between conciliation and mediation. In `conciliation' there is a little more latitude and conciliator can suggest some terms of settlements too.

29. When the parties come to a settlement upon a reference made by the Court for mediation, as suggested by the Committee there has to be some public record of the manner in which the suit is disposed of and, therefore the Court has to first record the settlement and pass a decree in terms thereof and if necessary proceed to execute it in accordance with law. It cannot be accepted that such a procedure would be unnecessary. If the settlement is not filed in the Court for the purpose of passing of a decree, there will be no public record of the settlement. It is, however, a different matter if the parties do not want the Court to record a settlement and pass a decree and feel that the settlement can be implemented even without a decree. In such an eventuality, nothing prevents them from informing the Court that the suit may be dismissed as the dispute has been settled between the parties outside the Court.

30. Regarding the refund of the Court fee where the matter is settled by the reference to one of the modes provided in Section 89 of the Code, it is for the State Governments to amend the laws on the lines of the amendment made in the Central Court Fee Act by Act 46 of the 1999 Amendment to the Code. The State Governments can consider making similar amendments in the State Court Fee legislations.

31.1. The draft ADR and Mediation Rules have been finalised by the Committee and now it is for the respective High Courts to take appropriate steps for making rules in exercise of the rule-making power subject to modifications, if any, which may be considered relevant.

31.2. The High Courts can examine the Model Case Flow Management Rules, discuss the matter and consider the question of adopting or making case law management and model rules with or without modification, so that a step forward is taken to provide to the litigating public a fair, speedy and inexpensive justice.

32. It is hoped that the High Courts in the country would be in a position to examine the aforesaid rules expeditiously and would be able to finalise the Rules within a period of four months. The Registrar Generals, the Central Government and the State/Union Territories shall file the progress reports in regard to the action taken within a period of four months.

SUCCESSION TO FEMALE PROPERTY AND LIMITATION LAW

AIR 2006 SC 1786, The suit land was gifted to the mother of appellant-plaintiff by `S'. Suit by widow of `S' resulted in compromise to the effect that widow of `S' would enjoy the suit property during her life time and after her death, the same could be inherited by mother of appellant. Thereafter widow of `S' adopted respondent-defendant and executed a gift deed in his favour. The adoption and gift deed were challenged by filing a suit which was decreed. Widow of `S' died in 1967. The decree was challenged in Letters Patent Appeal, which was dismissed in 1981. Mother of appellant filed the present suit in 1982 for recovery of possession of the suit land. It was dismissed as barred by limitation by trial court. The judgment of trial court was upset in first appeal. In second appeal, High Court held that the suit was barred by limitation as the same was not filed within 12 years from the date of death of widow of `S'. Hence the present appeal. Held that "High Court has rightly held that the suit should have been filed by the plaintiff within 12 years of the death of the Hindu female, and the same having not been filed within 12 years was barred by limitation. Article 65 of the Limitation act, 1963 prescribes the period of limitation for possession of immovable property or any interest based on title where the suit is by a Hindu or Muslim entitled to possession of immovable property on the death of a Hindu or Muslim female. Article 65(b) in express terms provides that "the possession of the defendant shall be deemed to become adverse only when female dies". The limitation prescribed is 12 years beginning from the date when the possession of the defendant becomes adverse to the plaintiff. Article itself provides that the possession of the defendant shall be deemed to become adverse only when the female dies. It cannot be said that limitation does not run from the date on which the Hindu female died and that it would start running from some other date. …… It cannot be said that in view of the pending litigation relating to the adoption and gift deed executed in favour of the defandant, in the Letters Patent Appeal till 1981, the appellant- plaintiff could not have filed the present suit. In the litigation which was pending before the High Court the plaintiff had not claimed possession of the suit land. High Court has rightly pointed out that even if the plaintiff had sought amendment of the pleadings in the pending matter and claimed decree for possession, the legal position would have been different. He having not done so, he should have filed the suit for possession of the suit lands within 12 years of the death, which he failed to do. ……..Limitation Act, 1963-Article 65-Suit for possession of immovable property on death of Hindu female-Limitation for-Suit filed after 12 years from the death of the female-Held: Such suit if not filed within 12 years of the death of the Hindu female, would be barred by limitation-In such case possession of the defendant shall be deemed to become adverse only from the date when the female dies and not from some other date…… "

