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THE JOURNAL OF RAJASTHAN STATE JUDICIAL ACADEMY

VI Issue
Edition : 2009

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342003 (Raj.) Telephone : 0291-2654701 Fax : 0291-2654702

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From the Desk of Director

Gradually growing dowry deaths, honour killings, ethnic violence, communal riots etc. are mushrooming like epidemics, weakening the edifice of our democracy. Corruption and criminalization is deepening its roots in the society and have become the order of the day. In these alarming situations, citizens of the nation have set their eyes on judiciary with the hope that it shall fulfill dreams of an ideal society.

Various welfare schemes are being floated by the organs of the State merely for befooling poor electorates and to derive personal benefits. It is more than an admitted position that the projected 'ultimate beneficiary' is getting only a meagre share. Happily, Judiciary is far from such a criticism and is seriously aiming at its objects i.e. reduction of arrears of cases, spreading legal awareness, dispensation of justice etc.

Judiciary of our country has made untiring efforts for nurturing our democracy since last more than half decade. Its appetite for imparting justice to a common man is unfazed and unquestionable. Still, more important role of judiciary for curbing social evils, eradicating ignorance & inequalities and upliftment of victims and have-nots of the society is desirable. To achieve these solemn objects, sturdy independence, quality of thoughts, geniality, liberal mind and unflagging and effervescent enthusiasm are expected from Judges and Judicial Officers. Zeal to do justice without fear and favour is a hallmark of a great Judge. If Judges take a vow to administer justice, uphold our Constitution and Rule of law, 'we the people of India' shall see that an egalitarian Society dreamt of by founding fathers of our Constitution is in offing. It will be an ideal situation for creating an environment of amity, prosperity and good governance. Faith of a common man in our judiciary is immense and will be reinforced when it shall redeem the status of golden bird for our country.

Bhuanesh Narain Bhatt

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JUDGMENT WRITING

Justice Kailash Joshi*

Almost every judicial proceeding ultimately culminates into final order or judgment, which determines and decides the rights, obligations and liabilities of the parties in a reasoned manner. A judge is normally judged by his orders and judgments which is the principal instrument of rendering justice. The perception of people about personality and performance of a provider of justice is principally derived from the judicial activities of judge concerned, therefore, it is all the more important to achieve perfection in the art of writing judgment.

At the very out-set, let me refer to the oldest surviving courtroom drama in world literature, written by a Greek playwright "Aeschylus" in 458 B.C. which reads as follows:

"Fair trial, fair judgment.....
Evidence which issued clear as day.....
....[Q]uench your anger; let not indignation begin
Pestilence on our soil, corroding every seed
'Til the whole land is sterile desert.....
.....[C]alm this black and swelling warth."

The world at the beginning of twenty first century is dramatically different from what it was even two decades ago. A new world order is emerging in the new borderless world and it is possible that old conflicts may get substituted by new ones. The role of the judges in the emerging scenario is not only 'speedy dispensation of justice' but its aim should be to do best to prevent disharmony in society.

Acquisition of knowledge is like an endless ocean and one requires guidance and support by several individuals in order to derive out a handful of pearls from the depth. Theoretical knowledge without practical learning is of little value. In order to achieve practical, positive and concrete results along with theoretical concepts, the exposure of

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real life situation is very much needed.

Experience shows that judgment should be delivered at an early date after conclusion of the hearing. If the date fixed for pronouncement of judgment is adjourned without cogent and convincing reason or an undue long date is fixed for judgment then that will create suspicion in the mind of litigating public about integrity and impartiality of the judge concerned and at the same time, will afford an opportunity to the miscreants to misuse the occasion by misleading parties and procuring illegal gratification in the name of judge. When hearing is completed, the judgment should come out as early as possible. Judgment involving important points of law and having vital impact requiring utmost care, considerations, critical analysis may require some time, but not long time. Obviously, writing of judgment is an art, but once perfection is achieved it will improve the efficiency.

It merits the equal importance that the judgment should be precise, avoiding unnecessary analysis/quoting or reproducing the extracts from documents/witnesses/pleadings/citations. There are many reasons behind lengthy judgments like excessive citations of previous cases and other writings, prolixity in arguments, presentation of several separate opinion in cases in which a single opinion would or might have been sufficient and also one reason can be excessive reporting of judgments. So while writing a precise and effective judgment, one should try to eliminate such things.

Art of writing judgment can not be said to be an art in strict sense because judgment writing is an essential feature of judicial functioning to be performed by a judge individually. This process of arriving at his/her own conclusion depends upon his/her own style, skill to marshall facts and evidence keeping in view the facts and circumstances of each case. Pronouncement of reasoned judgment is an essential requirement from different prospective i.e. for the litigant, legal profession, appellate/ subordinate courts and judge's own conscience.

Vision for writing judgment may be endless but I hold an opinion that an effective and precise judgment should contain following features in brief:

- (1) Brevity
- (2) Effective language and style
- (3) Reasoned approach and attitude.

Of these, the reasons must be explicit to enable the parties effectively to exercise their rights in appeal; should sufficiently communicate why and how this conclusion is drawn and why preference to one witness is given over other. Some things depend on impression. Intellectual honesty can, and should, be a sufficient guide. There are errors or misunderstandings to be guarded against; e.g. when a discretion is exercised, all relevant, and no irrelevant, matters are to be taken into account. A defective statement (“Taking into account *these* matters, I find I therefore conclude....”) suggests that other matters were ignored. Misapprehension may be avoided by an appropriate formula (“I have considered all the evidence. I think is of particular importance My conclusion is”). If he does not, his judgment is apt to be misunderstood by the parties in appeal. The finding should be indicated, not merely because it is part of the grounds for the judge’s conclusion but also because, if there is disagreement with his conclusion, it may help to show why he decided as he did. The language must be plain and the frame must be systematic. Cases not involving complicated issues may be dictated extempore as it avoids delay in delivery of judgment. However, avoid it if it is undesirable on account of there being some other work of urgent nature. Maintain brevity and try to do complete justice.

A reasoned judgment is important first, to explain to the parties that how and why the result was reached, especially to losing party, that why it lost the case. Secondly, if the judgment exposes the judges reasoning on matter of fact and law effectively then in case of further appeal, the appellate court finds it convenient to examine the soundness of judgment. Third purpose is exposure of any error or deficiency in area of public administration. Fourth one is to detect indiscrepancies in law or in its administration and the last but not least-only a reasoned judgment can expose the administration of justice to the public gaze.

Even the mode of writing judgment plays an important role in effectiveness and clarity of a judgment. Specifically in open court to avoid vagueness and provide more clarity, it is better to prepare a hand written draft prior to dictation so that you can determine the length and points to be covered. It will be convenient to edit the dictated judgment.

Justice Cardozo, a great judge of U.S. Supreme Court, said in his essay on ‘Law and

Literature' that in matters of literacy style in writing judgments, the sovereign virtue for the Judge is 'clearness'. He said:

“Write an opinion, and read it a few years later when it is dissected in the briefs of counsel. You will learn for the first time the limitations of the power of speech or if not those of speech in general, at all events your own. All sorts of gaps and obstacles and impediments will obtrude themselves before your gaze, as pitilessly manifest as the hazards on a golf course.”

There is an old proverb “well begin is half done”. In a good judgment too, introductory part must contain the complete structure of the judgment i.e., point in issue, evidence available on the record should be concisely narrated, it should be followed by history and facts of the case.

No doubt every individual judge has his own style of writing judgment and it should be so. But some things are common i.e. language should be simple, presentation should be clear and avoiding repetitions. Nevertheless the issues involved in case should be narrated in beginning and final conclusion should be there in the end.

As far structural part of the judgment is concerned the first page of a judgment is often labeled as prime real estate. In a well structured judgment, the front page says it all. First page is as much for judge as for reader. It sets the foundation and maps the course of judgment. At the beginning, concisely and without unnecessary details of recitation of pleadings and the legislation of case law, the issues for determinations should be succinctly stated.

In criminal matters, the introductory note should give a brief description of facts and should be followed by a brief narration of evidence, recounting the version of witnesses. The witnesses should be grouped together. In criminal cases it is a good practice also to present the points in issue under headings, like judgment is delivered in civil cases in respect of each of the issues framed. We may call it as act of self discipline.

One should be cautious, while writing an interim order in civil cases. The order must be speaking one but not of unnecessary length. Please remember that every ex. parte interim order is an operative judgment against a party, without hearing so long as it continues to operate. Some Judges have an erroneous perception that in cases against the Government, one can be more liberal in granting interim orders or even final relief as there will be no personal hardship.

But what should not be lost sight of, is the fact that while in a private litigation, the sufferer on account of an unwarranted interim or final order may be only an individual, the entire public interest suffers where the interim or final order is against the Government.

In civil matter, introductory part of judgment should give a brief description of plaint, written statement and additional reply if any. The points of determination remains already on record termed as "Issues", so the judgment should be issue wise. The operative portion of judgment should contain specifically the relief granted/refused/partly granted and the imposition of cost. Operative portion of judgment in civil suits gain importance for the reason that ultimately it prescribes the form of decree. Virtually essential ingredients of decree should be summarised in operative portion of judgment in civil matters.

Last but not least I visualize Indian Judiciary as a system which enables us to do our bit and best to build bridges between man and man on the foundation of justice and equality and not walls of distrust. This is possible only when we educate our people as regards his rights as well as the corresponding duty which can be inculcated only through healthy judicial system.

"Of course, it is embarrassing to confess a blunder; it may prove more embarrassment to adhere to it."

Jackson

HUMAN RIGHTS OF MENTALLY ILL PATIENTS

*By Prof. (Dr.) M. K. Vyas
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(A) INTRODUCTION

Since the dawn of human civilization, mentally ill patients have received the scant care and concern of the community on account of their unproductive value in the socio-economic value system. They have not only been neglected but received step motherly treatment from the health planners especially in the developing countries. It was only after the plea of progressive incorporation of the norms of human rights and liberal jurisprudence in the respective legal systems of nation states which has created the urgency and necessity of initiating appropriate steps for the care and treatment of mentally ill persons.

Thus as a result of the growth of humanistic values, it is now admitted on all hands that a mentally ill person needs more care and concern for his treatment and protection along with other human rights. Because of the social interests involved in ameliorating their conditions, the founding fathers of the constitution directed the future Government to continuously work for improving the public health.

It is admitted on all hands that barring few exceptions, the mentally ill persons deserve the same privileges as enjoyed by any other human being. However on account of their mental disability and consequently the inability to protect themselves against exploitation and to fulfill their basic needs for existence and dignified life, have made protection of human rights, a major challenge and a growing concern.

The provisions relating to the human rights of mentally ill patients have hitherto been neither specifically documented in any code nor been prescribed or elaborated by Judiciary in India. But it is generally agreed that barring few exceptions, the mentally ill person deserves the same privileges as enjoyed by any other human being.

The meaning of the term 'Human Rights' is still vague and unclear, because some of them are enforceable in the Courts of Law and some are un-enforceable under the legal system. Besides, since its birth as a natural law ideal, its meaning and scope has undergone radical change due to advancement of culture and civilization. However, not-with-standing the controversy about their precise meaning and concept, the term human rights in a broad sense mean "those claims which every individual has or should have upon the society in which he lives"¹.

According to Richard Wasserstorm, a noted International human rights Jurist, the term 'human rights' means, "one ought to be able to claim as entitlements (i.e. as human rights) those minimal things without which it is impossible to develop ones capabilities and to live life as a human beings"². In ultimate analysis the notion of 'Human Rights' is about balancing the rights of an individual within a community³. In the context of mentally ill persons, it not only refers to their privileges but also to the remedial rights of protection against infringement of their human and other statutory rights.

However, the 'Human Rights' of mentally ill persons can be discussed under the following heads :

(B) UNDER THE NATIONAL LEGAL SYSTEM OF INDIA :-

(a) under the constitutional Law : As citizens of India, they are entitled to all those human and fundamental rights which are guaranteed to each and every citizen by the constitution of India, to the extent their disability do not prevent them from enjoying those rights or their enjoyment is expressly or impliedly barred by the constitution or by any statutory law. The fundamental right to 'life and liberty' as interpreted by the Supreme Court of India in number of landmark cases includes the right to live with human dignity and the right to health"⁴. The Supreme Court of India has also laid down that maintenance and improvement of public health is one of the obligations that flow from Article 21 of the Constitution. This means that mentally ill persons have the fundamental human right to receive quality mental health care and to humane living conditions in the mental hospitals. The right to life in Article 21 of the constitution means some thing more than survival of animal existence⁵. It would include within its ambit the right to live with human dignity, right to health, right to potable water, right to pollution free environment and right to education etc., which have been held to be part of right to life⁶. In the context of mentally ill persons, apart from above narrated rights, it also includes right to live, to work as far as possible in the community, to privacy and to lead a normal family life. The seriously mentally ill are a very special group with disabilities. The concerns with this group are two folds, not only providing the privileges to live in society along with other citizens but also ensuring their right to protection against exploitation.

The Supreme Court of India has responded several times in various litigations against the protective homes/psychiatric hospitals to improve the public health system and restore the right to health of mentally ill patients. In *S. R. Kapoor V Union of India*⁷, where through a public interest litigation, mismanagement of hospital for mental diseases located at shahadara in Delhi was brought to the notice of the Court, the court directed the government of India to take over its management from Delhi Administration and to take steps to improve its working on the lines of institution run by NIMHANS at Banglore. Like-wise, the Supreme Court also

intervened in *Rakesh Chandra Narayan V. State of Bihar*⁸, *Supreme Court legal Aid Committee V. State of M.P.*⁹, to improve the working condition of Ranchi Mental Asylum and Gwailer Mental Asylum.

In *Sheela Barse V. Union of India and Anor*¹⁰, the non criminal mentally ill persons were detained in the Jails of West Bengal. The appalling conditions in which they were held was noted with concern by Hon'ble Supreme Court which held that admission of non-criminal mentally ill persons to Jails is illegal and unconstitutional. Similarly in *Chandan Kumar V. State of West Bengal*¹¹, the Supreme Court heard of the inhuman conditions in which mentally ill persons were held in mental hospital at man-khandi in the District of Hooghli. The Court denounced this practice and ordered the cessation of the practice of tying up patients who were unruly or not physically controllable with iron chains and ordered medical treatment for these patients. However on 6th August 2001 the indifference of state and private authorities resulted in the tragic death of 26 patients in Erwadi (in Tamil Nadu) as they were tied to their beds when fire engulfed the building. Following this tragedy the National Human Rights Commission of India (NHRC) advised all the chief ministers to submit a certificate stating : - “no persons with mental illness are kept chained in either government or private institutions¹²”.

Apart from the above referred constitutional provisions and guarantees offered to mentally ill persons, vide section 2(d) of protection of Human Rights Act, 1993, which defines Human Rights to mean the “rights relating to life, liberty, equality and dignity of the individual guaranteed by the constitution or embodied in the International covenants and enforceable by courts in India” are also available to them.

(b) Human Rights under the Mental Health Act, 1987: It is now accepted that health of the people is not only a desirable goal but is also an essential investment in human resources. Under the National Health policy of India, adopted in 1983 the objective of “Health for all” has not only been reiterated but a path has also been covered towards that direction. While paying so much concern to the primary needs of the society, can we ignore that the persons suffering from mental ailments are not only equal Indian citizens, rather for the reasons of their mental condition, they deserve more care, concern and conscious efforts of the state and society for their treatment and rehabilitation in the social life as members.

It was on account of such a need and necessity and to ensure the realization and protection of human rights of mentally ill persons the government of India introduced the new Mental Health Act, 1987, to replace the old and obsolete Indian Lunacy Act of 1912. This new Act of 1987 is no doubt a milestone in the area of promoting mental health in India as it incorporates many progressive modern and humanistic values for the care, custody and

treatment of mentally ill persons and also provides judicial safeguards and ensures human rights to the mentally ill patients.

Chapter VIII of this Act contains a very novel and explicit provision of protection of human rights of mentally ill persons. Section 81 of the Act provides that :-

- (1) No mentally ill person shall be subjected during treatment to any indignity (whether physical or mental) or cruelty.
- (2) No mentally ill person under treatment shall be used for purpose of research, unless- (i) such research is of direct benefit to him or purposes of diagnosis or treatment; or (ii) such person, being a voluntary patient, has given his consent in writing or where such persons (whether or not a voluntary patient) is incompetent, by reason of minority or otherwise, to give valid consent, the guardian or other person competent to give consent on his behalf, has given the consent in writing, for such research.
- (3) Subject to any rules made in this behalf under Section 94 for the purpose of preventing vexatious or defamatory Communication or Communications pre-judicial to the treatment of mentally ill persons, no letter or other communications sent by or to a mentally ill person under treatment shall be intercepted, detained or destroyed.

The doctrine of informed consent is partially recognized under the Mental Health Act, 1987, when a patient voluntarily admits himself in the hospital or accepts treatment without any admission. When a mentally ill patient detained as an in-patient and does not have property to bear cost of treatment, in such cases his expenses shall be borne by the Government of the State (Section 78).

If a mentally ill patient owns a property and he is not in a position to manage his property, the Court may entrust the management of such property to the Court of Wards (Section 54 {1}). Under Section 97 of the Act when a mentally ill person is not represented by a legal practitioner in any proceeding under mental health Act 1987 before a district court or a magistrate and such a patient does not have sufficient means to engage a legal practitioner, then the District Court or magistrate shall assign a legal practitioner to represent him at the expense of the state.

The above provisions though are noble but clearly indicates that the Act does not spell out much on Human Rights nor does it covers neglect or cruelty to mental patient sustained in families or alternative system of care like magicians, healers and quacks. The Mental Health Act, 1987 also does not spell out any enforceable right of the mentally ill to minimum standard of care and treatment. The good faith clause (Section 92) dispenses with accountability of the government or its servants for any negligence in the care and treatment of inmates of asylums.

The provision for legal aid to the mentally ill (Section 91) restricts the facility to proceedings before a District Court or a magistrate. The Act is silent on the right to legal aid and counseling at all stages including the facility of approaching the High Court or the Supreme Court.

The Mental Health Act also by definition of mentally ill persons excludes from its regime the mentally retarded. It also does not differentiate between the various degrees of illness that requires specialized care and treatment. Though it permits the commitment to hospitals of the criminal mentally ill, it makes no special provision for their care treatment and discharge. Besides the above, there is no provision for compensating those wrongfully incarcerated or negligently treated or victimized in any manner by misuse or abuse of powers under the Act. Another important shortcoming in this context is that there is no right to rehabilitation of those mentally ill discharged after being found fit.

(C) Human Rights of Mentally ill Persons and International Legal Order: In the arena of International Legal Order, various covenants, conventions & protocols have been signed or agreed upon by sovereign state to respect & protect the human rights of individuals including mentally ill persons. The United Nation has defined ‘Human Rights’ to mean “generally as those rights, which are inherent in our nature and without which we can not live as human beings”. In 1948 the United Nations through its declaration on Human Rights, affirmed the basic principle that a mentally ill person should at all times be treated with humanity and respect for the inherent dignity of the person. Every person with a mental illness should have the right to exercise all civil political, social and cultural rights. ‘The Declaration of the Rights of the Disabled, which includes persons with mental illness, was adopted by the United Nations in 1975¹³.

Article 12 of the International covenant on Economic, Social and Cultural Rights, 1966 also provides “that the state parties to the present covenant recognize the rights of everyone to the enjoyment of highest attainable standards of physical and mental health. As far as women mentally ill patients are concerned, article 12 of the convention on the elimination of all forms of discrimination against women provides that state parties shall take all appropriate measures to eliminate discrimination against women in the field of health. In the area of providing access to free medical services to mentally ill patients, Article 19, of the 1969 Declaration on Social Progress and Development could be relied upon, which calls for “the provision of free health services of the whole population and of adequate preventive and curative facilities and welfare medical service accessible to all”.

The Declaration on the Right to Mentally Retarded persons was adopted by the General Assembly on 20th December 1971. Keeping in view the necessity of providing help to mentally retarded persons in order to enable them to develop their abilities and promoting their

integration in the normal life, the Declaration provides a frame work with in which national and International actions should be initiated for the advancement of rights set forth in the Declaration.

(D) International year of Disabled Person 1981: The General Assembly on 19th December 1978, decided to observe the year 1981 as International year for Disabled persons with the following objective :-

- (a) Helping disabled persons in their physical and psychological adjustment to society;
- (b) Promoting all national and International efforts to provide disabled persons with proper assistance, training, care and guidance, to make available to them opportunities for suitable work and to ensure their full integration in society.
- (c) Encouraging study and research projects designed to facilitate the practical participation of disabled persons in daily life, for example for improving their access to public buildings and transportation systems.
- (d) Educating and informing the public of the rights of disabled persons to participate in and contribute to various aspect of economic social and political life; and
- (e) Promoting effective measures for the prevention of disability for the rehabilitation of disabled persons.

(E) The persons with Disabilities (Equal Opportunities, Protection of right and full participation) Act, 1996: The preamble of the Act makes it clear that the Act, was enacted with the object to enable a disabled human being to attain his full ‘personality’ which includes his ‘duty’ and ensure ‘equal opportunity’. The expression ‘disability’ has a wider meaning and includes within its ambit mentally ill patients and mentally retarded persons.

The persons with ‘disabilities’ are granted many benefits under the Act and includes the following :-

- (1) Prevention and early detection of disabilities (Section 25).
- (2) Education (Section 26 to 31).
- (3) Employment (Section 32 to 41).
- (4) Affirmative Action (Section 42 & 43).
- (5) Non-discrimination (Section 44 to 47).
- (6) Social Security Section (66 to 68).

Thus the above referred Act mandates the Central, State and local Government to ameliorate the dignity, education and employability of persons suffering with mental illness.

From the perusal of the above referred provision, it is evident that under various International covenants right to health is considered as a basic human right. It stresses on

highest attainable standard of physical and mental health by improving all aspects of environment by creating conditions which would assure to all, medical services and medical attention in the event of sickness, disease of infirmity. Perhaps inspired by these covenants and emphasizing the need of human rights for the mentally ill patients, the National Human Rights Commission has opined that “patients though reside in psychiatric hospital are entitled to get healthy and good treatment free from undue dependence and atrocities After their treatment and cure they are entitled to collective social and family life as a matter of right”¹⁴.

Thus rights of mentally ill have emerged as a growing concern all over the world. In this context, it is submitted that all the categories of staff in a psychiatric hospital or Nursing Home from Medical Superintendent to ward attendants should be made aware of those rights through a series of orientation programmes. That these rights are protected should be ensured by the hospital administration. If any violation of the rights of mentally ill should occur, the monitoring team within the hospital should take appropriate action against the individual in addition to preventive steps.

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| The law cannot make all men equal, but they are equal before the law in the sense that their rights are equally the subject of protection and their duties of enforcement. Pollock |
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EVIDENTIAL VALUE OF EXPERT OPINION –
A COMPARATIVE STUDY OF COMMON LAW AND CIVIL LAW SYSTEMS

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The administration of justice is an indispensable task of every modern welfare country but it is much arduous to accomplish it. Though absolute justice is an ultimate goal yet legal justice is imparted by the courts according to prevailing laws of the nation. It is possible only when rightful claims of the parties are recognized and enforced by the courts.

In courts, both the parties put their claims and plead them as genuine; it is for the court to ascertain the truth. Human knowledge is always incomplete and imperfect. Further, the courts are not provided with a magic mirror in which it can see the true picture of the case. Difficulty becomes more acute when technical matter is involved in the case, which requires special or scientific knowledge for its proper understanding.

For example, innumerable crimes are committed by using different types of weapons; it becomes quite difficult for the court to find out the kind of weapon with the injuries were caused to the victims. In murder cases, the court has to determine the true cause of death but it cannot conduct post-mortem examination of dead body for want of knowledge of medical science. In some cases, fruitful conclusion can be drawn after proper comparison of finger prints, handwriting etc. but due to lack of specialized knowledge and skill the courts are incapable to conduct all such technical examinations.

In spite of all such difficulties, the judge cannot sit as silent spectator and it has to give decision after ascertaining the truth of the case. The task of ascertaining the truth becomes more difficult when false documents are prepared deliberately and witnesses willfully avoid disclosing the truth, therefore, the law of evidence allows the courts to have external aid in the form of expert evidence.

Need of expert evidence is felt in both the major legal systems of the world- the civil law system and the common law system; and the judges in both the legal systems reap the fruit of expertise knowledge but both the systems are at poles apart in dealing with the matter of expert evidence. The courts in common law give lesser value to the expert opinion, whereas the

judges in civil law usually accept the opinion of expert in every case. Though both the attitudes are not perfect absolutely but they have their own merits and demerits.

It will be worthwhile to examine legal provisions of both the major legal systems regarding expert evidence and to highlight their merits so that maximum use of expertise knowledge can be taken by the courts in the administration of justice. Today, there is no compulsion upon any State for the adoption of the principles of common law system or civil law system and the State has every right to bring reform in its legal system according to the need of time. The purpose of this paper is to highlight some good characteristics in both the legal systems so that common law countries can reap the benefit of good experience of civil law countries and vice-versa.

It will be apt to mention at the outset that there is no exact parity in laws of all continental countries but the basic principles of civil law prevailing in continental countries are the same. Thus, the author endeavors to make formal comparison of common law and civil law. Further the precedent has only a persuasive authority in the civil law system; therefore, the case comparison is not the core of this research paper. As comparative study includes the study of similarity as well as of dissimilarity, therefore, the subject of expert evidence has been examined from both the point of view. Before launching directly upon the subject, it would be proper to discuss some general aspects of similarity and contrast in both the systems

Comparison of Civil Law system and Common Law System

The law of evidence is treated as part of procedure in civil law system while in common law system it constitutes a separate branch of law. Indeed, fundamental differences in the development of their procedural institution reflected in a multitude of divergences in their evidentiary concepts. The expert evidence is appreciated with different standards in these legal systems. True reason of it can be ascertained only when the common features and contrast in procedure of both the legal systems are analyzed and evaluated.

One of the common salient features in both the legal systems is 'adversary' or in French term "*contradictoire*" form of administration of justice. A case commences upon a party's demand and not as an official inquiry; it is left to the initiative of adverse party to contest demand and to frame defenses. Consequently, this principle requires that no decision should be given without providing reasonable opportunity to both the parties in the case. It is for the parties to initiate the proceedings and left to them to present the facts in support of their demands and defenses.¹

¹ Arthur Lenhoff, the Law of Evidence – A comparative Study Based Essentially on Austrian and N.Y. Law, 3 A.J.C.L. (1954) 313

Contrasts in procedure of both the legal systems are of many folds. Firstly in common law there is a jury system and they have to give their verdict. In civil law, judge has to ascertain the facts not the jury. Secondly, in Common Law witnesses depose facts and disclose information before jurors, while in civil law testimony of witnesses has to be conveyed to the court itself. Thus, expert witnesses are examined by the court and not by any body on behalf of the court. Thirdly, in civil law court prepares *protocol*, which in fact is condensed form of all essential occurrences during the hearing that is the party's allegations, testimony of witnesses, disposition of experts etc. In common law judge prepares records which are infinitely larger than resume protocol. The evidentiary value of protocol is much higher than that of such record as the former is by and large conclusive in nature and serves the purpose as the basis of judgment.

Fourthly, the common law excludes any reference to evidence in the pleadings. In civil law, the parties have to disclose evidence in pleading itself. French and Italian laws provide that every allegation and counter allegation have to contain reference to the corresponding media of proof as evidence.² Therefore, in civil law the fundamental principle of pleading "plead facts not evidence" is not accepted. But in common law matters of evidence are not advised to be pleaded.

Fifthly, in civil law parties are duty bound to present truthfully, unequivocally and completely all material facts that are related to their contentions. The court has to ensure that all relevant facts are stated and all means of proof for allegations are put forward. The court can seek full information from the parties whether pleaded or alleged by parties or not. In common law, parties decide what is to be pleaded and how it is to be proved. Sixthly, in civil law, judge has been granted wider province of activity in taking evidence in the case. The court itself conducts examination of parties, witnesses, experts etc. After the interrogation by the judge, the counsel of the parties may ask further questions.³ In common law, it is upon the parties to raise pleas or allegations. They have also to choose mode of proof. Witnesses are examined by parties, though court may also ask any question for its satisfaction.

Seventhly, in common law system the counsel present evidence on every matter provided its admissibility is not successfully challenged by the opponent. The parties themselves determine the issues which are to be proved. But the civil law judge can seek more clarification and supplementation of the factual material. The court may choose a mode of

² Cited in 3 AJCL (1954) 319 by Italian C. Proc. Civ.

³ Swedish law allows the court to authorize a primary investigation by counsel in an individual case.

proof, which is not even offered by the parties. In civil law, no proof can be taken without the order of the Court.⁴

Eighthly, in Civil Law System the examination of witnesses is purely a judicial function, hence the delay tactics by the parties are discouraged. The court has to see that what is to be proved and how it is to be proved. In common law, oral hearing of witnesses is much longer and time consuming in comparison to civil law.

Ninthly, in Common Law, the law of evidence includes the principles of burden of proof. In civil law, principles of burden of proof are construed as rules of substantive law rather than of adjective law. Tenthly, in civil law there are two types of presumptions “logical inferences” and “genuine inferences” and are both irrebuttable. It is upon the court to evaluate their evidential value. In common law, presumptions of facts are always rebuttable and even presumptions of law can be rebutted when they are not conclusive.

Lastly, in civil law usually failure to make an express denial of an allegation does not amount to admission of an allegation but in common law, if defendant fails to deny the allegations, it will amount to admission.

Indeed, the differences in the matter of expert evidence are due to the different historical background of both the legal systems. In common law system, the law of evidence is the child of jury system, whereas, in civil law it is grown due to a gradual development of procedural law laid down in the Code Napoleon. Thus, the historical survey in the subject becomes inevitable for proper understanding the matter of our discussion.

Historical Survey

Expert testimony is admitted because it has become a necessity. In early part of the history of common law and civil law, when a trial was merely a submission to a mechanical process of proof, there was no need of such expert opinion. The necessity of expert assistance was recognized for the first time in common law by Lord Mansfield in **Folkes v. Chadd** in the year 1782, whereas, the frequent use of expertise in civil law is made since Code Napoleon and onward.

In the early period of common law there were four methods of trial. In the method of proof by witnesses, a party was allowed to produce witnesses to swear to a belief. The essence of that process was the taking of oath itself and not its probative worth. If defendant denied the

⁴ In Italian law, the judges have the power to order the production of documents from third parties and can use the document, thus produced ex-officio.

claim on oath, the plaintiff had to bring certain number of persons or compurgators to rebut the denial with their oath. Again the essence of this process was also the oath itself, not its evidential value.

In trial by battle, victory could not be obtained but by physical force as well as by the intervention of almighty on the side of right. In trial by ordeal, there was a process of proof designed to provide for heavenly intervention by some sign or miracle, which would determine the question of issue between the parties. In each one of these processes, the function of the court was simply to determine, which party should submit to the selected form of proof and to see that the forms were observed.⁵

But with the development of the institution of jury trial and its gradual displacement of the older form of trial, adjudication based on reasoning became popular. But early juries were not the juries as we know today. They were bodies of neighbors, already acquainted with the facts, who par-took the character of witnesses as much as of judges. By the Act of 1562-63, it was provided for the first time a process to compel witness to attend and testify in the common law courts. Later on, need was felt for specialized knowledge in deciding the case reasonably. Under such circumstances there were two methods of obtaining the requisite specialized knowledge.

One was to impanel a jury of persons specially qualified to pass judgments in a particular case, this was really a jury of experts. During the 14th Century, there were many instances, when juries were selected from tradesmen or craftsmen to decide questions relating to trade or crafts.⁶ The second method was for the court to summon skilled persons to inform it about those matters beyond its knowledge. It is highly probable that the need of expert knowledge was first met by special juries or jury of experts. However, there are also instances when court summoned skilled person to aid it on certain problems requiring peculiar experience to understand them. Holsworth says “these witnesses were regarded as expert assistants to the court.”⁷

Because early juries were expected to decide issue from their own knowledge, therefore, such expert witnesses were looked askance until 16th century. They were rather prototypes of the modern expert witnesses. Modern expert witnesses came in light in 16th century only when witnesses began to be treated as mode of proof rather than to decide the case on personal

⁵ See 1 Holdworth, A History of English Law (1926) 299-312.

⁶ See Hand, Historical and Practical Considerations Regarding Expert Testimony (1901) 15 Harv. L. Rev.40 at 41 and 42.

⁷ Holsworth, Note 5, 333 See also Thayer, A preliminary Treatise on Evidence at the Common Law (1898) 94-97.

knowledge of juries. Initially expert witnesses were called by court itself. By the middle of 17th Century the office of the juror has become clearly distinct from that of witness and the expert witnesses were started to be testified by jurors also.⁸

Later on, experts were called from both the side i.e. prosecution side and defense side. In 1782, for the first time, the necessity for skilled assistance was expressly recognized at judicial platform by Lord Mansfield in **Folkes v. Chadd**.⁹ Thus, we may conclude that there were three methods of employing skilled knowledge for the decision of issues;¹⁰ special juries, expert juries, expert witnesses called by the court and parties. Today, the last method is the best known in common law countries.

The history of expert evidence in continental law is not as interesting as that of common law. During the kingdom of Roman Empire, Roman law prevailed in all the continental countries,¹¹ but Romans allowed some local customs to remain in force. In Fifth Century, especially in France, Burgundians, Visigoths and Franks displaced Roman Empire but they too failed to washout completely the existence of Roman law in their countries.

Later on, the feudal system took birth and got firmly established in continental countries. Till Eighteenth Century main laws applicable in continental countries were Corpus Juris and feudal laws. The Nineteenth century was the era of codification. The *Code Civil Des Francais* was published in the year 1804, which became popular as Napoleon Code. There was great impact and influence of the Napoleon Code, particularly and German Civil Code generally in other countries. Italy, Belgium, Rumania, Bulgaria, Greece, Turkey, Egypt, Japan etc. followed the Code Napoleon and German Civil Code as models. Indeed these Codes were not totally new but the result of the work of lawyers imbued with Romano-Germanic law.

Meaning of Expert

Normally a person having specialized knowledge in a particular field is called an expert. Such specialized knowledge may be acquired either by reading books or by undertaking special training or by gaining practical experience in a particular field. In **Balkrishna Das Agarwal v.Smt. Radha Devi and others**, Hon'ble justices N.N. Mittal and K K.. Birla have explained the meaning of an expert as under:-

⁸ L Loyd L. Rosenthal, 2 Law and Contemporary Problems (1935) 409

⁹ Douglas, cited in 2 Law & Contemporary Problems (1935) 409

¹⁰ In Italian law the juries has the power to order for the production of the documents from third parties and can use the document.

¹¹ Amos and Walton, Introduction to French Law, 26.

“ An expert, really means a person who by reason of his training or experience is qualified to express an opinion whereas an ordinary witness is not competent to do so.¹²

The definition of an expert as envisaged under the Act¹³ is somewhat restrictive and narrow. Section 45 of the Act specifically provides that when the court has to form an opinion upon a point of foreign law or science or art and as to identification of hand-writing or finger-impressions, the opinion of persons especially skilled upon that point of foreign law or science or art or handwriting or finger- impressions, are relevant. Thus, a person skilled in a field not covered under section 45 of the Act is not treated as an expert for the purpose of giving an expert opinion. Further, the term “specially skilled” is not so helpful, because neither any academic qualification for being an expert has been laid down nor any definite period of practical experience has been mentioned in the Act.

As a matter of fact the use of the term “expert” is not confined to a professional man. An expert is one who by experience has acquired special or peculiar knowledge of the subject, which he undertakes to testify and it does not matter whether such knowledge has been acquired by study or scientific works or by practical observation.¹⁴ The court has to critically examine and decide about the competency of an expert. Sometimes, experience of a witness itself has been considered more important than his qualification.

In **Lakshmi Chand Khajuria V.Smt. Ishrao Devi**,¹⁵ the competency of an expert was in question. The witness was academically qualified but he had hardly done any work as an expert for a long time. In his disposition, he had also exceeded the limits as an expert and supported the appellant in matters, which were not within his province. The Supreme Court held that his testimony had been rightly rejected by the trial court.

In another case,¹⁶ a witness did not possess any technical qualification, as he had neither obtained a degree nor any diploma in photography but his practical experience of working as photographer in the police department for over 25 years was held sufficient enough to call him as an expert. Similarly, the mere fact that a witness is a medical man does not necessary qualify him to give evidence as an expert on the question of insanity unless it is proved that he has had experience in such matters.¹⁷

¹² AIR 1989All.133 at154

¹³ Section 45 of the Indian Evidence act,1872

¹⁴ Ricc v. Locket 8 D.L.R. 84

¹⁵ AIR 1977 SC 1694 at 1697

¹⁶ Govind Reddi, In re, AIR 1958 Mysore 150 at 179

¹⁷ R. v. Kierstead (19182 D.L.R. 193)

Thus, we may say that to be an expert, a person should be either academically qualified or must have acquired sufficient experience in a field covered under section 45 of the Indian Evidence Act.¹⁸ The opinion of an expert specially skilled but not acquired sufficient experience is always admissible but it carries lesser weight.¹⁹ The competency of an expert is a preliminary question for the judge to decide,²⁰ therefore, objection regarding competency of an expert should be raised at the initial stage of the case and it cannot be raised at the time of argument.²¹

The expert opinion requires two things for its admissibility, firstly, the expert should be competent (*peritus*) and secondly, the subject matter of the case should be of such a nature in which expert opinion is allowed.

The word 'expert' in civil law system means a person appointed by the court to carry out the investigations prescribed by the court. The person thus appointed is often but not always a technically skilled or experienced specialist in the matter in question.²²

In continental countries competency of an expert is also considered by the court. In Brazil the court has to select persons as experts who have university credentials and are professionally registered.²³ In areas, where no such experts are available, the judge can use his own discretion in designating an expert.²⁴

The word expert in French refers to a person who is especially competent in a given, usually technical subjects. In French law, however, it also means the persons appointed by the court to carry out the investigations prescribed by the court.²⁵ The person thus appointed is often, but not always, a technically skilled or experienced or specialist in the matter in question. In order to provide, some guarantee of competence as experts, official list are drawn up in various fields of knowledge. In France, the lists are prepared annually by the court of Appeal in each jurisdiction on the nomination of the courts of first instance.²⁶

Usually in each field of knowledge specific requisite of capacity are laid down by the law. In Italy, for specialization the officially designated experts receive title from the Ministry

¹⁸ See *United States Shipping Board v. Ship St. Abans*, AIR 1942 Bom. 185 at 189

¹⁹ *R. v. Silverlock* (1894) 2 Q.B. 766

²⁰ *R. v. Peeper* (1888) 15 SCR 401

²¹ *State of Bihar v. Hanuman Koeri*, 1971 Cr. L. J. 187 at 192 (Patna)

²² See James Beardle, *Proof of fact in French Civil Code*, AJCL Vol. 34 (1986) 480

²³ Keith S. Rosenn, *Civil Procedure in Brazi*, 34 AJCL (1985) 496-97

²⁴ *Ibid.* at 498

²⁵ James Beardsley, *Proof of Fact in French Civil Procedure*, 34 AJCL (1986) 480 foot note 93

²⁶ *Moris Ploscowe*, 2 *law and Contemporary Problems* 505 (1935)

of Education, if their education and prior experience is considered sufficient.²⁷ In Germany the official list of experts is compiled by the president of the Landgericht (Superior Court of General Jurisdiction). In Germany and Austria, the court prepares list of publicly accredited experts for certain branches of knowledge from which choice is normally made.²⁸

Testimony of Expert

In common law expert is called either by parties or by court itself. In some cases both the parties may call experts to give evidence on their behalf. Therefore, there are ample chances of conflict in expert evidence. It is upon the court to decide that how much weight is to be given to their opinion. Indeed, experts are called in court to assist it in technical matters but in the case of contradiction in expert evidence the court has to play the role of super expert, which is practically very difficult for it to accomplish. The court has two alternatives, either to accept the opinion of one of them or to disregard both the experts. In the last resort the court may appoint its own expert but even then, there may not be unanimous opinion and testimony may not be beyond doubt. In these circumstances the experts put the court in an embarrassing situation rather than to aid in the administration of justice.

In civil law, efforts have been made to avoid such a situation, experts are usually appointed by the court from those who are well known as official experts. In case, there are more experts, one report is prepared by them on majority view and minority view is ignored. Experts accomplish the task set out for them by investigating magistrate. The defendant may appoint his own experts but they cannot supervise the functions of official experts. The defense expert can assist the defendant in preparation of defense only.

The defense lawyer may with the prior permission of the court put some questions to official experts at the time of their oral testimony in the court. Defense experts may guide the defense lawyer but he cannot be allowed by the court to ask directly questions to an official expert. In some cases defense experts may be allowed to submit written report regarding their objections to the findings of official experts. But such report will not carry equal weight to the report of official experts.

In spite of different strategy a battle of experts is not totally avoided in civil law courts. In French and German courts, the defense has very effective chance to impugn the findings of the official expert. The official expert may be submitted for cross-examination by the defense counsel who may also call his own expert to help him in contradicting the official expert. The

²⁷ *ibid*

²⁸ Hammelmann, *Expert Evidence* 10 *Modern Law Review* (1947) 32, 38

main difference in common law practice and civil law practice is that in the former case substantive examination is conducted by the parties and the court asks only supplementary questions but in the later case the position is quite reverse.

Merits and Demerits of Civil Law System and Common Law System

The expert plays a significant role in the continental law by assisting the court in deciding cases involving technical matters. The expert possesses specialized knowledge; therefore, he is supposed to help in imparting better justice in technical cases. By having his expertise, such cases are decided rapidly. Unlike common law system there is no undue delay in justice. In spite of this, the expert testimony in continental law is not free from criticism. The vices of the “expertise” often cause the chances of judicial error.

Firstly, political and extra-legal factors influence at the time of the formation of an official list of experts. Inclusion of names in the list gives the individual certain standing a prestige in his profession. The list is prepared by the officers of Government, therefore, there are ample chances of political influence and an incompetent person may be enlisted as an expert.

Secondly, the defense expert is relegated to a secondary role. The official expert is appointed by the court; therefore, his opinion carries a greater weight. When an incompetent person is designated as an official expert, there is no check, if he gives a partial and imperfect opinion. Although investigating magistrates and trial judges are free to make their independent evaluation of expert’s findings, yet normally they are incapable to do so. They do not have the necessary technical training to make an authentic criticism; therefore, the report of the official expert is usually accepted as conclusive proof of the matter.

Thirdly, by giving lesser value to the report of defense expert, the interest of the accused is not properly protected. The principle of natural justice requires that no person should be condemned unheard, and equality before the law should be maintained in a legal system. By giving supremacy to the official expert over defense expert the equality and personal liberty are undermined. Lastly, the expert in continental law is not strait-jacketed by hypothetical questions; therefore, the testimony of an expert cannot be verified either by the presiding officer of the court or by the defense counsel.

The common law system is very particular about maintaining the quality of justice. For the sake of expediency in justice, the quality of justice is not compromised. An accused is given equal opportunity in defending his case. There is a proper check upon the entry of a false expert in the court. Before admitting the opinion, a person is examined, so that it can be ensured

whether he is really an expert or not. Unlike civil law system oral evidence is not avoided and witnesses are examined thoroughly. In spite of this, there are some defects also.

In some countries, the power to accept expert testimony is delegated to jurors, who are generally good people, but for want of specialized knowledge they are usually unable to distinguish the competent expert from the incompetent ones and obviously a large number of genuine experts do not come up for examination before the court. The partisan nature of the expert's service also makes it difficult to obtain reliable and unbiased evidence. As the parties call experts on their own behalf, which is peculiar in common law, it encourages a battle of experts, which in fact results in victimization of the less-worthy party. Worse yet, when the experts are testified on hypothetical questions it results in repugnancy and absurdity.

When all the discussion boils down to its fundamental content it is realized that both the legal systems are sailing towards extremities. The common law is suffering from judicial skepticism and the civil law judges give undue credence to the expert evidence. In common law system due regard is given to the rule of law, and the quality of justice is maintained. On the other hand, in the civil law system there is a trend toward expediency of justice and to this extent the quality of justice is compromised.

Expert Evidence in Indian Perspective

Being a part of common wealth countries India has followed common law system. Though the Indian Evidence Act was passed in the year 1872 by the English people yet the jury system is not prevailing in India as in England. Now, India has to shed its common law prejudices and should also adopt useful practices of civil law system.

In civil law a panel of expert is prepared but experts are not necessarily well qualified, skilled or experienced person. In common law, qualified or experienced persons are called for but they have to undergo preliminary inquiry so that court can ascertain the competency of an expert. Such practice causes delay in trial; therefore, we may adopt similar practice of civil law system and prepare a panel of experts with prior consultation with the appropriate court. Proper care may be taken at the time of preparation of panel so that no false expert is impaneled. In this way neither an ordinary person will claim himself to be an expert nor the valuable time of the court will be wasted in examining the competency of expert witness.

In common law an expert is examined as an ordinary witness, while in civil law an expert plays the role of auxiliary officer of the court. In former case, special status of an expert is overlooked and in later case, undue importance is given to an expert. It is suggested that an expert should not be treated at par with ordinary witness as he possesses special knowledge in

the matter. The battle of experts should be avoided. Expert should be called by the court only but reasonable opportunity should be given to both the parties to examine the expert in the matter upon which his opinion is sought. As far as possible the opinion of expert should be expressed in the form of report and oral examination should be allowed to the extent, which is deemed to be reasonable by the court. In this way the time of the court will be saved.

In civil law system, the verdict of an expert is not mandatory and the court is not bound to accept the opinion as decisive but in practice the report of an expert is treated as conclusive. In common law, the expert opinion is always doubted and due value is not attributed to it. It is suggested that till the opinion is not contradicted by any party, it should be believed as genuine. The burden of proof should be upon the party who denies the genuineness of the expert evidence.

Conclusion Suggestions

In spite of enormous development in the field of forensic science, the courts in India could not reap the fruits of it in the course of administration of justice. There is a need of popularization of forensic science among lawyers, judges, law students and all those who have some concern in the process of administration of justice. Though the expert opinion is not binding upon the court yet due regard should be given to it. Undoubtedly, the court is expert of all experts because ultimately it has to decide the case and to impart justice but at the same time it should also be remembered that expert opinions in certain fields of science like finger print, DNA etc. are exact and irrefutable. Thus a pragmatic approach of the court is required.

Now, there is a need for proper understanding and coordination among bar, bench and experts. The attitude of courts and lawyers towards expert witness is needed to be changed. The expert witness should not be treated at par with ordinary witness. Today an expert, who is well qualified and highly experienced, hesitates to appear in court for testimony only because his competency and integrity is doubted by those who know little about the subject of his specialization. Often, they have complaint that neither their genuine opinion is appreciated nor due regard is given by advocated and courts.

Obviously, the bar and bench are not well acquainted with the latest developments in the field of science. On the other hand, the experts do not understand the limitations in the judicial process and consequently there is no coordination and mutual understanding between bar, bench and experts. Though an expert can play pivotal role in the administration of justice yet he is treated as alien in the judicial process.

It is suggested that the subject of forensic science must be part of LL.B. course. Co-ordination, refresher and orientation programmes should be organized frequently in joint collaboration with bar, bench, law schools and experts so that there can be inter se dialogue. Undoubtedly, if the advantage of development in different fields of science will be taken in the judicial process, courts would be able to impart better and expeditious justice.

Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident. Above all things, integrity is their portion and proper virtue.... Let the judges also remember that Solomon's throne was supported by lions on both sides : let them be lions, but yet lions under the throne. Francis Bacon

CORPORATE RESTRUCTURING: STATUS OF DEPOSITORY RECEIPTS IN THE TAKEOVER REGIME

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Depository Receipt – Regime of Issuance

Indian companies are allowed to raise equity in the international markets through issue of ADRs (American Depository Receipts) or GDRs (Global Depository Receipts).²⁹ This investment is taken into account for purposes of determining the foreign investment in a company. The issuance is governed by the regime created by the prevailing FDI Policy³⁰ and the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993³¹.

The issue structure of the GDRs has to be approved by the Department of Economic Affairs, Ministry of Finance. The issue structure is to be determined by the company in consultation with the Lead Manager. The Reserve Bank has prescribed specific pricing and eligibility norms for an ADR/GDR issue.³²

Expanding Horizons – Airtel’s African Safari

In ongoing times of uncertainty, when corporate India is leaving no stone unturned to explore opportunities of growth, acquiring business assets in other jurisdictions, especially

²⁹Clause 2.1.9 of the Consolidated FDI Policy defines DR as follows: “*Depository Receipt*’ (DR) means a negotiable security issued outside India by a Depository bank, on behalf of an Indian company, which represent the local Rupee denominated equity shares of the company held as deposit by a Custodian bank in India. DRs are traded on Stock Exchanges in the US, Singapore, Luxembourg, etc. DRs listed and traded in the US markets are known as American Depository Receipts (ADRs) and those listed and traded anywhere/elsewhere are known as Global Depository Receipts (GDRs).”

³⁰*Consolidated Fdi Policy*, Circular 1 OF 2010, Department of Industrial Policy & Promotion, Ministry of Commerce & Industry.

³¹S-11(25)/CCI-II/89/NRI dated 12th November, 1993.

³² Annex-1 of the A.P. (DIR Series) Circular No. 11 dated September 5, 2005.

emerging markets, is a lucrative option. It facilitates the company to dwell on its core competence.

The concept of Core competency is said to have been introduced by Gary Hamel and C. K. Prahalad in their work *Core Competence of the Corporation* in the Harvard Business Review (1990). Prahalad and Hamel argued that core competency exhibits itself in core products, which are not end products in themselves but are used to create other products. As an example they gave Honda's expertise in engines. Honda was able to exploit this core competency to develop a variety of quality products from lawn mowers and snow blowers to trucks and automobiles.

For a very long time, Indian companies have been trying to foray into the African market. Most notably, the telecom companies. Africa has the fastest growing telecommunication industry. In the telecom sector alone, the sky is the limit as far as growth is concerned. Tele-density in the continent is only about 30 percent.³³ A survey by Ernst & Young shows that between 2002 and 2007, the industry grew by 49.3 percent as opposed to Asia which recorded a 27.4 percent growth.³⁴ The Ernst & Young report's estimate growth of the industry almost doubles that of Brazil which stood at 28 percent in the same period and is almost seven times the growth France which grew at 7.5 percent over the same time.