MAINTENANCE

Kirtikant D. Vadodaria vs. State of Gujarat : (1996) 4 SCC 479 has held as under : "According to the Law of the Land with regard to maintenance, there is an obligation of the husband to maintain his wife which does not arise by reason of any contract express or implied but out of jural relationship of husband and wife consequent to the performance of marriage. Such an obligation of the husband to maintain his wife arises irrespective of the fact whether he has or has no property, as it is considered an imperative duty and a solemn obligation of the husband to maintain his wife."

Balwant Kaur vs. Chanan Singh : (2000) 6 SCC 310, this Court reiterated the said principle in the following words :- "21. This provision clearly indicates that if the widowed daughter-in-law is a destitute and has no earnings of her own or other property and if she has nothing to fall back upon for maintenance on the estate of her husband or father or mother or from the estate of her son or daughter, if any, then she can fall back upon the estate of her father-in-law. This provision also indicates that in case of a widowed daughter-in-law

of the family if she has no income of her own or no estate of her husband to fall back upon for maintenance, then she can legitimately claim maintenance from her father or mother. On the facts of the present case, therefore, it has to be held that Appellant 1, who was a destitute widowed daughter of the testator and who was staying with him and was being maintained by him in his lifetime, had nothing to fall back upon so far as her deceased husband's estate was concerned and she had no estate of her own.
Consequently, as per Section 19(1)(a) she could claim maintenance from the estate of her father even during her father's lifetime. This was a pre-existing right of the widowed daughter qua testator's estate in his own lifetime and this right which was tried to be crystallised in the Will in her favour after his demise fell squarely within the provisions of Section 22(2) of the Maintenance Act."

DOMESTIC VIOLENCE

S.R. Batra vs. Taruna Batra : (2007) 3 SCC 169 held that even a wife could not claim a right of residence in the property belonging to her mother-in-law, stating :
"17. There is no such law in India like the British Matrimonial Homes Act, 1967, and in any case, the rights which may be available under any law can only be as against the husband and not against the father-in- law or mother-in-law.
18. Here, the house in question belongs to the mother- in-law of Smt Taruna Batra and it does not belong to her husband Amit Batra. Hence, Smt Taruna Batra cannot claim any right to live in the said house.
19. Appellant 2, the mother-in-law of Smt Taruna Batra has stated that she had taken a loan for acquiring the house and it is not a joint family property. We see no reason to disbelieve this statement."

JUSTICE S. SINHA in case of Vimalben Ajitbhai Patel (2008) The Domestic Violence Act provides for a higher right in favour of a wife. She not only acquires a right to be maintained but also thereunder acquires a right of residence. The right of residence is a higher right. The said right as per the legislation extends to joint properties in which the husband has a share.

CHILD RIGHTS

Commissions For Protection of Child Rights Act, 2005 has been enacted for the constitution of a National Commission and State Commissions for protection of child rights and children's courts for providing speedy trial of offences against children or of violation of child rights and for matters connected therewith or incidental thereto. Section 13 which appears in Chapter III of the Act is of considerable importance. The same reads as follows: "13. Functions of Commission.
(1) The Commission shall perform all or any of the following functions, namely:-
(a) Examine and review the safeguards provided by or under any law for the time being in force for the protection of child rights and recommend measures for their effective implementation;
(b) Present to the Central Government, annually and at such other intervals, as the Commission may deem fit, reports upon the working of those safeguards;
(c) Inquire into violation of child rights and recommend initiation of proceedings in such cases;
(d) Examine all factors that inhibit the enjoyment of rights of children affected by terrorism, communal violence, riots, natural disaster, domestic violence, HIV/AIDS, trafficking, maltreatment, torture and exploitation, pornography and prostitution and recommend appropriate remedial measures.
(e) Look into the matters relating to children in need of special care and protection including children in distress, marginalized and disadvantaged children, children in conflict with law, juveniles, children without family and children of prisoners and recommend appropriate remedial measures;
(f) Study treaties and other international instruments and undertake periodical review of existing policies, programmes and other activities on child rights and make recommendations for their effective implementation in the best interest of children;
(g) Undertake and promote research in the field of child rights;
(h) Spread child rights literacy among various sections of the society and promote awareness of the safeguards available for protection of these rights through publications, the media, seminars and other available means;

(i) Inspect or cause to be inspected any juvenile custodial home, or any other place of residence or institution meant for children, under the control of the Central Government or any State Government or any other authority, including any institution run by a social organisation; where children are detained or lodged for the purpose of treatment, reformation or protection and take up with these authorities for remedial action, if found necessary;
(j) Inquire into complaints and take suo motu notice of matters relating to, -
(i) Deprivation and violation of child rights; (ii) non-implementation of laws providing for protection and development of children; (iii)non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and to provide relief to such children, or take up the issues arising out of such matters with appropriate authorities; and
(k) Such other functions as it may consider necessary for the promotion of child rights and any other matter incidental to the above functions

INTERLOCUTORY ORDERS AMOUNTING TO JUDGEMENT

Shah Babulal Khimji vs Jayaben D. Kania And Anr AIR 1981 SC 1786:- Some illustrations of interlocutory orders which may be treated as judgments may be stated thus:
(1) An order granting leave to amend the plaint by introducing a new cause of action which completely alters the nature of the suit and takes away a vested right of limitation or any other valuable right accrued to the defendant.
(2) An order rejecting the plaint.
(3) An order refusing leave to defend the suit in an action under Order 37, Code of Civil Procedure.
(4) An order rescinding leave to the trial Judge granted by him under clause 12 of the Letters Patent.
(5) An order deciding a preliminary objection to the maintainability of the suit on the ground of limitation, absence of notice under section 80, bar against competency of the suit against the defendant even though the suit is kept alive.
(6) An order rejecting an application for a judgment on admission under Order 12 Rule 6.
(7) An order refusing to add necessary parties in a suit under section 92 of the Code of Civil Procedure.
(8) An order varying or amending a decree.
(9) An order refusing leave to sue in forma pauperis.
(10) An order granting review.
(11) An order allowing withdrawal of the suit with liberty to file a fresh one.
(12) An order holding that the defendants are not agriculturists within the meaning of the special law.
(13) An order staying or refusing to stay a suit under section 10 of the Code of Civil Procedure.
(14) An order granting or refusing to stay execution of the decree.
(15) An order deciding payment of court fee against the plaintiff.

WHEN ORDER IS BAD IN ITS INCEPTION

Ritesh Tewari & Anr. vs State Of U.P.& Ors. (2010) JUSTICE P Sathasivam, B Chauhan "It is settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironical to permit a person to rely upon a law, in violation of which he has obtained the benefits." **(Vide Upen Chandra Gogoi Vs. State of Assam & Ors., (1998) 3 SCC 381; Satchidananda Misra Vs. State of Orissa & Ors., (2004) 8 SCC 599; and Regional Manager, SBI Vs. Rakesh Kumar Tewari, (2006) 1 SCC 530).**

LAW OF EQUITY

In Andhra Pradesh State Financial Corporation v. M/s. GAR Re- Rolling Mills & amp; Anr., AIR 1994 SC 2151, Court observed:- "Equity is always known to defend the law from clefty evasions and new subtelities invented to evade law."

INTEREST OF JUSTICE

In M.P. Mittal v. State of Haryana & Ors., AIR 1984 SC, 1888, Court held: "…….it is open to the High Court to consider whether, in the exercise of its undoubted discretionary jurisdiction, it should decline relief to such petitioner if the grant of relief would defeat the interests of justice. The Court always has power to refuse relief where the petitioner seeks to invoke its writ jurisdiction in order to secure a dishonest advantage or perpetrate an unjust gain."

State of Maharashtra & Ors. v. Prabhu, (1994) 2 SCC 481 considered the scope of equity jurisdiction of the High Court under Article 226 of the Constitution and pointed out as follows: "It is the responsibility of the High Court as custodian of the Constitution to maintain the social balance by interfering where necessary for sake of justice and refusing to interfere where it is against the social interest and public good."