Bharti Telecommunications or Airtel is a leading telecom player in India. After capturing a hundred million subscriber base in India and given competition from other players, Bharti has been very keenly evaluating African proposals. It entered into very serious discussions with the Kuwait based Zain Telecom and the South African MTN.³⁵ A series of failed talks and from almost done to gone merger attempts with MTN, Bharti has finally sealed the deal with Zain Telecom. It acquired the African assets of the company for about \$ 10 Billion.³⁶

Alliance Foregone, Controversy Persists

Matrimony between Airtel and MTN could have created the third largest telecom operator service in the world. Nonetheless, the courtship period between the enterprises raised a

³³ C.f. "<http://economictimes.indiatimes.com/articleshow/5734531.cms>" last visited on July 17, 2010 at 12.30 PM

³⁴ *Africa Connected: A Telecommunication Growth Story*, c.f. "<http://www.itnewsafrika.com/?p=2199>" last visited on July 17, 2010 at 12.30 PM

³⁵ For greater details of the talks see "<http://economictimes.indiatimes.com/news/news-by-industry/telecom/Bharti-Zain-deal-Will-Sunil-Mittal-be-third-time-lucky/articleshow/5575727.cms>" last visited on July 17, 2010 at 12.30 PM

³⁶ See "http://www.moneycontrol.com/news/business/bhartis-zain-bid-to-be-smoother-ride-than-mtn_442063.html" last visited on July 17, 2010 at 12.30 PM

series of regulatory issues in both countries. Most of these issues, like dual listing, came to limelight largely because of the possible merger. Another issue, which emerged from the structure of the deal, was SEBI's jurisdiction over the ADRs and GDRs issued by an Indian company.

The proposed deal structure was a cash and share exchange deal. MTN and its shareholders were to receive ADRs/GDRs, equivalent to 25% and 11% of Bharti's share capital respectively.³⁷ In this regard, Airtel sought an informal guidance from the SEBI on whether the deal will be exempt from Takeover Code obligations. SEBI responded by stating that the issue shall have to abide by Chapter II disclosure obligations³⁸ and Chapter III open offer obligations shall come into force once the depository receipts are converted into shares.³⁹

Against the guidance, an appeal was filed before the SAT by an Airtel shareholder.⁴⁰ The main contention of the appellant being that such a stance will devoid the existing shareholders to take the exit route at the time of issue of ADRs/GDRs. However, the same was dismissed on a technical ground – that an informal guidance given by SEBI does not constitute 'order' and hence not appealable. SEBI is not bound by the informal guidance rendered by it but shall consider the same while arriving at a final decision.

Moving in the Other Direction

The Airtel guidance already marked a turn from SEBI's earlier stand on ADRs/GDRs.⁴¹ The June guidance was made even more conservative in September, when SEBI amended the Takeover Code to hold that ADRs/GDRs carrying voting rights⁴² are as good as shares and

³⁷See "<http://www.business-standard.com/india/news/takeover-code-change-to-impact-bharti-mtn-deal/21/29/370971/>" last visited on July 17, 2010 at 12.30 PM

³⁸ This was in direct contrast to the response given to ALMT Legal (for Goldman Sachs) in CFD/DCR/AT/IG/11504/04 dated 31 May 2004 where SEBI took the position that ADRs/GDRs do not trigger Chapter II obligations till they are converted into shares. C.f. Shishir Jose Vayttaden, *SBEI Takeover Regulations* (Edition 2010 Lexis Nexis Butterworths Wadhwa Nagpur) ('Shishir')

³⁹ Response dated 22 June 2009 to Bharti Airtel Ltd. under the Informal Guidance Scheme CFD/DCR/IG/DMS/167230/09.

⁴⁰ *Deepak Mehra v. Securities and Exchange Board of India* [2010]98SCL126(SAT)

⁴¹ See *Infra* n. 11

⁴² The holders of Depository Receipts are not members or shareholders of a company, hence not entitled to vote. However DRs with voting rights can be issued. The vote is cast on behalf of and on the direction of the holder, by the Depository, governed by a contractual relationship. There are four types of contract terms which could govern this contract a) the depository will take instruction from the DR holder and vote according to that wish b) the depository will vote according to what is in the best interest of the shareholders c) the depository will vote in favour of existing management d) the depository will not vote the shares. Only in the last case are votes not exercised. C.f. "<http://origin-www.livemint.com/2009/09/23001947/Revised-norms-a-step-in-the-r.html>" last

hence must abide by both Chapter II and III obligations. Thereby, the time of ultimate conversion into shares became irrelevant.

This decision has evoked mixed reactions from the business community. While some welcome the measure has a check on holders of DRs. DRs are traded on international stock exchanges, nonetheless, the consequence of the transfer affects an Indian entity. Others have doubted the ability of SEBI to regulate the activities of DR holders who are not known or registered entity. It is significant to note, that SEBI or commentators did not consider a specific instance of a merger between an Indian entity and a foreign entity.

The subject matter of the instant work shall be to examine the situation when DRs have been issued in pursuance of a merger.

Merger Procedure – In brief

A foreign company can merge with an Indian company by following the procedure provided for in S. 391 to 394 of the Companies Act 1964, with the sanction of the concerned High Court.⁴³ Section 394(4)(b) of the Act expressly excludes a foreign company from the expression ‘transferee company’.⁴⁴ Briefly, a scheme of arrangement has to be prepared by the Board. Then, the company approaches the High Court with the competent jurisdiction to pass an order of meeting. This order for meeting is made for every class of creditors and members. The scheme is said to have been approved after receiving a vote of three fourths in its favour.

Relevance of DRs in a Merger

Probably the most important component of the scheme is the consideration the transferor company receives. Depending on the type of merger being sought to be achieved, consideration is designed. To illustrate, in a merger by acquisition⁴⁵, like proposed Airtel-MTN, the transferor company and its shareholders receives cash or shares in a ratio determined or sometimes even both.

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⁴³ Seth Dua & Associates, *Joint Ventures & Mergers and Acquisitions in India – Legal and Tax Aspects*, (Lexis Nexis Butterworths India 2005) p. 229.

⁴⁴ Though in Moschip case [(2004) 59 CLA 354], the High Court of Andhra Pradesh observed that a liberal view of the Section should be taken and recommended a suitable modification.

⁴⁵ “merger by acquisition” means an operation in which a company (other than a company formed for the purpose of the operation) acquires all the assets and liabilities of another company that is, or other companies that are, dissolved without going into liquidation in exchange for the issue to the members of that company, or the members of those companies, of securities or shares in the first mentioned company, with or without any cash payment; c.f. European Communities (Cross-Border Mergers) Regulations 2008.

In ongoing times when companies are cash strapped⁴⁶ and not inclined to enhance their debt exposure, share exchange is a serious alternative. Especially when both the companies are engaged in similar businesses. In such circumstances, ADRs/GDRs, issued in accordance with Scheme of 1993 and the FDI policy emerge as an efficient payment route for cross border mergers.⁴⁷

Merger vis-à-vis Takeover

Both the terms ‘merger’ and ‘takeover’ lack any statutory definition.⁴⁸ Merger is the process by which shareholders of two or more companies agree to merge with any one of the companies and to take the shares of the surviving company in lieu of their shareholding in the merging company.⁴⁹ The term takeover may be described as the process whereby the majority of the voting capital is bought through secret acquisition of shares or through a public offer to its shareholders.⁵⁰ Hence both phenomena are very distinct from one and another.

Any method of corporate combination or other fundamental change can work to the substantial prejudice of minority shareholders. Accordingly, both the legislatures and courts

⁴⁶ For instance in Airtel’s case, it had to participate in the auction of the 3G spectrum.

⁴⁷ On many occasions the transferor company or its shareholders are not inclined to accept equity shares as the same are traded only on Indian stock exchanges. Like in the Airtel-MTN case, a similar demand was raised by MTN’s shareholders. Sunil Mittal extensively approached the Indian government for grant of permission for dual listing. However given RBI’s concern on Full Capital Account Convertibility, the same remains a distant possibility.

⁴⁸ Though Amalgamation has been defined in the Income Tax Act 1961, as follows:

[(1B)] “amalgamation”, in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that—

(i) all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation ;

(ii) all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation ;

(iii) shareholders holding not less than 18[three-fourths] in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation, otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company ;]

However the definition is restricted in scope.

⁴⁹ *Supra* n. 16, p. 222

⁵⁰ *Supra* n. 16, p. 309

have recognized the need to protect the minority against abuse.⁵¹ In fact the Takeover Code⁵² was enacted to provide an option to the existing shareholders to sell their shares if they do not have confidence in the likely new management of the company.⁵³

Hence, the Code obligates the Acquirer to make an open offer to the shareholders of the target company after the breach of the trigger. This is mandatory offer. It is in sharp contrast to the contractual offer the Transferee company makes in a merger proceeding. Also, there are norms on which a mandatory offer has to be priced, while in event of the contractual offer, the shareholders of both, the transferee and transferor company approve the pricing as a part of the scheme.

It is interesting to note that Takeover as a route is adopted when the Acquirer does not wish to seek approval from its own shareholders. This observation is substantiated by Regulation 12 provides that an acquirer company need not announce its intentions to take over if it is being done in pursuance of a special resolution passed by the shareholders in a general meeting.

Exemption from Application

Regulation 3(1)(j)(ii) of the Code exempts transfer of shares from obligations under Regulation 10,11 and 12 pursuant to a *scheme of arrangement or reconstruction including amalgamation or merger or demerger under any law or regulation, Indian or foreign*. This is clear indication at differentiating takeover from a scheme of merger.

Infact such a provision is not a distinguished feature of the Indian Takeover Code but is found in other developed jurisdictions as well. For instance, Appendix 7 of the United Kingdom's Takeover Code provides a separate framework in event of a scheme of arrangement sanctioned by the Court. The Offeree is not required to make a mandatory offer after the sanction from the Panel on Mergers and Takeovers is obtained.⁵⁴

Similarly in the Singaporean Code on Takeovers and Mergers⁵⁵, a scheme of merger is exempt from making a mandatory offer. However, like the British Code, the Singaporean Code also contains a series of other safeguards. For example, persons not entitled to vote on the

⁵¹ James D. Cox and Thomas Lee Hazen, *Corporations*, (2nd Edition, 2003, Aspen Publishers, New York)

⁵² Securities And Exchange Board Of India (Substantial Acquisition Of Shares And Takeovers) Regulations, 1997

⁵³ *Shishir*

⁵⁴ The situations in which the consent of the Panel can be granted is enlisted as Notes in the Appendix 7 itself.

⁵⁵ The Singapore Code On Take-Over And Mergers

scheme, the contents of the scheme and explanation offered to the shareholders, enhancing shareholding post merger etc.

DRs also exempt?

The question remains whether DRs issued in pursuance of a scheme of merger can also avail of the Regulation 3(1)(j) exemption? The answer could be in the affirmative, provided the following:

- Issued as a consideration for merger
- The scheme of merger has been approved under the appropriate law. It is interesting to note here that the Regulation mentions both Indian and foreign law, hence indicating the possibility of application in event of a cross border merger as well

In *Re Ondeo Nalco*⁵⁶ SEBI took the position that a tender offer followed by a merger is not covered by this exemption. The SAT⁵⁷ affirming SEBI's position held that:

“From the aforesaid facts it is clear that the instant case is not a case of direct merger between two companies pursuant to a scheme of merger . In the instant case the merger between the H2O and ONC USA has taken place pursuant to the open offer (made by the Acquirer to acquire majority shareholding) as distinguished from "scheme....." as envisaged in the Regulations. In the instant case, the merger between H2O, a wholly owned subsidiary of the Acquirer and ONC USA was contingent upon acquisition of majority shares in the open offer made by H2O for acquisition of shares of ONC USA. Further, in case if the requisite number of shares, i.e., majority shares, were not received in the open offer by H2O, the merger between the two companies would not have been carried out. On receiving 97% shares in the open offer, H2O acquired majority shareholding in ONC USA and also acquired control over it.”

Also consider the case of Akzo Nobel NV.⁵⁸ Here the acquirer proposed to make an offer for all shares of an English company. This English company in turn held 52.69% of an Indian listed company's shares. Like an Indian amalgamation, an English scheme of merger, also takes effect after sanction from the High court. However, unlike in India, both the companies would

⁵⁶ SEBI Oder date April 9 2003, No. CO/10/TP/04/2003

⁵⁷ *SEBI v. Ondel Nalco India Limited* MANU/SB/0054/2003

⁵⁸ Informal Guidance Response dated 12 December 2007, CFD/DCR/TO/AK/11042/2007

continue to exist after the acquisition. SEBI opined that this acquisition would be exempted under regulation 3(1)(j)(ii).

Compliance with the Takeover Code will not only increase transaction cost but also make the process more cumbersome. Allowing DRs to pass through such a channel shall probably not be regulatory disaster. For starters, it shall provide Indian companies with an alternative other than an all cash deal. It makes more sense more the foreign investor, who retains the ability to actively trade these DRs on international stock exchanges and have them denominated in foreign currency.

Also the capital market regulator in the country of issue impose certain additional disclosure norms on the issuer (the Indian company), making the corporate governance practice smoother.

Example ADRs listed on U.S. exchanges or on the U.S. over-the-counter markets, are subject to the Securities Act of 1933 and the Securities Exchange Act of 1934. Under the Exchange Act, issuers of ADRs that list the securities on a U.S. exchange or have them quoted on NASDAQ must comply with the periodic reporting requirements.⁵⁹ When the ADRs are listed on a U.S. exchange, both the ADRs and the deposited foreign securities underlying the ADRs must be registered with the SEC pursuant to Section 12(b) of the Exchange Act, or sold pursuant to an exemption from the Exchange Act.⁶⁰

Regulatory Concerns

The characteristic beauty of a depository receipt is its ability to be traded on the international market without the need to comply with the laws of the country of incorporation of the issuer of the underlying shares.⁶¹ However the crux of the matter is trading in DR beyond the jurisdiction has implications in the country of incorporation. Therefore SEBI's concern is more than valid. As per the FDI policy, the proceeds from ADR/GDR cannot be employed to invest in the real estate market and can be procured in India only when there is actual requirement of funds in India. Till then, the funds are deployed in the enumerated sources.⁶²

⁵⁹ American Depository Receipts, Exchange Act Release No. 29226, International Series Release No. 274, [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) P 84,740, at 81,586 (May 23, 1991)

⁶⁰ Joseph J.M. Orabona, *There's A New Sheriff In Town - Will The New Sec Chairman Allow Issuers Of American Depository Receipts To Use International Accounting Standards To Satisfy Listing Requirements On U.S. Exchanges?*, 22 J. Nat'l A. Admin. L. Judges 223.

⁶¹ Dennis Campbell, *International Securities Law And Regulation*, (Vol. III) p. 403

⁶² (a) Deposits, Certificate of Deposits or other instruments offered by banks rated by Standard and Poor, Fitch, IBCA, Moody's, etc. with rating not below the rating stipulated by Reserve Bank from time to time for the purpose; (b) Deposits with branch/es of Indian Authorized Dealers outside India; and

It has been a settled proposition in securities law, that generally, the country with primary interest in regulating a tender offer is the target's home country or the country under whose laws the target is incorporated.⁶³

Therefore the rationale behind the September 2009 amendment is justified. By means of Regulation 3(2), application of Regulation 10, 11 and 12 are extended to ADR/GDR issue if issued with voting rights. Further under Regulation 14(2) imposes the obligation of making a public announcement. Usually these provisions will not be attracted as DRs are picked up by institutional investors for investment purposes, not for seeking control over the company. A single entity is highly unlikely to pick up a stake in DRs which would warrant application of the takeover code (i.e. 15% or more). Nonetheless, this safety valve is required to protect Indian companies from foreign takeover attempts.

Nonetheless the merger exemption must be granted. The need of hour is to expand the exemption contained in Regulation 3(1)(j)(ii), currently it is a blanket clause, drawing from the British and Singaporean regimes. The exemption should not come into operation automatically but granted after evaluation of the scheme of merger by the SBEI.

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore, belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. *Alexander Hamilton*

(c) Treasury bills and other monetary instruments with a maturity or unexpired maturity of one year or less.

⁶³ Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation Of Foreign Tender Offers*, 87 Nw. U. L. Rev. 523, (Winter, 1993)

न्यायिक अवमानना : लोकतांत्रिक दृष्टिकोण

डा. चन्द्रिका प्रसाद शर्मा,

आर.एच.जे.एस. (से.नि.)

अध्यक्ष, जिला उपभोक्ता संरक्षण मंच,

सवाई माधोपुर

लोकतंत्र में 'आमजनता' को सर्वोच्च स्थान दिया गया है, क्योंकि यह लोकतंत्र का सर्वमान्य सिद्धान्त है कि प्रत्येक लोकतांत्रिक देश का प्रशासन 'कानून के शासन' का मार्ग प्रशस्त करने वाले कानूनों के माध्यम से किया जावेगा। इसका प्रभाव व परिणाम यह है कि न्यायपालिका, कार्यपालिका व विधायिका आम जनता के सेवक से अधिक कुछ नहीं है। इस प्रकार हमारे देश की जनता ही हमारे इस देश की वास्तविक स्वामी है और उपरोक्त सभी 'अधिकार सम्पन्न' संस्थाएँ जनता की सेवक मात्र हैं।

दूसरे शब्दों में, देश के वास्तविक स्वामी (जनता) को अपने सेवकों के कार्य और कार्य को करने की प्रक्रिया की आलोचना करने का व्यापक अधिकार प्राप्त है। विशेष रूप से उन परिस्थितियों में, जब उपरोक्त संस्थाएँ जनता की वैधानिक आकांक्षाओं के अनुरूप आचरण और व्यवहार करने में असफल रहती हैं। अतः दूसरा तार्किक निष्कर्ष यह निकलता है कि किसी भी लोकतंत्र में आम नागरिक को न्यायपालिका या न्यायाधीशगण की समीक्षा और आलोचना करने का अधिकार हासिल है।

अब प्रश्न यह उठता है कि फिर इस लोकतांत्रिक देश में 'न्यायालय की अवमानना अधिनियम' की रचना की क्या उपादेयता है, जो कि कुछ सीमाओं तक, आम नागरिक को न्यायाधीशगण द्वारा किये जाने वाले कार्यों की आलोचना से प्रतिबंधित करता है।

इतना तो तय माना जा सकता है कि न्यायालय के अपने कार्य को प्रभावी रूप से अंजाम देने के लिए 'न्यायालय अवमानना अधिनियम' का होना आवश्यक है, लेकिन यह शक्ति आम नागरिक को किसी न्यायाधीश के द्वारा दुरुचरण करने या कर्त्तव्य निर्वहन में उपेक्षा बरतने पर टिप्पणी करने से प्रतिबंधित करने के लिए प्रयोग में नहीं लाई जा सकती

है। संविधान के अनुच्छेद १९(१)(ए) में आम नागरिक को बोलने एवं अभिव्यक्ति की स्वतंत्रता का अधिकार प्रदान किया गया है। इसके विपरीत संविधान के अनुच्छेद १२९ व २१७ उच्चतम व उच्च न्यायालय को न्यायालय की अवमानना के लिए दोषी व्यक्ति को दण्डित करने का अधिकार प्रदान करते हैं। अनुच्छेद १२९ के प्रावधान निम्न प्रकार हैं:-

‘उच्चतम न्यायालय का अभिलेख न्यायालय होना’ - उच्चतम न्यायालय अभिलेख न्यायालय होगा और उसको अपने अवमान के लिए दण्ड देने की शक्ति सहित ऐसे न्यायालय की सभी शक्तियां होंगी ।

अनुच्छेद २१७ के प्रावधान निम्न प्रकार हैं:- ‘उच्च न्यायालयों का अभिलेख न्यायालय होना’ - प्रत्येक उच्च न्यायालय अभिलेख न्यायालय होगा और उसको अपने अवमान के लिए दण्ड देने की शक्ति सहित ऐसे न्यायालय की सभी शक्तियां होंगी।

इस प्रकार न्यायपालिका को प्राप्त उक्त शक्तियां, अनुच्छेद १९(१)(ए) में जो अभिव्यक्ति का अधिकार आमजन को उपलब्ध है, उसको सीमित कर देता है।

अब प्रश्न है इन दोनों प्रावधानों का सामंजस्य किस प्रकार किया जावे। यदि हम यह स्वीकार करते हैं कि भारतीय लोकतंत्र में आम नागरिक ही सर्वोच्च सत्ता का केन्द्र बिन्दु है तब सामंजस्य के लिए हमें आम नागरिक की अभिव्यक्ति का अधिकार जिस हेतु अनुच्छेद १९(१)(ए) में व्यवस्था करी गई है, को न्यायालय अवमानना हेतु दंड के अधिकार के ऊपर प्राथमिकता देनी होगी। अतः अवमानना हेतु दंड का अधिकार, अभिव्यक्ति के व्यक्तिगत अधिकार के अधीनस्थ हो जाता है। दूसरे शब्दों में, आम नागरिक को न्यायाधीशों की आलोचना करने का अधिकार प्राप्त है, लेकिन यह आलोचना इस प्रकृति की नहीं होनी चाहिए कि न्यायालय की कार्यप्रणाली को असंभव या अतिकठिन बना देने की सीमा को ही पार कर जाये।

इसलिए क्या कोई कृत्य ‘न्यायालय की अवमानना’ की परिभाषा में आने वाला है, अथवा नहीं? इसका परीक्षण यह देखकर करना होगा कि क्या वह विशेष कृत्य न्यायिक प्रणाली के संचालन को अतिकठिन अथवा असंभव बनाने के लिए पर्याप्त है, अथवा नहीं?

यदि यह कृत्य ऐसा नहीं है, तो फिर इसे न्यायालय की अवमानना का कृत्य नहीं माना जावेगा, चाहे यह कितनी ही कटु आलोचना वाला कृत्य क्यों नहीं हो। भारतीय अवमानना कानून ब्रिटिश शासन की देन है। इसकी संरचना के समय भारत न तो स्वतंत्र था और न ही एक लोकतंत्र था। उस समय अनुच्छेद १९(१)(ए) जैसे प्रावधानों वाला संविधान भी नहीं था। इस कारण उस समय का बनाया गया यह कानून आज के भारतवर्ष के लोगों पर किस आधार पर लागू किया जा सकता है इसके लिए कोई विशेष सांस्कृतिक, सामाजिक, आर्थिक और राजनैतिक कारण या आधार दृष्टिगोचर नहीं होते हैं।

इसलिए, न्यायाधीश द्वारा अवमानना कानून का प्रयोग उसी स्थान पर करना उपयुक्त एवं उचित है, जहाँ उसका अपना न्यायिक-कार्य-निष्पादन असंभव हो जाता है। उदाहरण के लिए यदि कोई व्यक्ति न्यायालय की पत्रावली लेकर भाग जाता है, या वह न्यायालय में आये हुए गवाह को धमकाता है, अथवा न्यायालय में जोर-जोर से नारे लगाकर न्यायालय का कार्य अवरोधित करता है, तो वह व्यक्ति न्यायिक अवमानना का दोषी अवश्य है। विधिवेत्ता फली. एस. नरीमन के अनुसार न्यायालय के कार्यकलाप की लोकनिंदा करना या उसको कलंकित करना विषम विषय है। इसके कोई निश्चित नियम एवं सीमा नहीं है। जबकि, इससे संबंधित सीमा व नियम निश्चित होने चाहिए। लोगों को सदैव यह मालूम पडते रहना चाहिए कि वे न्यायालय के बाबत जब कोई टिप्पणी कर रहे हैं, तो क्या ऐसी टिप्पणी अवमानना की परिभाषा की सीमा में है या क्या टिप्पणीकार के अधिकार सीमा का अतिक्रमण कर रही है।

अवमानना कानून में जो अनिश्चितता दिखाई देती है उसके दो कारण सामने आते हैं। पहला-न्यायालय अवमानना अधिनियम १९७२ में 'अवमानना' क्या होगी? इसे परिभाषित नहीं किया गया है। दूसरा-न्यायालय अवमानना अधिनियम १९७१ (संशोधित) की धारा २ में अवमानना की परिभाषा तो जोड़ दी गई, लेकिन फिर भी पूर्वाग्रह, पक्षपात एवं हस्तक्षेप के क्या मायने हैं? यह अब भी स्पष्ट नहीं है। यह भी एक महत्वपूर्ण तथ्य है कि कल तक जिस विषय को न्यायालय की निंदा और कलंकित करना माना जाता था, संभव है कि अब

आज वह निंदा और कलंकित करने का कार्य नहीं माना जावे। इसी प्रकार आज जिसे पक्षपात, पूर्वाग्रह अथवा हस्तक्षेप माना जा रहा है, वह कल यह सब नहीं माना जावे, ऐसा भी संभव है।

न्यायालय अवमानना की शक्तियों के बारे में सर्वप्रथम न्यायाधीश विलमोर ने १७६७ में पहली बार 'विलकिज प्रकरण' में बताया कि न्यायालय की यह शक्ति उसके अधिकार को न्यायसंगत और दोष मुक्त ठहराती है। इंग्लेण्ड व दूसरे देशों के न्यायालयों ने भी इसी निर्देश का अनुसरण किया।

अब यह देखा जाये कि न्यायालयों को यह अधिकारिता या प्रतिष्ठा कहां से प्राप्त हुई है? इंग्लेण्ड में यह अधिकार न्यायाधीशों को वहां के शासक से प्राप्त हुए थे। इन न्यायाधीशों के न्यायालय स्थापित होने से पूर्व के काल में इंग्लेण्ड का शासक स्वयं प्रकरणों को निर्णित किया करता था। बाद में शासक ने न्यायिक कार्य निष्पादन के लिए न्यायाधीशों को पृथक से नियुक्त करना आरंभ कर दिया। इस प्रकार राजशाही में न्यायाधीश वास्तव में शासक द्वारा प्रदत्त अधिकारों का उपयोग करते थे और उसके लिए न्यायाधीश को वही प्रतिष्ठा और राजमर्यादा उपलब्ध होनी चाहिए, जो शासक को अपने नागरिकों से आज्ञा व आदेश पालन कराने के लिए उपलब्ध है।