RIGHT IN LAW

In C. Albert Morris Vs. K. Chandrasekaran & Ors., (2006) 1 SCC 228, Court held that a right in law exists only and only when it has a lawful origin. In Mangal Prasad Tamoli (dead) by LRs. Vs. Narvadeshwar Mishra (dead) by LRs. & Ors., (2005) 3 SCC 422, Court held that if an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non-est and have to be necessarily set aside.

PLEAD AND ADDUCE EVIDENCE

It is a settled proposition of law that a party has to plead the case and produce/adduce sufficient evidence to substantiate his submissions made in the petition and in case the pleadings are not complete, the Court is under no obligation to entertain the pleas. **In Bharat Singh & Ors. Vs. State of Haryana & Ors., AIR 1988 SC 2181**, Court has observed as under:- "In our opinion, when a point, which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or the counter-affidavit, as the case may be, the Court will not entertain the point. There is a distinction between a hearing under the Code of Civil Procedure and a writ petition or a counter- affidavit. While in a pleading, i.e. a plaint or written statement, the facts and not the evidence are required to be pleaded. In a writ petition or in the counter affidavit, not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it."

COME IN CLEAN HANDS

Where a party's claim is not founded on valid grounds, the party cannot claim equity. A party that claims equity must come before the court with clean hands as equities have to be properly worked out between parties to ensure that no one is allowed to have their pound of flesh vis-`-vis the others unjustly. **(vide: Sikkim Subba Associates v. State of Sikkim (2001) 5 SCC 629).**

Karnataka Industrial Areas ... vs Sri C. Kenchappa & Ors [(2006) 6 SCC 371], JUSTICE RUMA PAL & JUSTICE DALVEER BHANDARI:- The respondent agriculturists, who were affected by the acquisition of lands of different villages, filed a writ petition under Article 226 of the Constitution with a prayer that the

appellant Karnataka Industrial Areas Development Board (in short KIADB) be directed to refrain from converting the lands of the respondents for any industrial or other purposes and to retain the lands for use by the respondents for grazing their cattle. The respondents have filed a writ petition indicating that they are residents of villages and their lands bearing Survey Nos. 79 and 80 of Nallurahalli village are gomal lands (grazing lands for cattle), Survey No. 81 is part of the green-belt in the comprehensive development plan and Survey No. 34 is reserved for the residential purposes. According to the respondents, if the entire land is acquired and an industrial area is developed, the villagers would lose the gomal lands, causing grave hardship to them as well as their cattle. It was also submitted that there would be an adverse impact on the environment of the villages as the industrial area increases. Their prayer in the petition was that the gomal lands and the lands reserved for the residential purposes in the green-belt should not be acquired and allotted for non-agricultural purposes, including industrial purposes.

It was submitted by the respondents that deprivation of their land is violative of their fundamental rights guaranteed under Articles 14 and 21 of the Constitution. The respondents have alleged that the appellant and the State of Karnataka have violated the zonal regulations in allotting the lands to Gee India Technology Centre Pvt. Ltd. (respondent no. 3 in the writ petition). It was submitted that the allotment was made hurriedly without following the regular procedure and therefore, the same was illegal and arbitrary.

The concept of public trusteeship may be accepted as a basic principle for the protection of natural resources of the land and sea. The Public Trust Doctrine (which, found its way in the ancient Roman Empire) primarily rests on the principle that certain resources like air, sea, water and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature should be made freely available to everyone irrespective of their status in life. The doctrine enjoins upon the Government and its instrumentalities to protect the resources for the enjoyment of the general public.

The importance and awareness of environment and ecology is becoming so vital and important that we, in our judgment, want the appellant to insist on the conditions emanating from the principle of `Sustainable Development'.
(1) We direct that, in future, before acquisition of lands for development, the consequence and adverse impact of development on environment must be properly comprehended and the lands be acquired for development that they do not gravely impair the ecology and environment.
(2) We also direct the appellant to incorporate the condition of allotment to obtain clearance from the Karnataka State Pollution Control Board before the land is allotted for development. The said directory condition of allotment of lands be converted into a mandatory condition for all the projects to be sanctioned in future.

Court quoted following citations Enviro-Legal Action v. Union of India, [1996] 5 SCC 281. "While economic development should not be allowed to take place at the cost of ecology or by causing widespread environment destruction and violation; at the same time the necessity to preserve ecology and environment should not hamper economic and other developments. Both development and environment must go hand in hand, in other words, there should not be development at the cost of environment and vice versa, but there should be development while taking due care and ensuring the protection of environment."

Vellore Citizens Welfare Forum v. Union of India, [1996] 5 SCC 647, acknowledged that the traditional concept that development and ecology are opposed to each other, is no longer acceptable. Sustainable development is the answer. Some of the salient principles of "Sustainable Development" as culled out from Brundtland Report and other international documents, are Inter-Generational Equity. This Court observed that "the Precautionary Principle" and "the Polluter Pays Principle" are essential features of "Sustainable Development."

In Subhas Kumar v. State of Bihar, AIR (1991) SC 420, this Court has given directions that, under Article 21 of the Constitution, pollution free water and air are the fundamental rights of the people.

In the case of A.P. Pollution Control Board II v. M.V. Nayudu, [2001] 2 SCC 62, this Court observed that the right to have access to drinking water is fundamental to life and it is the duty of the State under Article 21 to provide clean drinking water to its citizens.

Narmada Bachao Andolan v. Union of India, [2000] 10 SCC 664, observed as under: "Water is the basic need for the survival of human beings and is part of the right to life and human rights as enshrined in Article 21 of the Constitution of India....."

Supreme Court in Vellore Citizens' Welfare Forum (supra) has recognized the Precautionary Principle. Again, this principle has been reiterated in the case of M.C. Mehta v. Union of India, [1997] 2 SCC 353. In the said case, the Precautionary Principle has' been explained in the context of municipal law as under:
"(i) Environmental measures - by the State Government and the statutory authorities - must anticipate; prevent and attack the causes of environmental degradation.
(ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environment degradation.
(iii) The `onus of proof' is on the actor or the
developer/industrialist to show that his action is environmentally benign."

Indian Council for Environ-Legal Action v. Union of India, [1996] 3 SCC 212 The Court in the said judgment observed as under: "The Polluter Pays principle demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution, or produce the goods which cause the pollution. Under the principle it is not the role of Government to meet the costs involved in either prevention of such damage or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer. The `Polluter Pays' principle was promoted by the Organisation for Economic Cooperation and Development (OECD) during the 1970s when there was great public interest in environmental issues. During this, time there were demands on Government and other institutions to introduce policies and mechanisms for the protection of the environment and the public from the threats posed by pollution in a modern industrialised society. Since then there has been considerable discussion of the nature of the Polluter Pays principle, but the precise scope of the principle and its implications for those involved in past, or potentially polluting activities have never been satisfactorily agreed."

In the case of M.C. Mehta v. Kamal Nath, [1997] 1 SCC 388, this Court dealt with the Public Trust Doctrine in great detail: The Court observed: as under: "We are fully aware, that the issues presented in this case illustrate the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities, who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change. The resolution of this conflict in any given case is for the legislature and not the court. If there is a law made by Parliament or the State Legislatures the courts can serve as an instrument of determining legislative intent in the exercise of its powers of judicial review under the Constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership, or for commercial use. The aesthetic use and the pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources:" .

In a recent case of Intellectuals Forum v. State of A. P., [2006] 3 SCC 549, Court has reiterated the importance of the Doctrine of Public Trust in maintaining sustainable development.

Honourable Apex Court in C.PADMA AND OTHERS vs. DY.SECRETARY TO THE GOVT.OF T.N. AND OTHERS [(1997) 2 SCC 627], the 'acquired land having vested in the State and compensation paid to the claimant, the claimants, thereafter, are not entitled to restitution of possession on ground that either original public purpose had ceased to be in operation or the land could not be used for any other purpose'

In 2006 (3) SCC 549 [Intellectuals Forum, Tirupathi v. State of A.P. and others], the Supreme Court once again reiterated the Constitutional mandate as enshrined under Articles 48-A and 51-A, wherein the State is mandatorily bound to protect and improve the national environment including forests, lakes, wildlife and to have compassion for living creatures. The Hon'ble Supreme Court laid emphasis that these Articles are not only fundamental in the governance of the country but also it should be the duty of the State to apply these principles in making laws and that these Articles are to be kept in mind in extending the scope and purport of Fundamental Rights guaranteed under Article 14, 19 and 21 of the Constitution of India, along with the various laws enacted by the Parliament and State Legislature. The Hon'ble Supreme Court gave thrust to the accepted social principle that all human beings have a fundamental right to a healthy environment, commensurate with their well-being, coupled with a corresponding duty of ensuring that resources are conserved and preserved in such a way that the present as well as the future generations are ensured of its maintenance and protection.