लेकिन यह परिस्थिति लोकतंत्र में पूर्णतया परिवर्तित हो जाती है, क्योंकि यहां पर न्यायाधीश अपनी शक्ति व अधिकार जनसाधारण से प्राप्त करता है। अतः निस्संदेह रूप से यह कहा जा सकता है कि लोकतंत्र में न्यायाधीश को अपनी प्रतिष्ठा एवं मान-मर्यादा को न्यायसंगत ठहराने की आवश्यकता नहीं है, क्योंकि लोकतंत्र में न्यायाधीश की प्रतिष्ठा सार्वजनिक विश्वास से पैदा होगी और यह सब न्यायाधीश के आचरण, ईमानदारी, निष्पक्षता व विद्वता तथा सत्यनिष्ठा और सरलता से पैदा हो पाएगा।

अब इंग्लैण्ड में भी इस दृष्टिकोण को मान लिया गया है। लॉर्ड सालमान ने एक प्रकरण निर्णित करते हुए यह स्वीकार किया है कि असंदिग्ध रूप से न्यायालय की अवमानना का ऐतिहासिक आधार है लेकिन इसमें यह तथ्य भ्रमित करने वाला है कि

इसका उद्देश्य न्यायालय की गरिमा और प्रतिष्ठा को सुरक्षित करना नहीं है, बल्कि न्याय प्रशासन को सुरक्षा प्रदान करना है। लॉर्ड डेनिम ने भी आर. बनाम पुलिस कमीश्नर के प्रकरण (१९६८) में अपना मत व्यक्त करते हुए कहा कि 'मुझे यह स्पष्ट कर देना चाहिए कि हम इस अवमानना के कानून की शक्ति का उपयोग कभी अपनी प्रतिष्ठा या गरिमा की रक्षा के लिए नहीं करेंगे और न ही हम इसका उपयोग हमारे विरुद्ध बोलने वाले लोगों की आवाज दबाने के उद्देश्य से करेंगे। हमें निन्दा या आलोचना से किसी भी प्रकार का भय नहीं है और न ही हम ऐसी आलोचना के प्रतिशोध में किसी को दण्डित करेंगे, क्योंकि इसमें जनता की अभिव्यक्ति की स्वतंत्रता के अधिकार निहित है, जिसे जनता को प्रयोग करने से वंचित नहीं किया जाना चाहिए।'

प्रत्येक न्यायाधीश के सबसे बड़े अस्त्र व शस्त्र उसकी ईमानदारी/निष्पक्षता की छवि, उसके ज्ञान व व्यवहारिकता की शोहरत है। हमारी विनम्र राय में एक न्यायाधीश, जिसमें इन सब गुणों का समावेश है, उसे अवमानना की शक्ति को प्रयोग करने का शायद ही अवसर आयेगा। परिणामस्वरूप, न्यायालय की अवमानना की शक्ति को तब सीमित व निर्धारित किया जा सकता है, जब न्यायाधीशगण इसके दुरुपयोग को न्यायालय की गरिमा और मर्यादा आदि की सुरक्षा के नाम पर न्यायसंगत प्रमाणित करने लगे। सार रूप में, इस शक्ति का प्रयोग मात्र न्यायालय का कार्य-कलाप सुनिश्चित करने के लिए ही किया जाना चाहिए। न्यायालय की अवमानना हेतु दंडित करने की शक्ति को इसलिए असाधारण परिस्थितियों में प्रयोग किया जाना चाहिए और तब ही किया जाना चाहिए जब न्यायालय का कार्य सम्पादन असंभव एवं अतिकठिन हो जाता है। इस प्रयोग को लेकर हमारी यह मान्यता है कि यदि अवमानना कार्यवाही आरम्भ करने की धमकी देने से कार्य चल सकता है तो उस परिस्थिति में अवमानना की कार्यवाही आरम्भ नहीं करनी चाहिए।

अब इस बात को लेकर मतभेद हो सकते हैं कि किसी न्यायाधीश के विचार में कौन सा कृत्य न्याय की धारा में अवरोध कारित करने वाला है और कौन सा कृत्य न्यायालय के कार्य निष्पादन को अतिकठिन बना देने वाला है। उदाहरणार्थ - आमजन,

अधिवक्ता या पत्रकार द्वारा की गई टिप्पणी या किसी लंबित प्रकरण पर प्रेस द्वारा की गई टिप्पणी को अवमानना का अपराध नहीं कहा जा सकता है। एक न्यायाधीश आध्यात्मिक शक्ति और समता के गुण से सम्पन्न होना चाहिए। उसमें ऐसी चारीत्रिक क्षमता होनी चाहिए कि किसी आलोचना से उद्विग्न, क्रोधित, विचलित नहीं होवे।

‘न्यायाधीश के कार्य-निष्पादन को अवरूद्ध करने अथवा उसे अतिकठिन बना देने वाला कृत्य’ साधारण रूप में ऐसे न्यायाधीश के हवाले से समझे जाने चाहिए जिसके पास वास्तव में एक न्यायाधीश जैसा स्वभाव हो अर्थात् वह पूर्णतया निष्पक्ष, शांत, क्षमतावान हो और उसमें आलोचना का भय वहन करने की क्षमता हो और इस आलोचना को अपने सिर पर ढोने की शक्ति हो। जैसा लोकतांत्रिक दृष्टिकोण पिछले दशकों में इंग्लैण्ड, अमेरिका व विश्व के अन्य देशों में विकसित हुआ है, वैसे ही दृष्टिकोण का विकास अब भारत में आरम्भ होना आवश्यक है, जिससे इस पुराने दमनकारी कानून का लोकतांत्रिक देश में केवल उचित रूप से प्रयोग किया जा सकें। पश्चिमी देशों में अवमानना के कानून को अत्यंत विषम परिस्थितियों में ढाल रूप में प्रयोग किया जाता है, तलवार के रूप में नहीं।

इंग्लैण्ड के न्यायाधीश लॉर्ड डिपलोक ने गार्डियन न्यूज पेपर्स प्रकरण (१९८५) ए.सी. ३३९ में एक स्थान पर टिप्पणी की है कि ‘अवमानना की वह प्रजाति जिसमें न्यायाधीश को कलंकित करने का कृत्य शामिल है, इंग्लैण्ड से लुप्त हो रही है और इसको सदा-सदा के लिए नकारा जाना चाहिए । हमें यह भी जान लेना चाहिए कि अवमानना का क्षेत्राधिकार हमारे स्वयं के विवेकाधिकार में निहित है। एक न्यायाधीश के लिए यह आवश्यक नहीं है कि वह किसी अवमानना के मामले में कोई कार्यवाही करें, यद्यपि वास्तविकता में वह कृत्य अवमानना का ही है।

अतः विषय का उपसंहार करते हुए हम डेविड पेनिक की पुस्तक ‘जजेज’ के इस अंश को उद्धृत करना चाहेंगे :-

‘कुछ राजनीतिक व विधिवेत्ता ऐसा मानते हैं कि न्यायपालिका के संबंध में किसी सत्य का उल्लेख करना खतरनाक बेवकूफी है। इसे अमेरिका के कोर्ट ऑफ अपील के

न्यायाधीश जिराम फ्रैंक ने साफ करते हुए कहा कि इस सुझाव के प्रति मेरा सम्मान कम है, क्योंकि मेरी समझ में नहीं आता है कि एक लोकतंत्र में, उसकी एक शाखा के कार्यकलाप के बारे में सच क्या है, इसकी जानकारी जनता को देना बुद्धिमानी नहीं है तो फिर यह एक पूर्णतया अलोकतांत्रिक कार्य है। हमें जनसाधारण से बच्चों जैसा व्यवहार नहीं करना है, जिससे उनकी स्वयं की बनाई गई संस्था की क्षमा नहीं किये जाने योग्य खामियों को जानने से भी वे वंचित रह जावे। हमारी राय में लोकतंत्र में न्यायपालिका की ऐसी खामियों से निजात पाने का एक प्रभावी तरीका यही है कि जनसाधारण को अवगत करवाया जावे कि वह संस्था कैसे कार्य करती है। इसलिए, न्यायालयों की प्रतिष्ठा को स्थापित करने के लिए जन साधारण को सत्य से दूर रखकर चलने का रूख गलत है।’

इस दिशा में हाल ही में जो कदम न्यायालय अवमानना अधिनियम को संशोधित करके उठाया गया है, वह प्रशंसनीय है। इसमें यह उल्लेखित किया गया है कि न्यायालय ‘सत्य के औचित्य’ को अवमानना की कार्यवाही में उचित बचाव मान सकती है, यदि ऐसा बचाव व्यापक जनहित में सदभावी तौर पर लिया जा रहा है।

इस तरह निष्कर्ष में यह सामने आता है कि न्यायालय अवमानना संशोधन अधिनियम २००६ की धारा १३(६) में अवमानना प्रकरण में ‘सत्य’ एक अधिकारपूर्ण बचाव के रूप में उपलब्ध हो चुका है। यह संशोधन अवमानना के कानून को लोकतांत्रिक स्वरूप प्रदान करने वाला एक प्रगतिशील कदम है जिसकी आवश्यकता देश की स्वतंत्रता प्राप्ति के बाद से ही महसूस की जाती रही है।

The power to punish for contempt of court is a safeguard not for judges as persons but for the function which they exercise.*Frankfurter*

ENHANCING TIMELY JUSTICE: STRENGTHENING CRIMINAL JUSTICE ADMINISTRATION

*by J.P.Sharma, RHJS,
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Justice delayed is Justice denied is the legendary enunciation of the canons of expeditious and timely dispensation of justice to the helpless and hapless consumers of justice, courting justice at the portals and door steps of the hallowed institutions of justice delivery mechanism conterminous with divine functions discharged by gods of clay and mortar clad in the shields of robes.

Whether the institutions of justice delivery mechanism are courts of justice or courts of law is a debatable and arguable point. Because law is merely a means and justice is the end. These institutions are interalia governed and regulated in their procedural propulsion by the provisions of Article 21 & 39 of the Constitution of India towards expeditious disposal of the cases.

There are four trusted pillars that Indian democracy rests on: the legislature, the executive, the press and the judiciary. The effective functioning of any or all of these is a barometer to a healthy nation with accountability, transparency, and protection of property, life, liberty and justice. Naturally, the judiciary has the most crucial role in ensuring that. But what happens when the judiciary itself comes under scrutiny.

The issue of accountability in the judiciary was highlighted by the prime minister himself, when he addressed the Chief Justices and implored them to make the Indian judicial system "arrears free". What has created the most heated debate is the fact that many judicial activists and even eminent jurists have openly raised questions on judicial stonewalling that prevents any attempt to reform the judiciary. While much of the focus has been on making assets public, the larger perennial issue is the huge backlog of cases that actually encourages judicial lethargy, laxity and apathy in the system. Over 30 million pending cases clog the country's legal system which has increased by 1.3 million since 2008.

When litigants' long queues for justice get longer by the day and judges are regularly caught with their hands in the till, both the credibility and the accountability of the honorable men and women in robes are under attack.

The waning confidence in the judiciary is also due to the inordinate delay in disposal of cases. At a recent chief ministers' conclave in Delhi, the prime minister said the biggest challenge before the judiciary was the disposal of huge backlog of cases. There were 20307 cases pending in the apex court in November 1999, it almost doubled to 39780 by 2006 and stood at 50659 on June 1st 2009 . In high courts, the pending cases run to over 3.95 millions. In the lower courts the number of pending cases, as on March 31 2009, was a staggering 26.7 million. According to the National Crime Records Bureau, there were 7.43 million criminal cases pending all over India in 2007, of which just over 1 million were taken up for trial. Of them, less than half a million ended in conviction. There are more than 10000 cases where the CBI has filed charge sheets and trials are yet to begin.

With a wayward land rights recording system, the revenue administration is a perpetual source of civil litigations. At times, courts also end up being recovery agents for financial institutions trying to recoup money. Out of over 1 million cases in Delhi courts, those relating to bounced cheques account for over half of them.

After months of deliberation, the Union Ministry of Law and Justice recently unveiled its Vision Statement for bringing down the backlog of cases and speeding up the justice delivery system. Speaking at the inaugural ceremony of the 'National Consultation for Strengthening the Judiciary towards Reducing pendency and Delays', Union Law Minister said that creation of a National Arrears Grid, focus on selection, training and performance assessment of judicial officials and introduction of procedural changes were some of the proposals which could be immediately put into practice.

The proposed National Arrears Grid, whose main job would be to ascertain and analyse the number of arrears in each court and to oversee reduction in pending cases, shall be headed by a sitting Judge of the Supreme Court. It would also include the Deputy Chairman of the Planning Commission, the Attorney General of India, the Solicitor General of India, Chief Justices of three High Courts, Director, National Judicial Academy and a representative of the Comptroller and Auditor General of India.

In another interesting proposal, the Ministry has suggested that courts function in three five-hour shifts for which 15000 new posts of judicial officers would be created for a two-year period. These posts would be filled from among retired judicial officers, lawyers, and others. The law minister also proposed that retired Judges of the High Courts and senior advocates be offered one-year contracts to hear cases on weekends and in the evenings.

The Government also intends to introduce a National Minimum Court performance Standard under which the case disposal rate at the national level is expected to be taken up to 95 per cent from the present 60 per cent.

It also hopes to ensure that no more than five per cent of the cases in each court go back more than five years and, after five years, to ensure that less than one per cent cases are over a year old. The government also wants the courts to award higher costs in cases where the delay is caused by one of the parties.

In his inaugural address at the function, Hon'ble Chief Justice of India Mr. K.G.Balakrishnan saheb said the paucity of funds was one of the biggest reasons for the slow justice delivery system. He said the judiciary was committed to working with the government to come up with a policy to reduce the pendency of cases before the judiciary.

Speaking on the subject of Government as a litigant, Attorney General of India said the government was preparing a national policy to bring down the number of cases in which the government is a party.

Acknowledging that the government is the single-largest litigant in the country, He said that one of the main reasons for the same was the policy of most officers not taking a decision on any issue for fear for being accused of wrongdoing. "These officers leave everything to the courts,".

Not long ago, even after 1991, there was a time when dispute resolution data were only available with a time-lag of around seven years. Data paucity led to strange figures floating around.

However, one should be pedantic first. The terms pendency, arrears, delay and backlog are used synonymously, though there is a difference. Pendency means total number of cases in courts and it is worth remembering court-based data don't capture cases clogged in quasi-judicial forums like tribunals. It is possible to argue high pendency indicates faith in the judicial system. Recently, the National Judicial Academy (NJA) put together some inter-state correlations. These show a neat positive correlation between institution rates and literacy. Another neat positive correlation exists between institution rates and population density. Per se, high pendency is a good rather than a bad. Arrears are excess of new cases over disposed cases. Arrears contribute to delays, old cases not disposed of.

Backlog is sometimes used in sense of pendency and sometimes in sense of delay. On June 30, 2009 pendency in Supreme Court was 52592. On March 31, 2009 pendency in high courts was 4 million - 3.2 million civil, 0.8 million criminal. Of these, almost a million cases

were stuck in the Allahabad HC and almost 500000 in Madras. On March 31, 26.8 million cases were stuck in district and subordinate courts, 7.6 million civil and 19.1 million criminal. At this lower court lever, there are 5.2 million cases in UP, 4.1 million in Maharashtra, 2.5 million in West Bengal, 2.2 million in Gujarat. Excluding quasi-judicial forums, we thus have overall pendency crossing 31 million. That's an enormous figure. To dramatise, let's work out another somewhat inaccurate number. With two sides, 31 million translates into 62 million. Roughly, one out of every four Indian house-holds is thus stuck with a case in the court system. That's horrendous. A gypsy curse states, "May you have a law suit in which you are in the right," and it shouldn't be surprising that gypsies originated in India Based on cross-country comparisons, extremely dubious for something like law reform, yet another back-of-the-envelope number can be mentioned. If we can fix the legal system, there will be an increment of 1 per cent to GDP growth.

Pendency is a stock, arrears are a flow. As is obvious, we should worry about arrears rather than pendency. What should be done has been repeated ad nauseam in the Rankin Committee (1942) High Courts Arrears Committees (1949,1972) several Law Commission reports, two Estimates Committees (1986, 1990) and SatishChandra Committee (1986). Broadly, there are supply-side solutions and demand-driven ones. On demand, one can use alternative dispute resolution, eliminate unnecessary cases under the Negotiable Instruments Act, Motor Accidents Claims or excise and get the government out of the system. Within civil cases, government litigation often crowds citizens out of the court system. One should mention yet another hoary number. Within civil litigation, 60-65 per cent of cases involve the government, sometimes on both sides of the divide. A large chunk of this is in the form of appeals and 90-95 per cent of government appeals fail. That is, these are appeals that shouldn't have been made in the first place. There is automaticity about government appeals and this has to do with one particular section in Prevention of Corruption Act that makes all public servants risk-averse.

Turning to supply, there are two (with spillovers) kinds of solutions- enhance supply by increasing number of courts and judges (lok adalats, fast-track courts, family courts, nyaya panchayats, gram nyayalayas, people's courts, women's courts are part of this) and improve productivity of existing infrastructure (mobile courts, shift systems, ICT-usage, reduced vacations, changes in procedural law, plea bargaining are part of this comprehensive scenario of justice delivery mechanism) . An NJA study found another neat inter-state correlation between load per judge and disposal rates. At a chief justices, conference in 2004, a committee was constituted to get a fix on the recommended judge/case ratio and a figure of 500 to 600 was

suggested for district and subordinate courts. Working with pendency figures, thus translates into an additional 35000 courts or so, depending on how one derives the number. There is also a difference between working strength and sanctioned strength.

Additional courts require additional judges, with large capital and recurrent expenditure. There are issues of who funds this (Centre versus states), financial autonomy for judiciary (which has limited acceptability until judiciary accepts improvement norms) and focus on certain types of cases (government litigation, petty cases, old cases) and specific courts (geographically targeted). These issues aren't new and have been known. What's new is that for the first time since 1991 speed of dispute resolution is now on the reform agenda. One doesn't mean speeches by Presidents and PMs. and recently on October 24-25, 2009 a national consultation was held on "Strengthening the Judiciary towards Reducing Pendency and Delays". The first part of the title reflects a bias towards one variety of supply-side solutions: that's fine as long as the second part is addressed. As a fallout, we have had a vision statement with 15700 new judges (some contractual), case disposal targets, three shifts in courts, reducing duration of cases from an average of 15 years to three, reduced government litigation, filling up vacancies, court management services by law students, video conferencing in jails, a national litigation policy and a national arrears grid.

Perhaps one should therefore be a bit more charitable. What Rankin said in 1924 remained valid for several years. Hopefully the year, 2010 might change that.

Ours is a system of adversarial praxis dependent upon legal fraternity representing the parties. Unless the members of the bar appearing for the parties are also sanitized and streamlined into extending their timely, prompt and proactive cooperation in the disposal of the cases, piling up in huge and insurmountable backlogs in pendency, the rather exparte reforms and measures suggested and intended in the judicial, executive and legislative circles can prove as always to be distant dreams and visual vanities.

The major challenges impeding the expeditious course of trial of the cases and the corresponding redressal strategies can be encapsulated as follows :-

1. Unless the number of courts is increased arrears of cases can not be handled and justice can not be delivered effectively.
2. Creation of national arrears grid, focus of selection training and performance assessment of judiciary.
3. Introduction of procedural changes to improve the system.

4. Unless the furious flow of cases consequent upon poverty, unemployment and illiteracy of masses in conflict with the classes is nipped in the bud by the primary executive intervention in ameliorating the ground reality of the masses, persistent and prolific inundation of the judiciary with such cases can not be discounted and denied.
5. In the matters of divorce petitions u/s 13 and 13B of the HMA 1955 where either of the parties has demonstrated aversion to resumption of conjugal cohabitation the petitions should be summarily adjudicated upon instead of compelling the unwilling party to obtain a decree of restitution u/s 9 of the Act, which legally can not be enforced because restive horses can be taken to the grass field but can in no way be compelled or coaxed into grazing the grass.
6. In the matters of cases u/s 498A of IPC resulting into detention in the high walls of prison of the in-laws of the complainant wife, no scope and space survive there after for an amicable settlement of the parties in eternal disillusionment and estrangement.
7. Non appearance of witnesses due to a plethora of reasons results in to either elongation of the shelf life of the cases on the one hand and the eventual unmerited and unlawful denial of reliefs to the complainant in criminal cases, which can be handled and tackled with recourse to mandatory video conferencing susceptible to examination in chief and examination in adverso.
8. Elaborate arguments by the legal fraternity tending to impress upon its clientele than to elucidate the points in controversy in substance should be curtailed and preferably be reduced to written arguments because court rooms are not places for histrionics in the legal garb.
9. Elaborate and irrelevant cross examination of the witnesses should be discouraged and disallowed.
10. In civil and criminal litigations no stay on the proceedings should be granted by the appellate forum as a rule and if any such stay is granted it should be decided within mandatory period of limitation.
11. In respect of cases u/s 138 of the N.I. Act bursting the seams of the dockets of the courts the matters should be mandatorily submitted for disposal to the lok adalats. Non disposal of the matters under the lok adalat should deprive the parties of its subsequent settlement by compromise. Ultimately such cases should be disposed of within a mandatory time frame and the parties indulging in to delaying and dilatory tactics should face realistic costs.

12. The appellate forum should not remand the matter for its fresh disposal to the trial courts as a matter of course but only under exceptional circumstances.
13. Alternative dispute resolution mechanism should be revitalized and reinforced in civil and criminal cases particularly those involving offences u/s 320 of CrPC and civil disputes in respect of monetary transactions, property disputes as well as matrimonial matters, which should invariably be routed through mediation conciliation, Lok Adalats, pre litigation clinics.
14. Judicial work suspensions on account of strikes, and condolences should be discouraged and disallowed.
15. Vacation vanities, a legacy of British era should be forth with be discontinued as well as holiday happiness in our country constituted in majority by the peasants and labour classes should also come to an earlier farewell.
16. Vacancies in the judiciary require to be timely filled up.
17. Regulation of the provisions of PIL to prevent and preempt its escalating misuse for ulterior motives on the one hand and utilizing the invaluable judicial time towards judicial disposals on the other as well as repelling the plausible accusation of judicial activism.
18. Legal and procedural reforms in identifying the legal provisions amenable to gross misuse and miscarriage of justice.
19. The decentralization of the judicial institutions in the nature of High Courts and Supreme Court to timely, effectively and qualitatively dispense justice to all and sundry within a reasonable distance of space and time.
20. The executive, the legislatures and the judiciary survive and subsist at the expense of the common man that is "we the people of India" as enshrined in our preambular perception promising to the ensure justice - social, economic and political to us.
21. To conclude, courting justice through arduous and labyrinthine course of travails and tribulations has been scripted rather fatally and fatefully on the foreheads of "we the people of the India" on account of judicial jaundice, legislative lethargy and executive inertia cumulatively abetting denigration and defilement of the vestigial remnants of the dignity the sovereign that is "we the people of the India".

When justice is in jeopardy and freedom in fetters, the judiciary can not and should not stay non aligned with its ambience then it becomes the duty of the judiciary to dissent with the legislative lethargy and executive inertia and the silence in this context on the part of judiciary

migrates in to the realm of sin which the judiciary can not afford to commit in view of the immense faith and trust reposed in the judiciary by multimillions of us, dignifying as well as deifying the judiciary to divine temple of justice.

Wisdom too often never comes, and so one ought not to reject it merely because it comes late.*Frankfurter*

**CYBER CRIME – COMPARATIVE STUDY OF INFORMATION
TECHNOLOGY ACT, 2000 AND INFORMATION TECHNOLOGY
(AMENDMENT) ACT, 2008**

By Hemant Singh, RJS
Civil Judge (JD) &
Judicial Magistrate,

Few years back, information and digital technology was in groom for the emerging needs but the situation obtaining today is that it is just everything and perhaps nothing without it. May it be big corporate commercial transactions, consumer activities related to common masses or public interface of official machineries, there is absolute dependency over digital technology. Digital Technology has taken us to a new era of internet, business networking and e-commerce, providing us a solution to increase efficiency, reduce cost, change the orthodox bulky paper based economic transactions to more speedy, easier and time saving paperless process. Internet, thus has taken us far ahead to combat our needs of present life, but this is only one facet of the information technology, the other facets are the challenges for whole world like cyber crimes and cyber terrorism. According to *Donn Parker* (an US icon in the field of computer security),-

“ For the first time in human history, computers and automated processes make it possible to possess, not just commit, a crime. Today, criminals can pass a complete crime in software from one to another, each improving or adapting it to his or her own needs. Since it could be tested repeatedly under predictable circumstances, it may become the perfect crime, one with no evidence and no basis for the victim and perpetrator to identify or confront each other. Neither would even know the crime method used and when and where it was done; it would happen before either could bat an eye (or click a mouse). The technology and know-how to launch the perfect crime are right around the corner. The only question that remains is, What can we do about it? ”

(Extract from *Fighting Computer Crime, a New Framework for the Protection of Information*, full article can be accessed at http://www.windowsecurity.com/whitepapers/Automated_Crime_.html)

What is cyber Crime

Cyber crime is much more than the acts which are made punishable under the Information Technology Act, 2000 as there are other acts also which are made punishable under the Indian Penal Code such as email spoofing, cyber defamation, sending threatening mails etc. A dewy-eyed definition of cyber crime would be "unlawful acts where the computer is used either as a tool or a target or both."