In (1990) 2 SCC 352 [Hindi Hitrakashak Samitiand others v. Union of India and others] question of holding entrance examination for pre-medical and pre-dental course for Hindi and regional language which was the Policy decision of the Government came to be challenged. Observing that there is no legal compulsion or statutory imperative for such Policy decision, Supreme Court held as follows:- "8. It is well settled that judicial review, in order to enforce a fundamental right, is permissible of administrative, legislative and governmental action or non-action, and that the rights of the citizens of this country are to be judged by the judiciary and judicial forums and not by the administrators or executives. But it is equally true that citizens of India are not to be governed by the judges or judiciary. If the governance is illegal or violative of rights and obligations, other questions may arise but whether, as mentioned hereinbefore, it has to be a policy decision by the government or the authority and thereafter enforcement of that policy, the court should not be, and we hope would not be an appropriate forum for decision."

STATE OF UTTARANCHAL v. BALWANT SINGH CHAUFAL (2010(1) SCALE 492), the Supreme Court after surveying the earlier decisions and with reference to the law regarding Public Interest Litigation in other countries, issued comprehensive guidelines in the matter of "Public Interest Litigations". The directions read thus:-

In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions:-

(1) The courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.

(2) Instead of every individual judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar General

of each High Court is directed to ensure that a copy of the Rules prepared by the High Court is sent to the Secretary General of this court immediately thereafter.

(3) The courts should prima facie verify the credentials of the petitioner before entertaining a P.I.L.

(4) The court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.

(5) The court should be fully satisfied that substantial public interest is involved before entertaining the petition.

(6) The court should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.

(7) The courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigations. (8) The court should also ensure that the petitions filed by busybodies for extraneous and ulteiror motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations."

The importance of agriculture in our rural economy was underlined by the **Supreme Court Samatha v. State of A.P., (1997) 8 SCC 191.** The observation reads thus:- Agriculture is the main part of the economy and source of livelihood to the rural Indians and a source and succour for social status and a base for dignity of person. Land is a tangible product and sustaining asset to the agriculturists.

In Waman Rao v. Union of India (1981) 2 SCC 362 a Constitution Bench had observed that India being a predominantly agricultural society, there is a strong linkage between the land and the persons status in social system. The strip of land on which they till and live assures them equal justice and dignity of their person by providing to them a near decent means of livelihood. Agricultural land is the foundation for a sense of security and freedom from fear. Assured possession is a lasting source for peace and prosperity."

In Fomento Resorts & Hotels Ltd. v. Minguel Martins, (2009) 3 SCC 571, the Supreme Court indicated the awareness of Indian Society, since time immemorial, with respect to the need of protecting ecology. The observation reads thus:- "59. The Indian society has, since time immemorial, been conscious of the necessity of protecting environment and ecology. The main motto of social life has been to live in harmony with nature. Sages and saints of India lived in forests. Their preachings contained in vedas, upanishadas, smritis, etc. are ample evidence of the societys respect for plants, trees, earth, sky, air, water and every form of life. It was regarded as a sacred duty of everyone to protect them. In those days, people worshipped trees, rivers and sea which were treated as belonging to all living creatures. The children were educated by their parents and grandparents about the necessity of keeping the environment clean and protecting earth, rivers, sea, forests, trees, flora, fauna and every species of life."

In Waman Rao v. Union of India (1981) 2 SCC 362 a Constitution Bench had observed , As stated in the Report of the Committee of the Panel on Land Reforms (Government of India, Planning Commission, 1959), the policy of imposition of ceiling on agricultural lands fulfils the following objectives :-
(i) Meeting the wide-spread desire to possess land;
(ii) Reducing glaring inequalities in ownership and use of land;
(iii) Reducing inequalities in agricultural incomes, and
(iv) Enlarging the sphere of self-employment.