Cyber offenders use the computer as a tool, target or both to gain information which can result in damage to the owner of such information. Internet is one of the means wherefrom cyber criminals can obtain price sensitive information of various corporates, banks, firms and individuals like their new product, policies, plans etc. Another aspect is selling pornography, providing obscene and immoral material etc. The illegal activities referred above are done through some technical methods commonly known as hacking, tempering, phishing, spoofing, pharming, wire transfer etc.

INFORMATION TECHNOLOGY ACT, 2000

The General Assembly of the United Nations by resolution dated the 30th January, 1997 adopted the Model Law on Electronic Commerce and recommended that all States should give favourable consideration to the Model Law when they enact or revise their laws.

The Information Technology Act, 2000 (IT Act, 2000) has been passed to give effect to the UN resolution and to promote efficient delivery of Government services by means of reliable electronic records.

Objectives of IT Act, 2000

To provide legal recognition for transactions carried out by means of electronic data interchange, and other means of electronic communication, commonly referred to as "electronic commerce";

To facilitate electronic filing of documents with Government agencies and E-Payments;

To amend the Indian Penal Code, Indian Evidence Act,1872, the Banker's Books Evidence Act 1891, Reserve Bank of India Act ,1934.

Non Applicability of the Act:

IT Act, 2000 does not apply to documents and transactions specified in its First Schedule. These are -

- (a) a negotiable instrument as defined in section 13 of the Negotiable Instruments Act, except cheque
- (b) a power-of-attorney as defined in section 1A of the Powers-of-Attorney Act
- (c) a trust as defined in section 3 of the Indian Trusts Act
- (d) a will as defined in section 2(h) of the Indian Succession Act, including any other testamentary disposition by whatever name called
- (e) any contract for the sale or conveyance of immovable property or any interest in such property
- (f) any such class of documents or transactions as may be notified by the Central Government in the Official Gazette. - -Broadly, documents which are required to be stamped are kept out of the provisions of the Act.

CYBER CRIMES UNDER INFORMATION TECHNOLOGY ACT, 2000:

Chapter XI of IT Act, 2000 deals with the offences. There have been major amendments in this chapter by Information Technology (Amendment) Act, 2008 which are made effective from 27.10.2009. The amendments are aimed to bring in a complete information security infrastructure into the IT industry. As a basic framework, conceptually following are the categories of cyber crimes recognised by IT Act, 2000:-

1. Tempering with computer source documents
2. Hacking
3. Publication of obscene material in e-form

4. Not complying with directions of Controller
5. Attempting or securing access to computer
6. Breaking confidentiality of the information of computer
7. Publishing false electronic signature, false in certain particulars
8. Publication of electronic signatures for fraudulent purpose

After the 2008 amendments, various earlier provisions are amended and a lot of new are inserted to provide complete information security infrastructure into the IT industry. The concept of digital signature is changed to electronic signature. Since, drastic changes are made, a comparative study of original IT Act and the amended provisions is needed.

| ORIGINAL PROVISIONS | AMENDED PROVISIONS |
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| <p>Sec. 65. Knowing or intentionally concealing, destroying, altering computer source documents was punishable with imprisonment upto 3 years or fine upto Rs. two lakh or both</p> | <p>No amendment is made in Sec. 65.</p> |
| <p>Sec. 66. Hacking with the computer system was punishable with imprisonment upto 3 years or fine upto Rs. two lakh or both. The essence of the offence was intention or knowledge to cause wrongful loss or damage by destroying information residing in computer resource or diminishing its value or utility.</p> | <p>Old Sec. 66 has been replaced by new Sec. 66. "Dishonesty" and "Fraudulent" intention are now made necessary. Before the amendments, unless such intention was not specified, the term "Diminishing of the value of information residing inside the computer" was material. Now other contraventions those are listed under Sec 43 have been added retaining the old one. Punishment is now imprisonment upto 3 years or fine upto Rs. five lakh or both.</p> <p>Now the offence is cognizable but bailable and compoundable.</p> <p>Section 66 A, 66B, 66C, 66D, 66E, 66F are newly added.</p> <p>Sec. 66A- It covers sending of offensive messages and it is made punishable with</p> |

imprisonment upto three years and fine. It covers Cyber stalking, Spam, threat mails, Phishing mails, SMS, etc.

Sec. 66B- This section covers receiving of stolen information, computer or a mobile. It is made punishable with imprisonment upto three years or fine upto Rs. one lakh or both

Sec. 66C- This section covers password theft which was earlier being covered under Section 66. It is related to identity theft. It is made punishable with imprisonment upto three years and fine upto Rs. one lakh.

Sec. 66D- This section covers Phishing which was earlier being covered under Section 66. This is a new section which covers Impersonation. It may also cover some kinds of e-mail related offences including harassment. It is made punishable with imprisonment upto one year and fine upto Rs. one lakh.

Sec. 66E- This Section is meant for "Video Voyeurism". This section covers non electronic documents. The section provides for capturing of pictures which means that it may cover the non Cyber aspects and may be of concern to photographers. Photographs of models in fashion shows in particular situation may come in this section. It makes punishable capturing, transmitting or publishing image of private area of any person without his consent with imprisonment upto three years or fine upto Rs. two lakh or both.

Sec. 66F- This section covers the Cyber Terrorism offence. This may cover hacking, denial of access attacks, Port Scanning, spreading viruses etc. if it can be linked to the object of terrorizing people. Conspiracy is also covered under the section. The punishment for it may extend upto life imprisonment.

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| <p>Sec. 67. Publishing obscene material in electronic form was made punishable by this section.</p> <p>First Conviction: Upto Five years imprisonment and fine upto Rs. one lakh</p> <p>Subsequent Conviction: Upto Ten years imprisonment and fine upto Rs. two lakh</p> | <p>Old Sec. 67 has been replaced by Sec. 67, 67A, 67B and 67C.</p> <p>Sec. 67- Punishment for publishing obscene material is reduced from five to Three years and fine upto Rs. five lakhs for first conviction and from ten years to five years and fine upto Rs. ten lakhs for subsequent conviction. This section is on the lines of corresponding provisions of IPC. The reduction of sentence is compensated by insertion of new Sections 67A and 67 B</p> <p>Sec. 67A – It makes punishable publication of "Sexually Explicit Content" in electronic form. First Conviction : Upto Five years imprisonment and fine upto Rs. ten lakhs Subsequent Conviction : Upto Seven years imprisonment and fine upto Rs. ten lakhs.</p> <p>Sec. 67 B - This section deals with pedophilia which was earlier covered under Section 66 and provides some clarifications regarding Kamasutra type of literature. This addresses child pornography and makes searching and browsing also offences. It is aimed to prevent child abuse in cyber space. Punishment- First Conviction : Upto Five years imprisonment and fine upto Rs. ten lakhs Subsequent Conviction : Upto Seven years imprisonment and fine upto Rs. ten lakhs.</p> <p>Sec. 67C – It provides for preservation and retention of information by intermediaries and violation of it is made punishable with imprisonment upto three years and fine. The "Intermediaries" here would include cyber cafes, ISPs, MSPs, e-auction sites etc. This provision is considered necessary from the national security angle though it also has capability of being abused.</p> |
| <p>Sec. 68. Violation to follow with the directions of the Controller was made punishable with imprisonment upto</p> | <p>Basic offence is same but the sentence is reduced to imprisonment upto two years or fine upto Rs. one lakh or both.</p> |

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| <p>three years or fine upto Rs. two lakh or both.</p> | |
| <p>Sec. 69. Failure to assist the government agency in situations related to sovereignty or integrity of India, national security etc. on the part of subscriber was made punishable with imprisonment upto seven years.</p> | <p>Old Sec. 69 is replaced by new Sec. 69, 69A, 69B.</p> <p>Under new Sec. 69 provisions are made considering national security. Imprisonment is same but fine is added. The amendments are aimed to control cyber terrorism.</p> <p>Sec. 69A – It is a new section which provides powers to a designated officer of the Central Government to "Block websites". Inserted for national security. Punishment under this section is imprisonment upto 7 years and fine.</p> <p>Sec. 69B - This new section gives powers to a designated officer of the Central Government to "collect traffic data" from any computer resource. It could be either in transit or in storage. Aimed at national security. Punishment under this section is imprisonment upto 3 years and fine.</p> |
| <p>Sec. 70 – Access to a Protected system was made punishable with imprisonment upto ten years and fine. Government could declare any computer network or system to be protected system.</p> | <p>Two new sub sections are added in Sec. 70. Punishment is same but now the government may declare any computer resource which directly or indirectly affects the facility of critical information infrastructure to be protected system. It also defines critical information infrastructure.</p> <p>New provisions are made in Sec. 70A and 70B for establishing National Nodal Agency for Critical Information Infrastructure Protection and Indian Computer Emergency Response Team.</p> |
| <p>Sec. 71 – Misrepresentation or concealing material fact from Controller or Certifying Authority is made punishable with imprisonment upto two years or fine upto Rs. one lakh or both</p> | <p>No change is made in Sec. 71.</p> |

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| <p>Sec. 72 – This section makes provision for breach of confidentiality and privacy and it is made punishable with imprisonment upto two years or fine upto Rs. one lakh or both.</p> | <p>No change is made in Sec. 72.</p> <p>A new Section 72 A is added which provides for imprisonment upto three years or fine upto Rs. five lakhs or both in cases relating to data breach.</p> |
| <p>Sec. 73 – Sentence of imprisonment upto two years or fine upto Rs. one lakh or both is provided for publishing Digital Signature Certificate false in certain particulars specified in this section.</p> | <p>No change is made except replacing digital certificate by electronic certificate.</p> |
| <p>Sec. 74 – Creation or publication of Digital Signature Certificate for fraudulent purpose is made punishable with imprisonment upto two years or fine upto Rs. one lakh or both.</p> | <p>No change is made except replacing digital certificate by electronic certificate.</p> |

COMPOUNDING OF OFFENCES:

Prior to amendments of 2008, there was no provision in IT Act about compounding of the offences. This was causing some confusions and legal complications. Now Section 77A has been inserted which provides that a court of competent jurisdiction may compound the offences other than those for which life imprisonment or imprisonment exceeding three years is provided. Compounding of offences is also not permissible where enhanced sentence for subsequent conviction may be given. No offence which affects the socio economic condition of the country or is against a woman or below child of 18 years can be compounded. This section also permits plea bargaining within the limits of Code of Criminal Procedure.

PROVISIONS ABOUT THE OFFENCES BEING BAILABLE OR NOT:

This aspect has also been clarified as earlier there was no provision in this regard. Now by virtue of Sec. 77B, the offences punishable with imprisonment of three years and above are cognizable and the offences punishable with imprisonment of three years are bailable.

INVESTIGATION OF OFFENCES:

Earlier the powers to investigate offences under IT Act was given to Deputy Superintendent of Police but now a police officer of the rank of Inspector can conduct

investigation. However, all other provisions regarding investigation are same which are summarised under keeping in view IT Act, 2000 and Cr.P.C.:

- Section 156 Cr.P.C. : Power to investigate cognizable offences.
- Section 155 Cr.P.C. : Power to investigate non cognizable offences.
- Section 91 Cr.P.C. : Summon to produce documents.
- Section 160 Cr.P.C. : Summon to require attendance of witnesses.
- Section 165 Cr.P.C. : Search by police officer.
- Section 93 Cr.P.C : General provision as to search warrants.
- Section 47 Cr.P.C. : Search to arrest the accused.
- Section 78 of IT Act, 2000 : Power to investigate offences-not below rank of Inspector.
- Section 80 of IT Act, 2000 : Power of police officer to enter any public place and search & arrest.

A FEW OTHER NEW PROVISIONS:

- Under Sections 84B, Abetment is punishable with the same punishment meant for the offence and under Section 84C, "Attempt" is punishable with half the imprisonment of the offence attempted. These are new provisions which were not in the original IT Act.
- As regards the "Data Protection" requirements, apart from the penal provisions of Section 72A, section 43A provides for civil liability for breach of data protection upto Rs 5 crores which is a new provision. The limit of liability for damages under sec 43 has been removed completely.
- In Indian Penal Code and Indian Evidence Act, the words digital signature are replaced by the words Electronic Signature.
- Section 45A is inserted in Indian Evidence Act whereby the opinion of examiner of electronic evidence referred in Sec. 79A of IT Act is made relevant fact.

CIVIL WRONGS UNDER IT ACT, 2000

Newly inserted Section 43A provides for civil liability for breach of data protection upto Rs 5 crores. The limit of liability for damages under sec 43 has been removed completely.

As per **Sec. 43** of IT Act - Whoever without permission of owner of the computer, secures access (mere U/A access), not necessarily through a network, downloads, copies, extracts any data, introduces or causes to be introduced any viruses or contaminant, damages or causes to be damaged any computer resource, destroy, alter, delete, add, modify or rearrange, change the format of a file, disrupts or causes disruption of any computer resource, shall be liable to pay penalty and compensation. Now there is no limit for penalty or compensation.

Adjudicating Mechanism:

Section 46 of the IT Act states that an adjudicating officer shall be adjudging whether a person has committed a contravention of any of the provisions of the said Act, by holding an inquiry. Principles of Audi alterum partum and natural justice are enshrined in the said section which stipulates that a reasonable opportunity of making a representation shall be granted to the concerned person who is alleged to have violated the provisions of the IT Act. It says that the inquiry will be carried out in the manner as prescribed by the Central Government. All proceedings before him are deemed to be judicial proceedings. Every Adjudicating Officer has all powers conferred on civil courts. Newly inserted provision is that the adjudicating officer can exercise jurisdiction where the claim is for damages upto Rs. 5 crore and for the cases exceeding this limit, the jurisdiction will vest with the competent court.

Conclusion:

A study of the amendments made by Amending Act, 2008 indicates that there are several provisions relating to data protection and privacy as well as provisions to curb terrorism using the electronic and digital medium that have been introduced into the new Act. It is hoped that these amendments would be able to take over the Grey areas of the original IT Act. Public awareness should be made about the provisions of IT Act. Much care has been given in the amendments on the implementation part. Information technology has emerged from the womb

of globalization. Though judiciary is doing its best to implement the laws, still there is a strong need for better law enforcement mechanism to enable the system of cyber law to achieve its target. Lastly, the issue which is most important is as to whether the amended provisions would be able to keep pace with the growth of internet.

Our society has put its trust in a system of criminal laws to punish lawless conduct. To avert personal feuds and violent brawls it has led its people to believe and expect that wrongs against them will be vindicated in the courts. Instead of attempting to take the law into their own hands, people have been taught to call for police protection to protect their rights wherever possible. It would betray our whole plan for a tranquil and orderly society to say that a citizen, because of his personal prejudices, habits, attitudes, or beliefs, is cast outside the law's protection and cannot call for the aid of officers sworn to uphold the law and preserve the peace. The worst citizen no less than the best is entitled to equal protection of the laws of his State and of his Nation.*Hugo L. Black*

Judgment Update

Important Judgments

Harman Electronics Private Limited and Another v/s National Panasonic India Private Limited (2009) 1 SCC 720 :-

Territorial jurisdiction for an offence u/s 138 N.I. Act- S.177, 178 & 179 of Cr.P.C. - Issuance of notice itself will not give rise to cause of action but communication of notice would.

While interpreting Section 177, 178 & 179 of CrPC with reference to Section 138 & 141 of N.I. Act, 1881, Hon'ble Supreme Court observed that it is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but it is another thing to say that dishonour of a cheque by itself constitutes an offence. For the purpose of proving its case that the accused had committed an offence under Section 138 of the Negotiable Instruments Act, the ingredients thereof are required to be proved. What would constitute an offence is stated in the main provision. The proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act are intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As, it is only on receipt of the notice that the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the proviso to Section 138 therefore must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of the notice would.

A court derives jurisdiction only when the cause of action arises within its jurisdiction. The same cannot be conferred by any act of omission or commission on the part of the accused. A distinction must also be borne in mind between the 'ingredient of an offence' and 'commission of a part of the offence'. While issuance of a notice by the holder of a negotiable instrument is necessary, service thereof is also imperative. Only on a service of such notice and failure on the part of the accused to pay the demanded amount within a period of 15 days thereafter, the commission of an offence completes. Giving of notice, therefore, cannot have any precedence over the service.

Section 177 CrPC determines the jurisdiction of a court trying the matter. The court ordinarily will have the jurisdiction only where the offence has been committed. The provisions of Section 178 and 179 CrPC are exceptions to Section 177. These provisions presupposes that all offences are local. Therefore, the place where an offence has been committed plays an important role.

Banking institutions holding several cheques signed by the same borrower can not only present the cheque for its encashment at four different places but also may serve notices from four different places so as to enable it to file four complaint cases at four different places. This only causes grave harassment to the accused. It is, therefore, necessary in a case of this nature to strike a balance between the right of the complainant and the right of an accused vis-a-vis the provisions of the Code of Criminal Procedure. Principle that debtor must seek the creditor cannot be applied in a criminal case. Jurisdiction of the court to try a criminal case is governed by the provisions of the Criminal Procedure Code and not on common law principle.

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Vijayan v/s Sadanandan K. and Another (2009) 6 SCC 652 :-

Default sentence of imprisonment for non compliance of Order u/s 357(3) Cr.P.C. held - permissible.

Hon'ble Supreme Court considered as to whether a default sentence of imprisonment can be imposed in cases where compensation is awarded to the complainant under Section 357(3) CrPC and observed that distinction between a fine and compensation as under-stood u/s 357 (1) (b) and 357(3) has been explained in *Dilip v/s Kotek Mahindra (2007) 6 SCC 528* but it does not decide whether default sentence clause could be made in respect of compensation payable u/s 357(3) CrPC. Provision for grant of compensation u/s 357(3) CrPC and recovery thereof makes it necessary for the imposition of a default sentence as held in *Hari Singh v/s Sukhbeer (1988) 4 SCC 551*.

Hon'ble Court observed that Section 357 CrPC bears the heading "Order to pay compensation". It includes in sub-section (1) the power of the court to utilise a portion of the fine imposed for the purpose of compensating any person for any loss or injury caused by the offence. In addition, sub-section (3) provides that when a sentence is imposed by the court, of

which fine does not form a part, the court may, while passing judgment, order the accused person to pay by way of compensation such amount, as may be specified in the order, to the person who suffers any loss or injury by reason of the act for which the accused person has been so sentenced. It is true that the said provision does not include the power to impose a default sentence, but read with Section 431 CrPC the said difficulty can be overcome by the Magistrate imposing the sentence. Provisions of Section 357(3) and 431 CrPC when read with Section 64 IPC empower the court, while making an order for payment of compensation, to also include a default sentence in case of non-payment of the same.

After taking note of *Ahammedakutty v/s Abdullakoya (2009) 6 SCC 660*, Hon'ble Court took the view that while awarding compensation under Section 357(3) CrPC, the court is within its jurisdiction to add a default sentence of imprisonment.

(N.B. - Same view is expressed in *K.A. Abbas H.S.A. v/s Sabu Joseph & another (2010) 6 SCC 230* also)

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Ramchandra Dagdu Sonavane (Dead) by Lrs. and Others v/s Vithu Hira Mahar (Dead) by Lrs. and Others (2009) 10 SCC 273:-

res judicata - in an earlier suit for injunction, the question of title of the property was decided as, right to possession of property could not be decided without its adjudication- held, it operates as res judicata in subsequent suit between same parties involving question of title of the same property.

Hon'ble Supreme Court propounded that in a suit for injunction, the issues and the decision would be confined to possessory aspect. If the right to possession of property cannot be decided without deciding the title of the property and a person who approaches the court, his status itself is to be adjudicated then without declaring his status, the relief could not be granted.

A plea decided even in a suit for injunction touching the title between the same parties would operate as res judicata. It is no doubt true that in an earlier suit for injunction, if there is an incidental finding on title, the same would not be finding if title is directly in question in the later suit or proceedings. But if in such earlier suit, a decision as to question of title was necessary for granting or refusing injunction and the relief for injunction was founded or based

on the findings of title between the same parties, bar of res judicata would operate in such later suit where the issue of title is directly in question.

The court further observed that the principle of res judicata comes into play when by judgment and order, a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implications even then the principle of res judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of the law, to avoid multiplicity of litigation and to bring about finality in it, is deemed to have been constructively in issue and, therefore, is taken as decided.

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Vimal Chand Ghevarchand Jain and Others v/s Ramakant Eknath Jadoo (2009) 5 SCC 713:-

O.14, R.2, O.6 R.1, & O.18 R.2 CPC - unless properly pleaded a fact cannot be proved - S. 54, 58 (c) & 8 of T.P. Act. If the execution of a document is proved, onus is on the defendant to prove that it is a sham transaction.-

Pleadings of the parties are required to be read as a whole. Defendant may raise alternative and inconsistent pleas but is not permitted to raise pleas which are mutually destructive to each other.

Adjudicating the nature of document i.e. whether it is sale or a money landing transaction, Hon'ble Court found that the deed of sale contained stipulations as regards passing of the consideration, lawful title of the vendor, full description of the vended property, conveyance of the right, title, interest, use, inheritance, property, possession, benefits, claims and demands at law and in equity of the vendor as also a stipulation that the purchaser had been in possession of the property and original sale deed dated 15.07.1968 has been handed over. Hon'ble Court reminded that a document must be construed in its entirety and it contains all requirements as envisaged under section 54 of transfer of property Act. When the true character of a document is questioned, extrinsic evidence by way of oral evidence is admissible (Section

91, 92 Evidence Act), still a registered deed of sale carries a presumption of genuineness. If execution of sale deed is proved, onus is on defendant to prove that the deed was not executed and it was a sham transaction. Unless properly pleaded, a fact cannot be proved. Title passes to the vendee from the moment the sale deed is registered. Hon'ble Court also observed that an equitable relief can be claimed for by the party who approaches the court with clean hands.

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R. Venkatkrishnan v/s C.B.I. (2009) 11 SCC 737:-

S.120 B & 43 IPC - criminal conspiracy - concept & proof explained. -

While dealing with an offence of Criminal conspiracy, it has been held that Criminal conspiracy is an independent offence. It is punishable separately. Prosecution, therefore, must prove the same by applying legal principles which are applicable for the purpose of proving a criminal misconduct on the part of an accused. A criminal conspiracy must be put to action and so long a crime is merely generated in the mind of criminal, it does not become punishable. Thoughts, even criminal in character, often involuntary, are not crimes but when they take concrete shape of an agreement to do or cause to be done an illegal act or an act which is not illegal but by illegal means, then even if nothing further is done, the agreement would give rise to a criminal conspiracy. Condition precedent for holding accused persons guilty of a charge of criminal conspiracy must, therefore, be considered on the anvil of a fact which must be established by prosecution viz. meeting point of two or more persons for doing or causing to be done an illegal act or an act by illegal means. The courts, however, while drawing an inference from materials brought on record to arrive at a finding as to whether the charges of criminal conspiracy have been proved or not, must always bear in mind that a conspiracy is hatched in secrecy and it is, thus, difficult, if not impossible, to obtain direct evidence to establish the same. The manner and circumstances in which offences have been committed and the level of involvement of accused persons therein are relevant factors. For the said purpose, it is necessary to prove that propounders had expressly agreed to, or caused to be done illegal act but it may also be proved otherwise by adducing circumstantial evidence and/or by necessary implication. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from knowledge itself. A conspiracy may further be a general one and a separate one. A smaller conspiracy may be a part of a larger conspiracy. It may develop in successive stages. New techniques may be invented and new means may be devised for advancement of common plan. For the said purpose, conduct of the parties would also be relevant.

Hon'ble Court adjudicated that dishonest intention can be evident from making available public money by bank officials to a private party, contrary to statutory provisions and departmental instructions and that amounts to criminal breach of trust, even if the money was subsequently recovered and bank did not suffer any monetary loss.

Further, it was decided that criminal law can be set in motion by anybody therefore, initiation of prosecution by C.B.I. instead of bank official is also not improper. Terms of Section 405 IPC are very wide and apply to one who is in any manner entrusted with property or dominion over property and converts it to his own use or dishonestly misappropriates it. Even temporary misappropriation also constitutes criminal breach of trust. Distinction between civil and criminal breach of trust lies in dishonest intention.

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Seth Ramdayal Jat v/s Laxmi Prasad (2009) 11 SCC 545:-

admissibility of judgment of a criminal court in civil case. -

Considering the issue of admissibility of a judgment of criminal court in civil case, Hon'ble Supreme Court gave its finding that the civil proceedings cannot be determined on the basis of a judgment of criminal court but that would not mean that it is not admissible for any purpose whatsoever. Admissions made during criminal trial can be used in civil case also after giving an opportunity to the maker to explain those admissions.

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Hari v/s State of Maharashtra (2009) 11 SCC 96:-

effect of non explanation of injuries on accused person - related witness - enmity- held by itself is not sufficient to discard testimony of a witness who is otherwise reliable. -

While dealing with principles governing appreciation of evidence, Hon'ble Apex Court observed that a relationship between witness and victim by itself is not a ground to discard testimony. Where an occurrence takes place in a closed house, it can be witnessed by relatives only. Mere enmity over land dispute by itself cannot be a good ground to discard evidence of a related witness which is otherwise cogent and credible. It may be quite natural that precedence is given to provide medical aid to the victim over lodging of F.I.R. and therefore, delay of few hours in lodging F.I.R. may be insignificant. It is not a general principle that non explanation of injury of an accused person shall in all cases vitiate the prosecution case and it would depend on fact and circumstances of each case. Considerations which weigh with Supreme Court in deciding a State's appeal against an order of acquittal by High Court are totally different from a

case where there are concurrent findings both by trial court and High Court about the guilt of the appellant. In an appeal against acquittal, Court has to keep itself confined only to consider whether the view taken by High Court is also a possible view therefore, *State of Rajasthan v/s Rajendra Singh (2009) 11 SCC 106 {decided on 22.07.98}* is not applicable to present case.