In M. Naga Venkata Lakshmi v. Visakhapatnam Municipal Corporation and Anr. 2007 (8) SC 748, the Supreme Court has held as follows: ...Before making the zonal plan and the master plan, the Authority was required to give an opportunity of hearing to the persons who may be affected thereby. Neither the writ court nor the court of a appeal dealt with the question as regards the right of the appellant to be heard in matter....

AIR 1979 SC 1628 In R.D. Shetty v. International Airport Authority Bhagwatti, J. speaking for the Court observed that the activities of the Government had a public element and if it entered into any contract, it must do so fairly without discrimination and without unfair procedure. Whenever the Government dealt with the public, whether by way of giving jobs or entering into contracts or issuing quotas or li- cences or granting other forms of larges, the Government could not act arbitrarily at its sweet-will but must act in conformity with standards or norms without being arbitrary, irrational or irrelevant. If the Government departed from such standard or norm in any particular case or cases its action was liable to be struck down unless it could be shown that the departure was not arbitrary but was based on some valid principle which was not irrational, unreasonable or dicriminatory.

AIR 1985 SC 1147 In Ram & Shyam Company v. State of Haryana, dealing with the question of disposal of State property Desai, J. speaking for the court said, "Let us put into focus the clearly demarcated approach that distinguishes the use and dis- posal of private property and socialist property. Owner of private property may deal with it in any manner he likes without causing injury to any one else. But the socialist or if that word is jarring to some, the community or further the public property has to be dealt with for public purpose and in public inter- est. The marked difference lies in this that while the owner of private property may have a number of considerations which may permit him to dispose of his property for a song. On the other hand, disposal of public property par- takes the character of a trust in that in its disposal there should be nothing hanky panky and that it must be done at the best price so that larger revenue coming into the coffers of the State administration would serve public purpose viz. the welfare State may be able to expand its beneficial activities by the avail- ability of larger funds. This is subject to one important limitation that socialist property may be disposed at the price lower than the market price or even for a token price to achieve some defined constitutionally recongnised public purpose, one such being to achieve the goals set out in Part IV of the Constitution. But where disposal is for aug- mentation of revenue and nothing else, the State is under an obligation to secure the best market price available in a market econo- my. An owner of private property need not auction it nor is he bound to dispose it of at a current market price. Factors such as per- sonal attachment, or affinity, kinship, empa- thy, religious sentiment or limiting the choice to whom he may be willing to sell, may permit him to sell the property at a song and without demure. A welfare State as the owner of the public property has no such freedom while disposing of the public property. A welfare State exists for the largest good of the largest number more so when it proclaims to be a socialist State dedicated to eradica- tion of poverty. All its attempt must be to obtain the best available price while dispos- ing of its property because the greater the revenue, the welfare activities will get a fillip and shot in the arm. Financial con- straint may weaken the tempo of activities. Such an approach serves the larger public purpose of expanding welfare activities primarily for which Constitution envisages the setting up of a welfare State."

AIR 1986 SC 1158 In Chenchu Rami Reddy v. Government of Andhra Pradesh THAKKAR, M.P. (J) VENKATARAMIAH, E.S. (J) it was observed that public officials entrusted with the care of 'public property' were required to show exem- plary vigilance. The Court indicated that the best method of disposal of such property was by public auction and not by private negotiation. That was a case where land belonging to a Math was sold by private trenty for Rs. 20 lakhs when there were people ready to purchase the land for Rs. 80 lakhs. The difference between sale of land and other readily saleable commodities and the allotment of land for estab- lishing a modern Five-Star Hotel of International standard is so obvious as to need no more explanation. On a consideration of the relevant cases cited at the bar the following propositions may be taken as well estab- lished. State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the depar- ture must be rational and should not be

suggestive of dis- crimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appear- ance of bias. jobbery or nepotism.