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Malay Kumar Ganguly v/s Dr. Sukumar Mukherjee and others (2009) 9 SCC 221:-

importation of public law doctrine of legitimate expectation in case of medical negligence - standard of evidence required to prove criminal negligence - explained.

Civil and Criminal aspects of medical negligence have been considered very elaborately in this judgment. Hon'ble Court observed that the standard of duty to take care in medical services may also be inferred after factoring in the position and stature of doctors concerned as also the hospital; premium stature of services available to patient certainly raises a legitimate expectation. The Court is not oblivious that source of the doctrine of legitimate expectation is in administrative law. A little expansion of the said doctrine having regard to an implied nature of service which is to be rendered, would not be quite out of place. AMRI makes a representation that it is one of the best hospitals in Kolkata and provides very good medical care to its patients. Senior Counsel appearing for the respondents, when confronted with the question in regard to maintenance of the nurse' register, urged that it is not expected that in AMRI regular daily medical check-up would not have been conducted. The Court thought so, but the records suggest otherwise. The deficiency in service emanates therefrom. Even in the matter of determining deficiency in medical service, if representation is made by a doctor that he is a specialist and ultimately it turns out that he is not, deficiency in medical service will be presumed.

Hon'ble Court further held that to prove negligence in criminal law, prosecution must prove: (i) existence of duty, (ii) breach of duty causing death, (iii) breach of duty must be characterised as gross negligence. Criminal negligence is failure to exercise duty with reasonable and proper care and employing precautions guarding against injury to public generally, or to any individual in particular. So far as negligence alleged to have been caused by medical practitioner is concerned, to constitute negligence, simple lack of care or an error of

judgment is not sufficient. Negligence must be of a gross or a very high degree to amount to criminal negligence. Medical science is a complex science. Before an inference of medical negligence is drawn, the court must hold not only existence of negligence but also omission or commission on his part upon going into depth of the working of professional as also the nature of the job. The cause of death should be direct or proximate. To prosecute a medical professional for negligence under criminal law, it must be shown that the accused did something or failed to do something which in the given facts and circumstances, no medical professional in his ordinary senses and prudence would have done or failed to do.

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Kaliaperumal v/s Rajgopal and another (2009) 4 SCC 193:-

Registration Act, Ss. 47 & 48 - registration of sale deed without payment or partial payment of sale consideration - effect on the transaction - held intention of the parties is a decisive factor - normally title passes with the registration of sale deed. -

Normally title passes to the purchaser on registration of sale deed even without payment or with partial payment of sale consideration but the true test is the intention of the parties. Registration is prima-facie proof of an intention to transfer property but not a proof of operative transfer. Where payment of consideration is condition precedent for passing of title, the title will not pass unless full consideration is paid to the seller. Such intention is primarily to be gathered from recitals of sale deed. Where recitals are insufficient or ambiguous, circumstances and conduct of parties can be looked into, subject to provisions of Sec. 92, Evidence Act, 1872. Payment of entire consideration is not a condition precedent for completion of sale and passing of title. Remedy of vendor in such a case is to sue for unpaid consideration and he is entitled to a charge upon the property under Sec. 55(4)(b) of Transfer of Property Act.

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Rajasthan High Court V. Beena Verma (5699/2000) and RJS Officers Association V. State of Rajasthan (576/2003) :-

Rules 6, 8, 9 & 22 of RHJS rules 1969 read with its schedule I- strength of service - meaning. -

While examining scheme and various provisions of Rajasthan Higher Judicial Service Rules, 1969, Hon'ble Supreme Court has held in **Rajasthan High Court V. Beena Verma (5699/2000)** and **RJS Officers Association V. State of Rajasthan (576/2003)** that there is no quota for appointment to RHJS by direct recruitment. If, the permissive mode of making direct recruitment is opted-for, two fold restrictions shall have to be observed. Firstly, the total number of direct recruitee cannot exceed at any time 1/3 of the strength of service and secondly, a rotation of 3:1 shall have to be maintained between promotees and direct recruitees at the time of making direct recruitment. Strength of service shall mean the strength as shown in schedule-I which will not automatically increase upon creation of any temporary or permanent post but specific order revising schedule-I shall be a condition precedent for making any change in strength of service. Temporary vacancies/posts can be filled only and only by according

promotion and in no case such temporary post/vacancies can be taken in to count while determining vacancies for direct recruitment.

Kishanlal v/s Dharmendra Bafna & Ors. AIR 2009 SC 2932:-

Sec. 156, Cr.P.C. - power of investigation - ordinarily & except in exceptional situation, no interference in investigation is permissible by any court. -

While raising question about correctness of Sakiri Vasu v/s State of Uttar Pradesh & Ors. Hon'ble Supreme Court held that interference in investigation by court is very rare exception and further investigation could not be ordered without indicating, in what respect investigation has not been carried out and what are hidden truth which are required to be unearthed. Where two responsible different police officers carried out investigation and there was no evidence of their bias towards complainant then the order of further investigation was not justified. The investigation officer, when an FIR is lodged in respect of a cognizable offence, upon completion of the investigation would file a police report. The power of investigation is a statutory one and ordinarily and save and except some exceptional situations, no interference therewith by any court is permissible. When final report is filed u/s 173 (2) CrPC, the first informant has to be given a notice if the report is negative. First informant may file a protest petition which may in a given case be treated as a complaint on the basis whereof, after fulfilling other statutory requirement cognizance may be taken. Magistrate may also take cognizance on the basis of the material based on record collected by investigation agency and it also permissible for a learned Magistrate to direct further investigation. "Further investigation" and "Reinvestigation" are two different things. A superior court may in its constitutional power direct an investigation or further investigation. Reinvestigation or fresh investigation, as opined by Hon'ble Pasayat J. in Ramchandran v. R.Udai Kumar (2008) 5 SCC 413 is not envisaged in Sec. 173 (2) or 173 (8) CrPC.

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C. Cheriathan V. P. Naryanan Embranthiri (2009) 2 SCC 673:-

S.58(c) of T.P. Act - distinction between 'mortgage by conditional sale' & 'sale with condition of repurchase' - explained.

It is essential that there must be an intention to create relationship of creditor and borrower to make a transaction mortgage by conditional sale. On the other hand, in case of sale with a condition of repurchase, condition of repurchase should be embodied in the document itself purporting to effect the sale. Vendor must relinquish all rights over that property and there must be consent over a term after efflux of which the sale has to become absolute.

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Sarla Verma and Ors. V. Delhi Transport Corporation and Ors.(2009) 6 SCC 121:-

S.166 & 168 M.V. Act, 1988 - facts which are needed to be established for assessing compensation & steps to be followed by tribunal while determining compensation in death cases - explained. -

Exhaustive directions are given in it to Motor Accident Claim Tribunals/Courts in respect of procedure/steps to be followed to arrive at uniformity and consistency. Dealing with the aspect of just compensation, it is held that assessment of compensation involves certain hypothetical consideration yet it should be objective. Basically only three facts need to be established by the claimants for assessing compensation in the case of death i.e. (a) age of the deceased; (b) income of the deceased; and (c) the number of dependants. Further, the issues to be determined by the Tribunal to arrive at the loss of dependency are: (i) additions/deductions to be made for arriving at the income of the deceased; (ii) the deduction to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference to the age of the deceased. If these determinants are standardised, there will be uniformity and consistency in the decisions. There will be lesser need for detailed evidence. It will also be easier for the insurance companies to settle accident claims without delay.

Hon'ble Court directed that, tribunals must determine compensation in death cases by the following steps:

Step 1 (Ascertaining the multiplicand)

The income of the deceased per annum should be determined. Out of the said income a deduction should be made in regard to the amount which the deceased would have spent on himself by way of personal and living expenses. The balance, which is considered to be the contribution to the dependant family, constitutes the multiplicand.

Step 2 (Ascertaining the multiplier)

Having regard to the age of the deceased and period of active career, the appropriate multiplier should be selected. This does not mean ascertaining the number of years he would have lived or worked but for the accident. Having regard to several imponderables in life and economic factors, a table of multipliers with reference to the age has been identified by the Supreme Court. The multiplier should be chosen from the said table with reference to the age of the deceased.

Step 3 (Actual calculation)

The annual contribution to the family (multiplicand) when multiplied by such multiplier gives the "loss of dependency" to the family.

Thereafter, a conventional amount in the range of Rs. 5000 to Rs. 10,000 may be added as loss of estate. Where the deceased is survived by his widow, another conventional amount in the range or Rs. 5000 to Rs. 10,000 should be added under the head of loss of consortium. But no amount is to be awarded under the head of pain, suffering or hardship caused to the legal heirs of the deceased.

The funeral expenses, cost of transportation of the body (if incurred) and cost of any medical treatment of the deceased before death (if incurred) should also be added.

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National Insurance Company Ltd. v. Annappa Irappa Nasaria & Ors. 2008 AIR SCW 906:-

S.2(21) & 149 MV Act, Central Motor Vehicle Act, 1989 (Form 4) as it stood before amendment in 2001 - meaning of Light Motor Vehicle - explained -

Hon'ble Court held that light motor vehicle covers "light passenger carriage vehicle" and "light goods carriage vehicle". Therefore, a driver possessing LMV license cannot be said to not possess effective license to drive Matador van having Goods Carriage permit.

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Devendra and Ors. V. State of Uttar Pradesh and Anr. (2009) 7 SCC 495 :-

While elaborately explaining essentials of cheating and of forgery, it has been reiterated that making of any false documents is sine qua non for an offence of forgery.

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Jayendra Vishnu Thakhu V. State of Maharashtra (2009) 7 SCC 104:-

recording of evidence in absence of accused- prerequisite essential - Sec. 299 Cr.P.C. -

It is held that section 299(1) CrPC is in two parts - the first part provides for proof of jurisdictional fact in respect of absconding of an accused person and the second, that there was no immediate prospect of arresting him. Both the conditions contained in the first part of Section 299 CrPC must be read conjunctively and not disjunctively. Satisfaction of one of the requirements is not sufficient.

The term "absconding" has been defined in several dictionaries. The primary meaning of the word is to hide. It means to depart secretly or suddenly, especially to avoid arrest, prosecution or service of process. In addition to factum of "absconding", it must also be proved that there is no immediate prospect of arresting the accused. Then only, order under Sec. 299 CrPC can be passed and ipse dixit of the court would not be sufficient for attracting an extraordinary provision.

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V. Kishan Rao V/s Nikhil Super Specialty Hospital & Anr. (Civil Appeal No. 2641 of 2010, decided on 08.03.2010):

Purpose of Consumer Protection Act, 1986 - Held is to provide a forum for speedy and simple redressal of consumer disputes - complaints before consumer fora are tried summarily by following principles of natural justice - Evidence Act, 1872 is not applicable - District Forum

may rely upon hospital records without following provisions of Sec. 61,64,74 and 75 of Evidence Act - Efficacy of Act would be curtailed if requirement of having expert evidence in cases of Civil medical negligence is super imposed regardless of factual position of a case - Expert opinion is required only when a case is complicated enough warranting expert opinion or facts of a case are such that a Forum cannot resolve an issue without expert's assistance - direction given in Jacob Mathew case, (2005) 6 SCC 1, para 52 is meant for criminal cases and not for civil cases filed in consumer fora - General directions given in Martin F. D'Souza case, (2009) 3 SCC 1, para 106 extending the same to civil cases are per incuriam - Medical negligence is a mixed question of law and fact - In complicated civil cases requiring expert evidence, parties are also free to approach civil court instead of Consumer Forum - Applicability of Res ipsa loquitur - Where negligence is evident, the complainant is not required to do anything as res proves itself - In such a case, it is for the respondent to prove that he has taken care and has done his duty - Bolam test which lays down that "a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art", is now being criticized in England also and it is now being considered, not as a rule of law but, merely a rule of practice or of evidence in Britain also - Because of binding precedent of Jacob Mathews case, it cannot be departed in India but requires reconsideration - Patient suffering from intermittent fever and chills, was wrongly treated for typhoid instead of malaria for four days, which resulted in her death, is an apparent case of medical negligence which requires no expert opinion - Investigation conducted by another hospital where patient was removed in critical condition on fifth day, showed that Widal Test for typhoid was negative whereas test for malarial parasite was positive, was sufficient for District Forum to conclude that it was a case of wrong treatment -

Civil liberties had their origin and must find their ultimate guarantee in the faith of the people.*Jackson*

LATEST ACTS, AMENDMENTS, NOTIFICATIONS & GOVERNMENT POLICIES

MINISTRY OF LAW AND JUSTICE

(Legislative Department)

New Delhi, the 21th August, 2009/Bhadra 5.1931 (Saka)

The following Act of Parliament received the assent of the President on the 26th August, 2009, and is hereby published for general information:—

THE RIGHT OF CHILDREN TO FREE AND COMPULSORY EDUCATION ACT, 2009

No. 35 of 2009

[26th August, 2009.]

An Act to provide for free and compulsory education to all children of the age of six to fourteen years.

Be it enacted by Parliament in the Sixtieth Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title, extent and commencement. - (1) This Act may be called the **Right of Children to Free and Compulsory Education Act, 2009**.

(2) It shall extend to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions - In this Act, unless the context otherwise requires,—

(a) "*appropriate Government*" means—

(i) in relation to a school established, owned or controlled by the Central Government, or the administrator of the Union territory, having no legislature, the Central Government;

(ii) in relation to a school, other than the school referred to in sub-clause (i), established within the territory of—

(A) a State, the State Government;

(B) a Union territory having legislature, the Government of that Union territory;

(b) "*capitation fee*" means any kind of donation or contribution or payment other than the fee notified by the school;

(c) "*child*" means a male or female child of the age of six to fourteen years;

(d) "*child belonging to disadvantaged group*" means a child belonging to the Scheduled Caste, the Scheduled Tribe, the socially and educationally backward class or such other group having disadvantage owing to social, cultural, economical, geographical, linguistic, gender or such other factor, as may be specified by the appropriate Government, by notification;

(e) "*child belonging to weaker section*" means a child belonging to such parent or guardian whose annual income is lower than the minimum limit specified by the appropriate Government, by notification;

(f) "*elementary education*" means the education from first class to eighth class:

(g) "*guardian*", in relation to a child, means a person having the care and custody of that child and includes a natural guardian or guardian appointed or declared by a court or a statute;

(h) "*local authority*" means a Municipal Corporation or Municipal Council or Zila Parishad or Nagar Panchayat or Panchayat, by whatever name called, and includes such other authority or body having administrative control over the school or empowered by or under any law for the time being in force to function as a local authority in any city, town or village;

(i) "*National Commission for Protection of Child Rights*" means the National Commission for Protection of Child Rights constituted under section 3 of the Commissions for Protection of Child Rights Act, 2005 (4 of 2006);

(j) "*notification*" means a notification published in the Official Gazette;

(k) "*parent*" means either the natural or step or adoptive father or mother of a child;

(l) "*prescribed*" means prescribed by rules made under this Act;

(m) "*Schedule*" means the Schedule annexed to this Act;

(n) "*school*" means any recognised school imparting elementary education and includes—

(i) a school established, owned or controlled by the appropriate Government or a local authority;

(ii) an aided school receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority:

(iii) a school belonging to specified category; and

(iv) an unaided school, not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority;

(o) "*screening procedure*" means the method of selection for admission of a child, in preference over another, other than a random method;

(p) "*specified category*", in relation to a school, means a school known as Kendriya Vidyalaya, Navodaya Vidyalaya, Sainik School or any other school having a distinct character which may be specified, by notification, by the appropriate Government;

(q) "*State Commission for Protection of Child Rights*" means the State Commission for Protection of Child Rights constituted under section 3 of the Commissions for Protection of Child Rights Act, 2005.

CHAPTER II

RIGHT TO FREE AND COMPULSORY EDUCATION

3. Right of child to free and compulsory education. - (1) Every child of the age of six to fourteen years shall have a right to free and compulsory education in a neighbourhood school till completion of elementary education.

(2) For the purpose of sub-section (1), no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing the elementary education:

Provided that a child suffering from disability, as defined in clause (i) of Sec. 2 of the Persons with Disabilities (Equal Opportunities, Protection and Full Participation) Act, 1996 (1 of 1996); shall have the right to pursue free and compulsory elementary education in accordance with the provisions of Chapter V of the said Act.

4. Special provisions for children not admitted to or who have not completed, elementary education. - Where a child above six years of age has not been admitted in any school or though admitted, could not complete his or her elementary education, then, he or she shall be admitted in a class appropriate to his or her age:

Provided that where a child is directly admitted in a class appropriate to his or her age, then, he or she shall, in order to be at par with others, have a right to receive special training, in such manner, and within such time-limits, as may be prescribed:

Provided further that a child so admitted to elementary education shall be entitled to free education till completion of elementary education even after fourteen years.

5. Right of transfer to other school. - (1) Where in a school, there is no provision for completion of elementary education, a child shall have a right to seek transfer to any other school, excluding the school specified in sub-clauses (iii) and (iv) of clause (n) of Sec. 2, for completing his or her elementary education.

(2) Where a child is required to move from one school to another, either within a State or outside, for any reason whatsoever, such child shall have a right to seek transfer to any other school, excluding the school specified in sub-clauses (iii) and (iv) of clause (n) of Sec. 2, for completing his or her elementary education.

(3) For seeking admission in such other school, the Head-teacher or in-charge of the school where such child was last admitted, shall immediately issue the transfer certificate:

Provided that delay in producing transfer certificate shall not be a ground for either delaying or denying admission in such other school:

Provided further that the Head-teacher or in-charge of the school delaying issuance of transfer certificate shall be liable for disciplinary action under the service rules applicable to him or her.

CHAPTER III

DUTIES OF APPROPRIATE GOVERNMENT, LOCAL AUTHORITY AND PARENTS

6. Duties of appropriate Government and local authority to establish school. - For carrying out the provisions of this Act, the appropriate Government and the local authority shall establish, within such area or limits of neighbourhood, as may be prescribed, a school, where it is not so established, within a period of three years from the commencement of this Act.

7. Sharing of financial and other responsibilities. - (1) The Central Government and the State Governments shall have concurrent responsibility for providing funds for carrying out the provisions of this Act.

(2) The Central Government shall prepare the estimates of capital and recurring expenditure for the implementation of the provisions of the Act.

(3) The Central Government shall provide to the State Governments, as grants-in-aid of revenues, such percentage of expenditure referred to in sub-section (2) as it may determine, from time to time, in consultation with the State Governments.

(4) The Central Government may make a request to the President to make a reference to the Finance Commission under sub-clause (d) of clause (3) of Article 280 to examine the need for additional resources to be provided to any State Government so that the said State Government may provide its share of funds for carrying out the provisions of the Act.

(5) Notwithstanding anything contained in sub-section (4), the State Government shall, taking into consideration the sums provided by the Central Government to a State Government under sub-section (3), and its other resources, be responsible to provide funds for implementation of the provisions of the Act.

(6) The Central Government shall—

- (a) develop a framework of national curriculum with the help of academic authority specified under section 29;
- (b) develop and enforce standards for training of teachers;
- (c) provide technical support and resources to the State Government for promoting innovations, researches, planning and capacity building.

8. Duties of appropriate Government.- The appropriate Government shall—

(a) provide free and compulsory elementary education to every child: Provided that where a child is admitted by his or her parents or guardian, as the case may be, in a school other than a school established, owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government or a local authority, such child or his or her parents or guardian, as the case may be, shall not be entitled to make a claim for reimbursement of expenditure incurred on elementary education of the child in such other school.

Explanation.—The term "compulsory education" means obligation of the appropriate Government to—

- (i) provide free elementary education to every child of the age of six to fourteen years; and
- (ii) ensure compulsory admission, attendance and completion of

elementary education by every child of the age of six to fourteen years;

(b) ensure availability of a neighbourhood school as specified in section 6;

(c) ensure that the child belonging to weaker section and the child belonging to disadvantaged group are not discriminated against and prevented from pursuing and completing elementary education on any grounds;

(d) provide infrastructure including school building, teaching staff and learning equipment;

(e) provide special training facility specified in section 4;

(f) ensure and monitor admission, attendance and completion of elementary education by every child:

(g) ensure good quality elementary education conforming to the standards and norms specified in the Schedule;

h) ensure timely prescribing of curriculum and courses of study for elementary education; and

(i) provide training facility for teachers.

9. Duties of local authority. - Every local authority shall—

(a) provide free and compulsory elementary education to every child:

Provided that where a child is admitted by his or her parents or guardian, as the case

may be, in a school other than a school established, owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government or a local authority, such child or his or her parents or guardian, as the case may be, shall not be entitled to make a claim for reimbursement of expenditure incurred on elementary education of the child in such other school;

(b) ensure availability of a neighbourhood school as specified in section 6;

(c) ensure that the child belonging to weaker section and the child belonging to disadvantaged group are not discriminated against and prevented from pursuing and completing elementary education on any grounds;

(d) maintain records of children up to the age of fourteen years residing within its jurisdiction, in such manner as may be prescribed:

(e) ensure and monitor admission, attendance and completion of elementary education by every child residing within its jurisdiction;

(f) provide infrastructure including school building, teaching staff and learning material;

(g) provide special training facility specified in section 4;

(h) ensure good quality elementary education conforming to the standards and norms specified in the Schedule;

(i) ensure timely prescribing of curriculum and courses of study for elementary education;

(j) provide training facility for teachers;

(k) ensure admission of children of migrant families;

(l) monitor functioning of schools within its jurisdiction; and

(m) decide the academic calendar.

10. Duty of parents and guardian. - It shall be the duty of every parent or guardian to admit or cause to be admitted his or her child or ward, as the case may be, to an elementary education in the neighbourhood school.

11. Appropriate Government to provide for pre-school education. - With a view to prepare children above the age of three years for elementary education and to provide early childhood care and education for all children until they complete the age of six years, the appropriate Government may make necessary arrangement for providing free pre-school education for such children.

CHAPTER IV

RESPONSIBILITIES OF SCHOOLS AND TEACHERS

12. Extent of School's responsibilities for free and compulsory education. - (1) For the purposes of this Act, a school,—

(a) specified in sub-clause (i) of clause (n) of section 2 shall provide free and compulsory elementary education to all children admitted therein;

(b) specified in sub-clause (ii) of clause (n) of section 2 shall provide free and compulsory elementary education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent.;

(c) specified in sub-clauses (iii) and (iv) of clause (n) of section 2 shall admit in class I, to the extent of at least twenty-five percent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion:

Provided further that where a school specified in clause (n) of section 2 imparts pre-school education, the provisions of clauses (a) to (c) shall apply for admission to such pre-school education.

(2) The school specified in sub-clause (iv) of clause (n) of section 2 providing free and compulsory elementary education as specified in clause (c) of sub-section (1) shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed:

Provided that such reimbursement shall not exceed per-child-expenditure incurred by a school specified in sub-clause (i) of clause (n) of section 2:

Provided further that where such school is already under obligation to provide free education to a specified number of children on account of it having received any land, building, equipment or other facilities, either free of cost or at a concessional rate, such school shall not be entitled for reimbursement to the extent of such obligation.

(3) Every school shall provide such information as may be required by the appropriate Government or the local authority, as the case may be.

13. No capitation fee and screening procedure for admission. - (1) No school or person shall, while admitting a child, collect any capitation fee and subject the child or his or her parents or guardian to any screening procedure.

(2) Any school or person, if in contravention of the provisions of sub-section (1),—

(a) receives capitation fee, shall be punishable with fine which may extend to ten times the capitation fee charged;

(b) subjects a child to screening procedure, shall be punishable with fine which may extend to twenty-five thousand rupees for the first contravention and fifty thousand rupees for each subsequent contraventions.

14. Proof of age for admission. - (1) For the purposes of admission to elementary education, the age of a child shall be determined on the basis of the birth certificate issued in accordance with the provisions of the Births, Deaths and Marriages Registration Act, 1886 or on the basis of such other document, as may be prescribed.

(2) No child shall be denied admission in a school for lack of age proof.

15. No denial of admission.- A child shall be admitted in a school at the commencement of the academic year or within such extended period as may be prescribed:

Provided that no child shall be denied admission if such admission is sought subsequent to the extended period:

Provided further that any child admitted after the extended period shall complete his studies in such manner as may be prescribed by the appropriate Government.

16. Prohibition of holding back and expulsion.- No child admitted in a school shall be held back in any class or expelled from school till the completion of elementary education.

17. Prohibition of physical punishment and mental harassment to child.- (1) No child shall be subjected to physical punishment or mental harassment.

(2) Whoever contravenes the provisions of sub-section (1) shall be liable to disciplinary action under the service rules applicable to such person.

18. No School to be established without obtaining certificate of recognition. - (1) No school, other than a school established, owned or controlled by the appropriate Government or the local authority, shall, after the commencement of this Act, be established or function, without

obtaining a certificate of recognition from such authority, by making an application in such form and manner, as may be prescribed.

(2) The authority prescribed under sub-section (1) shall issue the certificate of recognition in such form, within such period, in such manner, and subject to such conditions, as may be prescribed:

Provided that no such recognition shall be granted to a school unless it fulfils norms and standards specified under section 19.

(3) On the contravention of the conditions of recognition, the prescribed authority shall, by an order in writing, withdraw recognition:

Provided that such order shall contain a direction as to which of the neighbourhood school, the children studying in the derecognised school, shall be admitted:

Provided further that no recognition shall be so withdrawn without giving an opportunity of being heard to such school, in such manner, as may be prescribed.