The impugned order deserves to be quashed; (i) as it suffers from the vice of non-application of mind to essential matters; and (ii) as there is no compliance with the relevant statutory provision. The impugned order, far from recording the satisfaction that it is in the interest of the institution to sell the lands otherwise than by public auction, does not even reveal awareness (1) as regards the necessity for being so satisfied and (2) as regards the mandatory obligation imposed by the statute to record the reasons for forming such an opinion in the order itself. In the instant case, there is nothing to show that the authority which passed the impugned order was even aware of the essential pre-conditions envisioned by the statute. On the other hand, it is clear that if the concerned authority had even stolen a casual glance at the relevant statutory provision it could not have failed to say, what it was bound to say, if it was so satisfied, that the departure from the prescribed mode of selling by public auction was in the interest of the 'Math'. Nor could it have failed to record its reasons in support of this conclusion, for the statute in so many words, casts an obligation on the concerned authority to record such reasons in the order itself. The inference is therefore irresistible that the competent authority had failed to direct its mind to the requirements of law before passing the impugned order.

What belongs to 'many', collectively, does not cause pangs to 'any', for no one is personally hurt directly. That is why public officials and public minded citizens entrusted with the care of 'public property' have to show exemplary vigilance. that is true of 'public property', is equally true of property belonging to religious or charitable institutions or endowments. Properties of religious or charitable R institutions or endowments must be jealously protected. A large segment of the community has beneficial interest in it A (that is the raison d'etre of the Act itself). The authorities exercising the powers under the Act must not only be lost alert and vigilant in such matters but also show awareness of the ways of the present day world as also the ugly realities of the world of today. They cannot afford to take things at their face value or make a less than the closest-and-best-attention approach to guard against all pitfalls. The approving authority must be aware that in such matters the trustees, or persons authorised to sell by private negotiations, can, in a given case, enter into a secret or invisible under-hand deal or understanding with the purchasers at the cost of the concerned institution. Those who are willing to purchase by private negotiations can also bid at a public auction. Why would they feel shy or be deterred from bidding at a public auction? Why then permit sale by private negotiations which will give rise to public suspicion unless there are special reasons to justify doing so? and care must be taken to fix a reserve price after ascertaining the market value for the sake of safeguarding the interest of the endowment.

In Gurpal Singh v. State of Punjab & amp; Others (2005) 5 SCC 136, the appointment of the appellant as Auction Recorder was challenged. The Court held that the scope of entertaining a petition styled as a public interest litigation and locus standi of the petitioner particularly in matters involving service of an employee has been examined by this Court in various cases. The Court observed that before entertaining the petition, the Court must be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. The court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions.

This Court in Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India & amp; Others AIR 1981 SC 298 at page 317, held that our current processual jurisprudence is not of individualistic Anglo-Indian mould. It is broad-based and people-oriented, and envisions access to justice through `class actions', `public interest litigation', and `representative proceedings'. Indeed, little Indians in large numbers seeking

remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concepts of `cause of action', `person aggrieved' and individual litigation are becoming obsolescent in some jurisdictions.

In Sunil Batra v. Delhi Administration & amp; Others AIR 1978 SC 1675, the Court departed from the traditional rule of standing by authorizing community litigation. The Court entertained a writ petition from a prisoner, a disinterested party, objecting to the torture of a fellow prisoner. The Court entertained the writ after reasoning that "these 'martyr' litigations possess a beneficent potency beyond the individual litigant and their consideration on the wider representative basis strengthens the rule of law." Significantly, citing "people's vicarious involvement in our justice system with a broad-based concept of locus standi so necessary in a democracy where the masses are in many senses weak," the Court permitted a human rights organization to intervene in the case on behalf of the victim.

In Hussainara Khatoon & Others v. Home Secretary, State of Bihar, Patna AIR 1979 SC 1369, P. N. Bhagwati, J. has observed that "today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to (sic) about changes in their life conditions and to deliver justice to them. The poor in their contact with the legal system have always been on the wrong side of the line. They have always come across 'law for the poor" rather than law of the poor'. The law is regarded by them as something mysterious and forbidding--always taking something away from them and not as a positive and constructive social device for changing the social economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker section of the community.

In Prem Shankar Shukla v. Delhi Administration AIR 1980 SC 1535, a prisoner sent a telegram to a judge complaining of forced handcuff on him and demanded implicit protection against humiliation and torture. The court gave necessary directions by relaxing the strict rule of locus standi.