(4) With effect from the date of withdrawal of the recognition under sub-section (3), no such school shall continue to function.

(5) Any person who establishes or runs a school without obtaining certificate of recognition, or continues to run a school after withdrawal of recognition, shall be liable to fine which may extend to one lakh rupees and in case of continuing contraventions, to a fine often thousand rupees for each day during which such contravention continues.

19. Norms and standards for school (1) No school shall be established, or recognised, under section 18, unless it fulfils the norms and standards specified in the Schedule.

(2) Where a school established before the commencement of this Act does not fulfil the norms and standards specified in the Schedule, it shall take steps to fulfil such norms and standards at its own expenses, within a period of three years from the date of such commencement.

(3) Where a school fails to fulfil the norms and standards within the period specified under sub-section (2), the authority prescribed under sub-section (1) of section 18 shall withdraw recognition granted to such school in the manner specified under sub-section (3) thereof.

(4) With effect from the date of withdrawal of recognition under sub-section (3), no school shall continue to function.

(5) Any person who continues to run a school after the recognition is withdrawn, shall be liable to fine which may extend to one lakh rupees and in case of continuing contraventions, to a fine of ten thousand rupees for each day during which such contravention continues.

20. Power to amend Schedule. - The Central Government may, by notification, amend the Schedule by adding to, or omitting there from, any norms and standards.

21. School Management Committee- (1) A school, other than a school specified in sub-clause (iv) of clause (n) of School section 2, shall constitute a School Management Committee consisting of the elected Management representatives of the local authority, parents or guardians of children admitted in such school and teachers:

Provided that at least three-fourth of members of such Committee shall be parents or guardians.

Provided further that proportionate representation shall be given to the parents or guardians of children belonging to disadvantaged group and weaker section:

Provided also that fifty per cent, of Members of such Committee shall be women.

(2) The School Management Committee shall perform the following functions, namely:

-
- (a) monitor the working of the school;
 - (b) prepare and recommend school development plan;
 - (c) monitor the utilisation of the grants received from the appropriate Government or local authority or any other source; and
 - (d) perform such other functions as may be prescribed.

22. School Development Plan.- (1) Every School Management Committee, constituted under sub-section (1) of School section 21, shall prepare a School Development Plan, in such manner as may be prescribed.

(2) The School Development Plan so prepared under sub-section (1) shall be the basis for the plans and grants to be made by the appropriate Government or local authority, as the case may be.

23. Qualifications for appointment and terms and conditions of service of teachers.- (1)

Any person possessing such minimum qualifications, as laid down by an academic authority, authorised by the Central Government, by notification, shall be eligible for appointment as a teacher.

(2) Where a State does not have adequate institutions offering courses or training in teacher education, or teachers possessing minimum qualifications as laid down under sub-section (1) are not available in sufficient numbers, the Central Government may, if it deems necessary, by notification, relax the minimum qualifications required for appointment as a teacher, for such period, not exceeding five years, as may be specified in that notification:

Provided that a teacher who, at the commencement of this Act, does not possess minimum qualifications as laid down under sub-section (1), shall acquire such minimum qualifications within a period of five years.

(3) The salary and allowances payable to, and the terms and conditions of service of, teachers shall be such as may be prescribed.

24. Duties of teachers and redressal of grievances. - (1) A teacher appointed under sub-section (1) of section 23 shall perform the following duties, namely: —

(a) maintain regularity and punctuality in attending school:

(b) conduct and complete the curriculum in accordance with the provisions of sub-section (2) of section 29;

(c) complete entire curriculum within the specified time;

(d) assess the learning ability of each child and accordingly supplement additional instructions, if any, as required;

(e) hold regular meetings with parents and guardians and apprise them about the regularity in attendance, ability to learn, progress made in learning and any other relevant information about the child; and

(f) perform such other duties as may be prescribed.

(2) A teacher committing default in performance of duties specified in sub-section (1), shall be liable to disciplinary action under the service rules applicable to him or her:

Provided that before taking such disciplinary action, reasonable opportunity of being heard shall be afforded to such teacher.

(3) The grievances, if any, of the teacher shall be redressed in such manner as may be prescribed.

25. Pupil-Teacher ratio.- (1) Within six months from the date of commencement of this Act, the appropriate Government and the local authority shall ensure that the Pupil-Teacher Ratio, as specified in the Schedule, is maintained in each school.

(2) For the purpose of maintaining the Pupil-Teacher Ratio under sub-section (1), no teacher posted in a school shall be made to serve in any other school or office or deployed for any non-educational purpose, other than those specified in section 27.

26. Filling up vacancies of teachers.- The appointing authority, in relation to a school established, owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government or by a local authority, shall ensure that vacancy of teacher in a school under its control shall not exceed ten per cent of the total sanctioned strength.

27. Prohibition of deployment of teacher for non-educational purposes.- No teacher shall be deployed for any non-educational purposes; other than the decennial population census, disaster relief duties or duties relating to elections to the local authority or the State Legislatures or Parliament, as the case may be.

28. Prohibition of private tuition by teacher.- No teacher shall engage himself or herself in private tuition or private teaching activity.

CHAPTER V

CURRICULUM AND COMPLETION OF ELEMENTARY EDUCATION

29. Curriculum and evaluation procedure.- (1) The curriculum and the evaluation procedure for elementary education shall be laid down by an academic authority to be specified by the appropriate Government, by notification.

(2) The academic authority, while laying down the curriculum and the evaluation procedure under sub-section (1), shall take into consideration the following, namely:—

- (a) conformity with the values enshrined in the Constitution;
- (b) all round development of the child;
- (c) building up child's knowledge, potentiality and talent;
- (d) development of physical and mental abilities to the fullest extent;
- (e) learning through activities, discovery and exploration in a child friendly and child-centered manner;
- (f) medium of instructions shall, as far as practicable, be in child's mother tongue;
- (g) making the child free of fear, trauma and anxiety and helping the child to express views freely;
- (h) comprehensive and continuous evaluation of child's understanding of knowledge and his or her ability to apply the same.

30. Examination and completion certificate. - (1) No child shall be required to pass any Board examination till completion of elementary education, and

(2) Every child completing his elementary education shall be awarded a certificate, in such form and in such manner, as may be prescribed.

CHAPTER VI

PROTECTION OF RIGHT OF CHILDREN

31. Monitoring of child's right to education.- (1) The National Commission for Protection of Child Rights constituted under section 3, or as the case may be, the State Commission for Protection of Child Rights constituted under section 17, of the Commissions for Protection of Child Rights Act, 2005 (4 of 2006) shall, in addition to the functions assigned to them under that Act, also perform the following functions, namely:—

(a) examine and review the safeguards for rights provided by or under this Act and recommend measures for their effective implementation:

(b) inquire into complaints relating to child's right to free and compulsory education; and

(c) take necessary steps as provided under sections 15 and 24 of the said Commissions for Protection of Child Rights Act.

(2) The said Commissions shall, while inquiring into any matters relating to child's right to free and compulsory education under clause (c) of sub-section (1), have the same powers as assigned to them respectively under sections 14 and 24 of the said Commissions for Protection of Child Rights Act.

(3) Where the State Commission for Protection of Child Rights has not been constituted in a State, the appropriate Government may, for the purpose of performing the functions specified in clauses (a) to (c) of sub-section (1), constitute such authority, in such manner and subject to such terms and conditions, as may be prescribed.

32. Redressal of grievances.- (1) Withstanding anything contained in section 31, any person having any grievance relating to the right of a child under this Act may make a written complaint to the local authority having jurisdiction.

(2) After receiving the complaint under sub-section (1), the local authority shall decide the matter within a period of three months after affording a reasonable opportunity of being heard to the parties concerned.

(3) Any person aggrieved by the decision of the local authority may prefer an appeal to the State Commission for Protection of Child Rights or the authority prescribed under sub-section (3) of section 31, as the case may be.

(4) The appeal preferred under sub-section (3) shall be decided by State Commission for Protection of Child Rights or the authority prescribed under sub-section (3) of section 31, as the case may be, as provided under clause (c) of sub-section (1) of section 31.

33. Constitution of National Advisory Council.- (1) The Central Government shall constitute, by notification, a National Advisory Council." consisting of such number of Members, not exceeding fifteen, as the Central Government may deem necessary, to be appointed from amongst persons having knowledge and practical experience in the field of elementary education and child development.

(2) The functions of the National Advisory Council shall be to advise the Central Government on implementation of the provisions of the Act in an effective manner.

(3) The allowances and other terms and conditions of the appointment of Members of the National Advisory Council shall be such as may be prescribed.

34. Constitution of State Advisory Council.- (1) The State Government shall constitute, by notification, a State Advisory Council consisting of such number of Members, not exceeding fifteen, as the State Government may deem necessary, to be appointed from amongst persons having know ledge and practical experience in the field of elementary education and child development.

(2) The functions of the State Advisory council shall be to advise the State Government on implementation of the provisions of the Act in an effective manner.

(3) The allowances and other terms and conditions of appointment of Members of the State Advisory Council shall be such as may be prescribed.

CHAPTER VII
MISCELLANEOUS

35. Power to issue directions.- (1) The Central Government may issue such guidelines to the appropriate Government or, as the case may be, the local authority, as it deems fit for the purposes of implementation of the provisions of this Act.

(2) The appropriate Government may issue guidelines and give such directions, as it deems fit, to the local authority or the School Management Committee regarding implementation of the provisions of this Act.

(3) The local authority may issue guidelines and give such directions, as it deems fit, to the School Management Committee regarding implementation of the provisions of this Act.

36. Previous sanction for prosecution.- No prosecution for offences punishable under sub-section (2) of section 13, sub-section (5) of section 18 and sub-section (5) of section 19 shall be instituted except with the previous sanction of an officer authorised in this behalf, by the appropriate Government, by notification.

37. Protection of action taken in good faith.- No suit or other legal proceeding shall lie against the Central Government, the State Government, the National Commission for Protection of Child Rights, the State Commission for Protection of Child Rights, the local authority, the School Management Committee or any person, in respect of anything which is in good faith done or intended to be done, in pursuance of this Act, or any rules or order made there under.

38. Power of appropriate Government to make rules.- (1) The appropriate Government may, by notification, make rules, for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely: -

(a) the manner of giving special training and the time-limit thereof, under first proviso to section 4;

(b) the area or limits for establishment of a neighbourhood school, under section 6;

(c) the manner of maintenance of records of children up to the age of fourteen years, under clause (d) of section 9;

(d) the manner and extent of reimbursement of expenditure, under sub-section (2) of section 12;

- (e) any other document for determining the age of child under sub- section (1) of section 14;
- (f) the extended period for admission and the manner of completing study if admitted after the extended period, under section 15;
- (g) the authority, the form and manner of making application for certificate of recognition, under sub-section (1) of section 18;
- (h) the form, the period, the manner and the conditions for issuing certificate of recognition, under sub-section (2) of section 18;
- (i) the manner of giving opportunity of hearing under second proviso to sub-section (3) of section 18;
- (j) the other functions to be performed by School Management Committee under clause (d) of sub-section (2) of section 21 ;
- (k) the manner of preparing School Development Plan under sub-section (1) of section 22;
- (l) the salary and allowances payable to, and the terms and conditions of service of teacher, under sub-section (3) of section 23;
- (m) the duties to be performed by the teacher under clause (f) of sub-section (1) of section 24;
- (n) the manner of redressing grievances of teachers under sub-section (3) of section 24:
- (o) the form and manner of awarding certificate for completion of elementary education under sub-section (2) of section 30;
- (p) the authority, the manner of its constitution and the terms and conditions therefor, under sub-section (3) of section 31;
- (q) the allowances and other terms and conditions of appointment of Members of the National Advisory Council under sub-section (3) of section 33;
- (r) the allowances and other terms and conditions of appointment of Members of the State Advisory Council under sub-section (3) of section 34.

(3) Every rule made under this Act and every notification issued under sections 20 and 23 by the Central Government shall be laid, as soon as may be after it is made, before each

House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or notification or both Houses agree that the rule or notification should not be made, the rule or notification shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or notification.

(4) Every rule or notification made by the State Government under this Act shall be laid, as soon as may be after it is made; before the State Legislatures.

THE SCHEDULE
(See sections 19 and 25)
NORMS AND STANDARDS FOR A SCHOOL

| SI. No. | Item | Norms and Standards | |
|---------|--|---|--|
| 1. | Number of teachers: <i>(a)</i> For first class to fifth class | Admitted children Up to Sixty - Between sixty-one to ninety - Between Ninety-one to one hundred and twenty - Between One hundred and twenty-one to two hundred - Above One hundred and fifty children - Above Two hundred children- | Number of teachers Two Three Four Five Five plus one Head-teacher Pupil-Teacher Ratio (excluding Head-teacher) shall not exceed forty |
| | <i>(b)</i> For sixth class to eighth class | 1) At least one teacher per class so that there shall be at least one teacher each for- (i) Science and Mathematics; (ii) Social Studies; (iii) Languages. (2) At least one teacher for every thirty-five children. (3) Where admission of children is above one hundred— (i) a full time head-teacher; (ii) part time instructors for— (A) Art Education; (B) Health and Physical Education; (C) Work Education. | |
| 2. | Building | All-weather building consisting of— (i) at least one class-room for every teacher and an office-cum-store-cum-Head teacher's room; (ii) barrier-free access; (iii) separate toilets for boys and girls; | |

| | | |
|----|--|--|
| | | (iv) safe and adequate drinking water facility to all children; (v) a kitchen where mid-day meal is cooked in the school; (vi). Playground; (vii) arrangements for securing the school building by boundary wall or fencing. |
| 3. | Minimum number of working days/instructional hours in an academic year | (i) two hundred working days for first class to fifth class; (ii) two hundred and twenty working days for sixth class to eighth class; (iii) eight hundred instructional hours per academic year for first class to fifth class; (iv) one thousand instructional hours per academic year for sixth class to eighth class. |
| 4. | Minimum number of working hours per week for the teacher | Forty-five teaching including preparation hours. |
| 5. | Teaching learning equipment | Shall be provided to each class as required. |
| 6. | Library | There shall be a library in each school providing newspaper, magazines and books on all subjects, including story-books. |
| 7. | Play material, games and sports equipment | Shall be provided to each class as required. |

(Gaz. of India, Exty. Pt. II-Sec. 1, No. 39, dt. 27.08.2009, P.1] = 2009 CCS/P.1116/H.373]

(Brought into force w.e.f. 01.04.2010)

A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force. Just so far as the aid of the public force is given to a man, he has a legal right, and this right is the same whether his claim is founded in righteousness or iniquity.

....*Holmes*

THE CODE OF CRIMINAL PROCEDURE CODE (AMENDMENT) ACT, 2008

No. 5 of 2009

[7th January, 2009]

An Act further to amend the Code of Criminal Procedure, 1973.

Be it enacted by Parliament in the Fifty-seventh Year of the Republic of India as follows:-

1. Short title the commencement.- (1) This Act may be called the Code Of Criminal procedure (Amendment) Act, 2008.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint; and different dates may be appointed for different provisions of this Act.

2. Amendment of Sec. 2- In Sec. 2 of the Code of Criminal Procedure, 1973 (2 of 1974) (hereinafter referred to as the principal Act), after clause (w), the following clauses shall respectively be substituted, namely:-

(wa) "*victim*" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "*victim*" includes his or her guardian or legal heir.'

2. Amendment of Sec. 24.- In Sec. 24 of the principal Act, in sub-sec.(8), the following proviso shall be inserted, namely:-

"Provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section."

4. Amendment of Sec. 26- In Sec. 26 of the principal Act, in clause (a), the following proviso shall be inserted, namely:-

"Provided that any offence under Sec. 376 and Secs. 376-A to 376-D of the Indian Penal Code (45 of 1860) shall be tried as far as practicable by a Court presided over by a woman."

5. Amendment of Sec. 41.- In Sec. 41 of the principal Act, -

(i) in sub-sec. (1), for clauses (a) and (b), the following clauses shall respectively be substituted namely:-

"(a) who commits, in the presence of a police officer, a cognizable offence;

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:-

(i) the police officer has reason to believe on the basis of such complaint information, or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary-

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the court whenever required cannot be ensured,

and the police officer shall record while making such arrest, his reasons in writing.

(ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence;"

(ii) for sub-sec. (2), the following sub-section shall be substituted, namely:-

"(2) Subject to the provisions of Sec. 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been

received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate."

6. Insertion of new Secs. 41-A, 41-B, 41-C & 41-D- After Sec. 41 of the principal Act, the following new sections shall be inserted, namely:-

"41-A. *Notice of appearance before police officer-* (1) The police officer may, in all cases where the arrest of a person is not required under the provisions of sub-sec (1) of Sec. 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice, it shall be lawful for the police officer to arrest him for the offence mentioned in the notice, subject to such orders as may have been passed in this behalf by a competent Court.

41-B. *Procedure of arrest and duties of officer making arrest.-* Every police officer while making an arrest shall-

(a) bear an accurate, visible and clear identification of his name which will facilitate easy identification;

(b) prepare a memorandum of arrest which shall be-

(i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made;

(ii) countersigned by the person arrested; and

(c) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest.

- 41-C *Control room at districts-* (1) The State Government shall establish a police control room-
- (a) in every district; and
 - (b) at State level.
- (2) The State Government shall cause to be displayed on the notice board kept outside the control room at every district, the names and addresses of the persons arrested and the name and designation of the police officers who made the arrests.
- (3) The control room at the Police Headquarters at the State level shall collect from time to time, details about the persons arrested, nature of the offence with which they are charged and maintain a database for the information of the general public.

41-D *Right of arrested person to meet an advocate of his choice during interrogation-* When any person is arrested and interrogated by the police, he shall be entitle to meet an advocate of his choice during interrogation, though not throughout interrogation".

7. Amendment of Sec. 46- In Sec. 46 of the principal Act, in sub-sec. (1), the following proviso shall be inserted, namely:-

"Provided that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police office shall not touch the person of the women for making her arrest".

8. Substitution of new sections for Sec. 54. - For Sec. 54 of the principal Act, the following section shall be substituted, namely:-

"54. Examination of arrested person by medical officer.- (1) When any person is arrested, he shall be examined by a medical officer in the service of Central or State Government, and in case the medical officer is not available, by a registered medical practitioner soon after the arrest is made:

Provided that where the arrested person is a female, the examination of the body shall be made only by or under the supervision of a female medical officer, and in case the female medical officer is not available, by a female registered medical practitioner.

(2) The medical officer or a registered medical practitioner so examining the arrested person shall prepare the record of such examination, mentioning therein any injuries or marks of violence upon the person arrested, and the approximate time when such injuries or marks may have been inflicted.

(3) Where an examination is made under sub-sec. (1), a copy of the report of such examination shall be furnished by the medical officer or registered medical practitioner, as the case may be, to the arrested person or the person nominated by such arrested person".

9. Insertion of new Sec. 55-A.- After Sec. 55 of the principal Act, the following section shall be inserted, namely:-

"55-A. *Health and safety of arrested person-* It shall be the duty of the person having the custody of an accused to take reasonable care of the health and safety of the accused".

10. Insertion of new Sec. 60-A.- After Sec. 60 of the principal Act, the following section shall be inserted, namely:-

"60-A. *Arrest to be made strictly according to the Code.-* No arrest shall be made except in accordance with the provisions of this Code or any other law for the time being in force providing for arrest".

11. Amendment of Sec.157- In Sec. 157 of the principal act, in sub-sec (1), after the proviso, the following proviso shall be inserted, namely:-

"Provided further that in relation to an offence of rape, the recording of statement of victim shall be conducted at the residence of the victim or in place of her choice and,

as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or a social worker of the locality."

12 Amendment of Sec.161- In Sec. 161 of the principal Act, in sub-sec (3), the following provisions shall be inserted, namely:-

"Provided that statement made under this sub-section may also be recorded by audio-video electronic means."

13. Amendment of Sec.164.-In Sec. 164 of the principal Act, in sub-sec (1), for the proviso, the following provisos shall be substituted, namely:-

"Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the persons accused of an offence:

Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force."

14. Amendment of Sec.167.- In Sec. 167 of the principal Act, in sub-sec. (2),-

(a) in the proviso,-

(i) for clause (b), the following clause shall be substituted, namely:-

"(b) no Magistrate shall authorize detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage.",

(ii) for Explanation II, the following shall be substituted, namely:-

"Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.",

(b) after the proviso, the following proviso shall be inserted, namely:-

"Provided further that in case of woman under eighteen years of age, the detention shall be authorized to be in the custody of a remand home or recognized social institution."

15. Amendment of Sec. 172.- In Sec. 172 of the principal Act, after sub-sec. (1), the following sub-sections shall be inserted, namely:-

"(1-A) The statements of witnesses recorded, during the course of investigation, under Sec. 161 shall be inserted in the case diary.

(1-B) The diary referred to in sub-sec. (1) shall be volume and duly paginated."

16. Amendment of Sec.173- In Sec.173 of the principal Act,-

(a) after sub-sec. (1), the following sub-section shall be inserted, namely:-

"(1-A) the investigation in relation to rape of a child may be completed within three months from the date on which the information was recorded by the officer-in-charge of the police station."

(b) in sub-sec. (2), after clause (g), the following clause shall be inserted, namely;-

"(h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under Secs. 376, 376-A, 376-B, 376-C or 376-D of the Indian Penal Code (45 of 1860)."

17. Insertion of new Sec. 195-A.- After Sec. 195 of the principal Act, the following section shall be inserted, namely:-

"195-A. *Procedure for witnesses in case of threatening etc.*- A witness or any other person may file a complaint in relation to an offence under Sec. 195-A of the Indian Penal Code (45 of 1860)."

18. Amendment of Sec. 198- In sec 198 of the principal Act, in sub-sec. (6), for the words "fifteen years of age", the words "eighteen years of age" shall be substituted.

19. Amendment of Sec. 242- In Sec. 242 of the principal Act, in sub-sec.(1), the following proviso shall be inserted, namely:-

"Provided that the Magistrate shall supply in advance to the accused, the statement of witnesses recorded during investigation by the police."

20. Amendment of Sec. 275.- In Sec.275 of the principal Act, in sub-sec. (1), the following proviso shall be inserted, namely:-

"Provided that evidence of a witness under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of the offence."

21. Amendment of Sec. 309- In Sec. 309 of the Principal Act,-

(a) In sub-sec. (1), the following proviso shall be inserted, namely:-

"Provided that when the injury or trial relates to an offence under Secs. 376 to 376-D of the Indian Penal Code (45 of 1860), the inquiry of trial shall, as far as possible, be completed within a period of two months from the date of commencement of the examination of witnesses.",

(b) in sub-sect. (2), after the third proviso and before Explanation 1, the following proviso shall be inserted, namely:-

"Provided also that-

- (a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;
- (b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;
- (c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the

examination-in-chief or cross-examination of the witness, as the case may be."

22. Amendment of Sec. 313 - In Sec. 313 of the principal Act, after sub-sec. (4), the following sub-section shall be inserted, namely:-

"(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section."

23. Amendment of Sec. 320.- In Sec. 320 of the Principal Act,-

(i) in sub-sec. (1), for the TABLE, the following TABLE shall be substituted namely:-

| Offence | Section of the Indian Penal Code applicable | Person by whom offence may be compounded |
|---|---|---|
| 1 | 2 | 3 |
| Uttering words, etc., with deliberate intent to wound the religious feelings of any person. | 298 | The person whose religious feelings are intended to be wounded. |
| Voluntarily causing hurt | 323 | The person to whom the hurt is caused. |
| Voluntarily causing hurt by provocation. | 334 | Ditto. |
| Voluntarily causing grievous hurt on grave and sudden provocation. | 335 | Ditto. |
| Wrongfully restraining or confining any person | 341,342 | The person restrained or confined. |
| Wrongfully confining a person for three days or more | 343 | The person confined |
| Wrongfully confining a person for ten days or more | 344 | Ditto. |
| Wrongfully confining a person in secret. | 346 | Ditto. |

| | | |
|---|-------------|---|
| Assault or use of criminal force | 352,355,358 | The person assaulted or to whom criminal force is used. |
| Theft | 379 | The owner of the property stolen. |
| Dishonest misappropriation of property | 403 | The owner of the property misappropriated. |
| Criminal breach of trust by a carrier, wharfinger, etc. | 407 | The owner of the property in respect of which the breach of trust has been committed. |
| Dishonestly receiving stolen property knowing it to be stolen. | 411 | The owner of the property stolen. |
| Assisting in the concealment or disposal of stolen property, knowing it to be stolen. | 414 | Ditto. |
| Cheating | 417 | The person cheated. |
| Cheating by personation. | 419 | Ditto. |
| Fraudulent removal or concealment of property, etc. to prevent distribution among creditors. | 421 | The creditors who are affected thereby. |
| Fraudulently preventing from being made available for his creditors a debt or demand due to the offender. | 422 | Ditto. |
| Fraudulent execution of deed of transfer containing false statement of consideration. | 423 | The person affected thereby. |
| Fraudulent removal of concealment of property. | 424 | Ditto. |
| Mischief, when the only loss or damage caused is loss or damage to a private person. | 426,427 | The person to whom the loss or damage is caused. |

| | | |
|--|-----|---|
| Mischief by killing or maiming animal | 428 | The owner of animal. |
| Mischief by killing or maiming cattle, etc. | 429 | The owner of cattle or animal. |
| Mischief by injury to works of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to private person. | 430 | The person to whom the loss or damage is caused. |
| Criminal trespass | 447 | The person in possession of the property trespassed upon. |
| House-trespass. | 448 | Ditto. |
| House-trespass to commit an offence (other than theft) punishable with imprisonment. | 451 | The person in possession of the house trespassed upon. |
| Using a false trade or property mark. | 482 | The person to whom loss or injury is caused by such use. |
| Counterfeiting a trade or property mark used by another. | 483 | Ditto. |
| Knowingly selling, or exposing or possessing for sale or for manufacturing purpose, goods marked with a counterfeit property mark. | 486 | Ditto. |
| Criminal breach of contract of service | 491 | The person with whom the offender has contracted. |
| Adultery | 497 | The husband of the woman |
| Enticing or taking away or detaining with criminal intent a married woman. | 498 | The husband of the woman and the woman. |
| Defamation, except such cases as are as specified against Sec. | 500 | The person defamed. |

| | | |
|--|-----|-------------------------|
| 500 of the Indian Penal Code (45 of 1860) in column 1 of the Table under sub-sec. (2) | | |
| Printing or engraving matter, knowing it to be defamatory. | 501 | Ditto. |
| Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter. | 502 | Ditto. |
| Insult intended to provoke a breach of the peace. | 504 | The person insulted. |
| Criminal intimidation. | 506 | The person intimidated. |
| Inducing person to believe himself an object of divine displeasure. | 508 | The person induced." |

(ii) in sub-sec (2) for the TABLE the following TABLE shall be substituted namely:-

"TABLE

| Offence | Section of the Indian Penal Code applicable | Person by whom offence may be compounded. |
|---|---|---|
| 1 | 2 | 3 |
| Causing miscarriage | 312 | The woman to whom miscarriage is caused. |
| Voluntarily causing grievous hurt. | 325 | The person to whom hurt is caused. |
| Causing hurt by doing an act so rashly and negligently as to endanger human life or the perusal safely of others. | 337 | Ditto. |
| Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the | 338 | Ditto. |

| | | |
|--|-----|--|
| perusal safely of others. | | |
| Assault or criminal force in attempting wrongfully to confine a person. | 357 | The person assaulted or to whom the force was used. |
| Theft, by clerk or servant of property in possession of master | 381 | The owner of the property stolen. |
| Criminal breach of trust | 406 | The owner of property in respect of which breach of trust has been committed. |
| Criminal breach of trust by a clerk or servant | 408 | The owner of the property in respect of which the breach of trust has been committed |
| Cheating a person whose interest the offender was bound, either by law or by legal contact, to protect. | 418 | The person cheated. |
| Cheating and dishonestly inducing delivery of property or the making, alteration or destruction of a valuable security. | 420 | The person cheated. |
| Marrying again during the lifetime of a husband or wife. | 494 | The husband or wife of the person so marrying. |
| Defamation against the President or the Vide-President or the Governor of a State or the Administrator of Union territory or a Minister in respect of his public functions when instituted upon a complaint made by the Public Prosecutor. | 500 | The person defamed. |
| Uttering words or sounds or | 509 | The woman whom it was |

| | | |
|---|--|--|
| making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman. | | intended to insult or whose privacy was intruded upon.", |
|---|--|--|

(iii) for Sub-sec. (3), the following sub-section shall be substituted, namely:-

"(3) When an offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) or where the accused is liable under Secs. 34 or 149 of the Indian Penal Code (45 of 1860) may be compounded in like manner."

24. Amendment of Sec. 327.- In Sec. 327 of the principal Act,-

(a) In sub-sec. (2), after the proviso, the following proviso shall be inserted, namely:-

" Provided further that in camera trial shall be conducted as far as practicable by a woman Judge or Magistrate."

(b) in sub-sec. (3), the following proviso shall be inserted, namely:-

"Provided that the ban on printing or publication of trial proceedings in relation to an offence of rape may be lifted, subject to maintaining confidentiality of name and address of the parties."

25. Amendment of Sec. 328. - In Sec. 328 of the principal Act, -

(a) after sub-sec. (1), the following sub-section shall be inserted, namely-

"(1-A) If the civil surgeon finds the accused to be a unsound mind, he shall refer such person to a psychiatrist or clinical psychologist for care, treatment and prognosis of the condition and the psychiatrist or clinical psychologist, as the case may be, shall inform the Magistrate whether the accused is suffering from unsoundness of mind or mental retardation.

Provided that if the accused is aggrieved by the information given by the psychiatric or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of -

(a) head of psychiatry unit in the nearest government hospital; and

(b) a faculty member in psychiatry in the nearest medical college."

(b) for sub-sec.(3), the following sub-sections shall be substituted, namely:-

"(3) If such Magistrate is informed that the person referred to in sub-sec. (1-A) is a person of unsound mind, the Magistrate shall further determine whether the unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate shall record a finding to that effect, and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if he finds that no *prima facie* case is made out against the accused, he shall, instead of postponing the enquiry, discharge the accused and deal with him in the manner provided under Sec. 330:

Provided that if the Magistrate finds that a *prima facie* case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the proceeding for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused, and order the accused to be dealt with as provided under Sec. 330.

(4) If such Magistrate is informed that the person referred to in sub-sec.(1-A) is a person with mental retardation, the Magistrate shall further determine whether the mental retardation renders the accused incapable of entering defence, and if the accused is found so incapable, the Magistrate shall order closure of the inquiry and deal with the accused in the manner provided under Sec. 330."

26. Amendment of Sec. 329.- In Sec. 329 of the principal Act, -

(a) after sub-sec. (1), the following sub-section shall be inserted, namely:-

"(1A) If during trial, the Magistrate or Court of Sessions finds the accused to be of unsound mind, he or it shall refer such person to a psychiatrist or clinical psychologist for care and treatment, and the psychiatrist or clinical psychologist, as the case may be, shall report to the Magistrate or Court whether the accused is suffering from unsoundness of mind.

Provided that if the accused is aggrieved by the information given by the psychiatric or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of -

- (a) head of psychiatry unit in the nearest government hospital; and
- (b) a faculty member in psychiatry in the nearest medical college.";

(b) for sub-sec.(2), the following sub-sections shall be substituted, namely:-

"(2) If such Magistrate or Court is informed that the person referred to in sub-sec. (1-A) is a person of unsound mind, the Magistrate or Court shall further determine whether unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate or Court shall record a finding to that effect and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if the Magistrate or Court finds that no *prima facie* case is made out against the accused, he or it shall, instead of postponing the trial, discharge the accused and deal with him in the manner provided under Sec. 330;

Provided that if the Magistrate or Court finds that a *prima facie* case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the trial for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused.

(3) If the Magistrate or Court finds that a *prima facie* case is made out against the accused and he is incapable of entering defence by reason of mental retardation, he or is shall not hold the trial and order the accused to be dealt with in accordance with Sec. 330."

27. Substitution of new section for Sec.330.- For Sec. 330 of the principal Act, the following section shall be substituted, namely:-

"330. *Release of person of unsound mind pending investigation or trial.* - (1) Whenever a person is found under Sec. 328 or Sec. 329 to be incapable of entering defence by reason of unsoundness of mind or mental retardation, the Magistrate or Court, as the case may be shall, whether the case is one in which bail may be taken or not, order release of such person on bail:

Provided that the accused is suffering from unsoundness of mind or mental retardation which does not mandate in-patient treatment and a friend or relative undertakes to obtain regular out-patient psychiatric treatment from the nearest medical facility and to prevent from doing injury to himself or to any other person.

(2) If the case is one in which, in the opinion of the Magistrate or Court, as the case may be, bail cannot be granted or if any appropriate undertaking is not given, he or it shall order the accused to be kept in such a place where regular psychiatric treatment can be provided, and shall report the action taken to the State Government:

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the State Government may have made under the Mental Health Act, 1987 (14 of 1987).

(3) Whenever a person is found under Sec. 328 or Sec. 329 to be incapable of entering defence by reason of unsoundness of mind or mental retardation, the Magistrate or Court, as the case may be, shall keeping in view the nature of the act committed and the extent of unsoundness of mind or mental retardation, further determine if the release of the accused can be ordered:

Provided that-

- (a) if on the basis of medical opinion of a specialist, the Magistrate or Court, as the case may be, decide to order discharge of the accused, as provided under Sec. 328 or 329, such release may be ordered, if sufficient security is given that the accused shall be prevented from doing injury to himself or to any other person;
- (b) if the Magistrate or Court, as the case may be, is of opinion that discharge of the accused cannot be ordered, the transfer of the accused to a residential facility for persons of unsound mind or mental retardation may be ordered wherein the accused may be provided care and appropriate education and training."

28. Insertion of new Sec. 357-A- After Sec. 357 of the principal Act, the following section shall be inserted, namely:-

"357-A. *Victim compensation scheme.* - (1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of

compensation the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-sec. (1).

(3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under Sec. 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under sub-sec. (4) the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

(6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order immediate first-aid facility or for medical benefits to be made available free of cost on the certificate of the police officer not be low the rank of the officer-in-charge, of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit."

29. Amendment of Sec. 372.- In Sec. 372 of the principal Act, the following proviso shall be inserted, namely:-

"Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court."

30. Amendment of Sec. 416.-In Sec. 416 of the principal Act, the words "order the execution of the sentence to be postponed, and may, if it thinks fit" shall be omitted.

31. Insertion of new Sec. 437-A.- After Sec. 437 of the principal Act, the following section shall be inserted, namely:-

"437-A. *Bail to require accused to appear before next appellate court.* - (1) Before conclusion of the trial and before disposal of the appeal, the trial Court trying the offence or the Appellate Court, as the case may be, shall require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of the respective Court and such bail bonds shall be in force for six months.

(2) If such accused fails to appear, the bond stands forfeited and the procedure under Sec. 446 shall be applicable."

32. Amendment of Form 45.- In the Second Schedule to the principal Act, in Form No. 45, after the figures "437". the figures and letter "437-A", shall be inserted.

[*Gaz. of India, Exty. Pt. II-Sec.1, No.6 dt. 9.1.2009 P.1*] 2009 CCS/P.98/H.45]

The study of law is not merely the gaining of knowledge about the laws of one's country.

It is a liberal education, a discipline of the mind. Law teaches us precision, lucidity of expression, the value of words, and, more than anything else, how to sift the wheat from the chaff, how to discard the irrelevancies that surround a subject, and how to get at the

root of the matter. *Mahomedali Currim Chagla*

**THE RAJASTHAN COURT FEES AND SUITS VALUATION
(AMENDMENT) ACT, 2009**

(Act No. 19 of 2009)

[Received the assent of the Governor on the 11th day of September, 2009]

An Act further to amend the Rajasthan Court Fees and Suits Valuation Act, 1961.

Be it enacted by the Rajasthan State Legislature in the Sixtieth Year of the Republic of India, as follows:-

1. Short title and commencement. - (1) This Act may be called the **Rajasthan Court Fees and Suits Valuation (Amendment) Act, 2009**.

(2) It shall come into force at once.

1[STATEMENT OF OBJECTS AND REASONS

In the matter of Writ Petition (Civil) No. 496/2000 in Salem Advocate Bar Association Tamilnadu vs. Union of India, Hon'ble Supreme Court vide its judgment dt. 2nd August, 2005 observed as under:-

"67. Regarding refund of the court fee where the matter is settled by the reference to one of the modes provided in Sec. 89 of the Act it is for the State Government to amend the laws on the lines of amendment made in Central Court Fee Act by 1999 Amendment of the Code. The State Government can consider making similar amendments in the State Court Fee legislation." (Para 67 of the Judgment)

To comply with the judgment of Hon'ble Supreme Court and also public interest a new Sec. 65-B has been proposed to be added in the Rajasthan Court Fees and Suits Valuation Act, 1961 (Act No. 23 of 1961).

This Bill seeks to achieve the aforesaid objectives.]

2. Addition of new Sec. 65-B in Rajasthan Act No. 23 of 1961. - After the existing Sec. 65-A of the Rajasthan Court Fees and Suits Valuation Act, 1961 (Act. No. 23 of 1961), the following new Sec. 65-B shall be added, namely:-

"65-B. *Refund of Fee.*- Where the Court refers the parties to a suit to any one of the mode of settlement of dispute referred to in Sec. 89 of the Code of Civil Procedure, 1908 (Central Act No. 5 of 1908) and the matter is settled by one of the modes provided under

Sec. 89 of the Code of Civil Procedure, the plaintiff shall be entitled to a certificate from the Court authorising him to receive back from the Collector, the full amount of the fee paid in respect of such plaint."

[*Noti .No. F. 2(24) Vidhi/2/2009, dt. 11.9.2009- Raj. Gaz., Exty., Pt. IV-A, dt. 11.9.2009, p. 17(2).*] = 2009 RSCS/III/P. 822/H. 532

Justice is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement, and progress of our race. And whoever labors on this edifice, with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributors to raise its august dome still higher in the skies, connects himself in name, and fame, and character, with that which is and must be as durable as the frame of human society.*Daniel Webster*

424. The Protection of Women from Domestic Violence Act, 2005 - Sec. 8(1)- All the Dy. Directors (ICDS), Women and Child Development Department, all the Child Development Project Officers and all the Prachetas- Appointed as Protection Officers for their respective jurisdiction.

In supersession of this department notification No. F. 16(1)(14) DWE/W.ATTRO/2007/3548, dt. 21.2.2008 and No. 16(1)(14) DWE/W.ATTRO/2007/10381, dt. 11.4.2008 and in exercise of the powers conferred under sub-sec. (1) of Sec. 8 of the **Protection of Women from Domestic Violence Act, 2005** (Central Act, No. 43 of 2005) the State Government hereby appoints all the Dy. Directors (ICDS), Women and Child Development Department, all the Child Development Project Officers and all the Prachetas as Protection Officers for their respective jurisdiction. The Protection Officers as appointed shall exercise the powers and perform the duties conferred on them by and under the Act in their respective jurisdiction.

Note.- See 2008 RSCS, Pt. II (Raj. Sec.) at page 456, Head Note No. 280 and at page 625, Head Note No. 336 for the above referred superseded notification dated 21.2.2008 and 11.4.2008 respectively.

[*Noti .No. F. 16(1)(14)DWE/W.ATTRO/2007/5083, dt. 4.3.2009- Raj. Gaz., Exty., Pt. I-A, dt. 20.3.2009, p. 237.*] = 2009 RSCS/II/P. 744/H. 424

NATIONAL LITIGATION POLICY

National Litigation Policy, as formulated by the Central Government, India for the purpose of reducing case pendency in various Courts in India, is available on <http://lawmin.nic.in/Legal.htm> (last visited on 13.08.2010). The text is being published for knowledge and for providing ready information to the readers.

I. INTRODUCTION

Whereas at the National Consultation for Strengthening the Judiciary toward Reducing Pendency and Delays held on the 24th and 25th October, 2009 the Union Minister for Law and Justice, presented resolutions which were adopted by the entire Conference unanimously.

And Wherein the said Resolution acknowledged the initiative undertaken by the Government of India to frame a National Litigation Policy with a view to ensure conduct of responsible litigation by the Central Government and urges every State Government to evolve similar policies.

The National Litigation Policy is as follows:-

II. THE VISION/MISSION

1. The National Litigation Policy is based on the recognition that Government and its various agencies are the pre-dominant litigants in courts and Tribunals in the country. Its aim is to transform Government into an Efficient and Responsible litigant. This policy is also based on the recognition that it is the responsibility of the Government to protect the rights of citizens, to respect fundamental rights and those in charge of the conduct of Government litigation should never forget this basic principle.

“EFFICIENT LITIGANT” MEANS

- Focusing on the core issues involved in the litigation and addressing them squarely.
- Managing and conducting litigation in a cohesive, coordinated and time-bound manner.
- Ensuring that good cases are won and bad cases are not needlessly persevered with.
- A litigant who is represented by competent and sensitive legal persons: competent in their skills and sensitive to the facts that Government is not an ordinary litigant and that a litigation does not have to be won at any cost.

“RESPONSIBLE LITIGANT” MEANS

- That litigation will not be resorted to for the sake of litigating.
 - That false pleas and technical points will not be taken and shall be discouraged.
 - Ensuring that the correct facts and all relevant documents will be placed before the court.
 - That nothing will be suppressed from the court and there will be no attempt to mislead any court or Tribunal.
2. Government must cease to be a compulsive litigant. The philosophy that matters should be left to the courts for ultimate decision has to be discarded. The easy approach, “Let the court decide,” must be eschewed and condemned.
 3. The purpose underlying this policy is also to reduce Government litigation in courts so that valuable court time would be spent in resolving other pending cases so as to achieve the Goal in the National Legal Mission to reduce average pendency time from 15 years to 3 years. Litigators on behalf of Government have to keep in mind the principles incorporated in the National mission for judicial reforms which includes identifying bottlenecks which the Government and its agencies may be concerned with and also removing unnecessary Government cases. Prioritisation in litigation has to be achieved with particular

emphasis on welfare legislation, social reform, weaker sections and senior citizens and other categories requiring assistance must be given utmost priority.

4. The Stakeholders:

A) In ensuring the success of this policy, all stake holders will have to play their part – the Ministry of Law & Justice, Heads of various Departments, Law Officers and Government Counsel, and individual officers all connected with the concerned litigation. The success of this policy will depend on its strict implementation. Nodal Officers will be appointed by Heads of Department.

“Head of Department” means the administrative person ultimately responsible for the working of the Department or Agency, as the case may be.

B) The appointment of Nodal Officers must be done carefully. The Nodal Officer has a crucial and important role to play in the overall and specific implementation of this Policy, including but not limited to the references made hereinafter. Every Ministry must be mindful of the responsibility to appoint proper Nodal Officers who have legal background and expertise. They must be in a position to pro-actively manage litigation. Whilst making such appointments, care must be taken to see that there is continuity in the incumbents holding office. Frequent changes in persons holding the position must be avoided. Nodal Officers must also be subjected to training so that they are in a position to understand what is expected of them under the National Litigation Policy.

C) Accountability is the touch-stone of this Policy. Accountability will be at various levels; at the level of officers in charge of litigation, those responsible for defending cases, all the lawyers concerned and Nodal Officers. As part of accountability, there must be critical appreciation on

the conduct of cases. Good cases which have been lost must be reviewed and subjected to detailed scrutiny to ascertain responsibility. Upon ascertainment of responsibility, suitable action will have to be taken. Complacency must be eliminated and replaced by commitment.

- D) There will be Empowered Committees to monitor the implementation of this Policy and accountability. The Nodal Officers and the Heads of Department will ensure that all relevant data is sent to the Empowered Committees. The Empowered Committee at the National level shall be chaired by the Attorney General for India and such other members not exceeding six in number as may be nominated by the Ministry of Law with an Additional Secretary to be the Member Secretary. There will be four Regional Empowered Committees to be chaired by an Additional Solicitor General nominated by the Ministry of Law. It shall include all the Assistant Solicitors General of the Region and such other members including a Member Secretary nominated by the Ministry of Law. The Regional Committees shall submit monthly reports to the National Empowered Committee which shall in turn submit Comprehensive Reports to the Ministry of Law. It shall be the responsibility of the Empowered Committee to receive and deal with suggestions and complaints including from litigants and Government Departments and take appropriate measures in connection therewith.

III. GOVERNMENT REPRESENTATION

- A) While it is recognized that Government Panels are a broad based opportunity for a cross section of lawyers, Government Panels cannot be vehicles for sustaining incompetent and inefficient persons. Persons who recommend names for inclusion on the Panel are requested to be careful in making such

recommendations and to take care to check the credentials of those recommended with particular reference to legal knowledge and integrity.

- B) Screening Committees for constitution of Panels will be introduced at every level to assess the skills and capabilities of people who are desirous of being on Government Panels before their inclusion on the Panel. The Ministry of Law shall ensure that the constitution of Screening Committees will include representatives of the Department concerned. The Screening Committees will make their recommendations to the Ministry of Law. Emphasis will be on identifying areas of core competence, domain expertise and areas of specialisation. It cannot be assumed that all lawyers are capable of conducting every form of litigation.
- C) Government advocates must be well equipped and provided with adequate infrastructure. Efforts will be made to provide the agencies which conduct Government litigation with modern technology such as computers, internet links, etc. Common research facilities must be made available for Government lawyers as well as equipment for producing compilations of cases.
- D) Training programs, seminars, workshops and refresher courses for Government advocates must be encouraged. There must be continuing legal education for Government lawyers with particular emphasis on identifying and improving areas of specialization. Law schools will be associated in preparing special courses for training of Government lawyers with particular emphasis on identifying and improving areas of specialization. Most importantly, there must be an effort to cultivate and instill values required for effective Government representation.
- E) National and regional conferences of Government advocates will be organized so that matters of mutual interest can be discussed and problems analysed.

- F) Advocates on Record must play a meaningful role in Government litigations. They cannot continue to be merely responsible for filing appearances in Court. A system of motivation has to be worked out for Government advocates under which initiative and hard work will be recognised and extraordinary work will be rewarded. This could be in the form of promotions or out of turn increments.
- G) It will be the responsibility of all Law Officers to train Panel lawyers and to explain to them what is expected of them in the discharge of their functions.
- H) Panels will be drawn up of willing, energetic and competent lawyers to develop special skills in drafting pleadings on behalf of Government. Such Panels shall be flexible. More and more advocates must be encouraged to get on to such Panels by demonstrating keenness, knowledge and interest.
- I) Nodal Officers will be responsible for active case management. This will involve constant monitoring of cases particularly to examine whether cases have gone “off track” or have been unnecessarily delayed.
- J) Incomplete briefs are frequently given to Government Counsel. This must be discontinued. The Advocates-on-Record will be held responsible if incomplete briefs are given. It is the responsibility of the person in charge of the Central Agency concerned, to ensure that proper records are kept of cases filed and that copies retained by the Department are complete and tally with what has been filed in Court. If any Department or Agency has a complaint in this regard it can complain to the Empowered Committee.
- K) There should be equitable distribution of briefs so that there will be broad based representation of Government. Additional Solicitors General will be associated with regard to distribution of briefs in the High Court. Complaints that certain

Panel advocates are being preferred in the matter of briefing will be inquired into seriously by the Empowered Committee.

- L) Government lawyers are expected to discharge their obligations with a sense of responsibility towards the court as well as to Government. If concessions are made on issues of fact or law, and it is found that such concessions were not justified, the matter will be reported to the Empowered Committee and remedial action would follow.
- M) While Government cannot pay fees which private litigants are in a position to pay, the fees payable to Government lawyers will be suitably revised to make it remunerative. Optimum utilisation of available resources and elimination of wastage will itself provide for adequate resources for revision of fees. It should be ensured that the fees stipulated as per the Schedule of Fees should be paid within a reasonable time. Malpractice in relation to release of payments must be eliminated.

IV. ADJOURNMENTS

- A) Accepting that frequent adjournments are resorted to by Government lawyers, unnecessary and frequent adjournments will be frowned upon and infractions dealt with seriously.
- B) In fresh litigations where the Government is a Defendant or a Respondent in the first instance, a reasonable adjournment may be applied for, for obtaining instructions. However, it must be ensured that such instructions are made available and communicated before the next date of hearing. If instructions are not forthcoming, the matter must be reported to the Nodal Officer and if necessary to the Head of the Department.
- C) In Appellate Courts, if the paper books are complete, then adjournments must not be sought in routine course. The matter must be dealt with at the first hearing itself. In such cases, adjournments should be applied for only if a specific query

from the court is required to be answered and for this, instructions have to be obtained.

- D) One of the functions of the Nodal Officers will be to coordinate the conduct of litigation. It will also be their responsibility to monitor the progress of litigation, particularly to identify cases in which repeated adjournments are taken. It will be the responsibility of the Nodal Officer to report cases of repeated and unjustified adjournments to the Head of Department and it shall be open to him to call for reasons for the adjournment. The Head of the Agency shall ensure that the Records of the case reflect reasons for adjournment, if these are repeated adjournments. Serious note will be taken of cases of negligence or default and the matter will be dealt with appropriately by referring such cases to the Empowered Committee. If the advocates are at fault, action against them may entail suspension/removal of their names from Government Panels.
- E) Cases in which costs are awarded against the Government as a condition of grant of adjournment will be viewed very seriously. In all such cases the Head of Department must give a report to the Empowered Committee of the reasons why such costs were awarded. The names of the persons responsible for the default entailing the imposition of costs will be identified. Suitable action must be taken against them.

V. PLEADINGS / COUNTERS

- A) Suits or other proceedings initiated by or on behalf of Government have to be drafted with precision and clarity. There should be no repetition either in narration of facts or in the grounds.
- B) Appeals will be drafted with particular attention to the Synopsis and List of Dates which will carefully crystallise the facts in dispute and the issues involved. Slipshod and loose drafting will be taken serious note of. Defaulting advocates may be suspended/removed from the Panels.
- C) Care must be taken to include all necessary and relevant documents in the appeal paper book. If it is found that any such documents are not annexed and this

entails an adjournment or if the court adversely comments on this, the matter will be enquired into by the Nodal Officer and reported to the Head of Department for suitable action.

- D) It is noticed that Government documentation in court is untidy, haphazard and incomplete, full of typing errors and blanks. Special formats for Civil Appeals, Special Leave Petitions, Counter Affidavits will be formulated and circulated by way of guidance and instruction as a Government Advocates Manual. This will include not only contents but also the format, design, font size, quality of paper, printing, binding and presentation. It is the joint responsibility of the Drafting Counsel and the Advocate on Record to ensure compliance.
- E) Counter Affidavits in important cases will not be filed unless the same are shown to and vetted by Law Officers. This should, however, not delay the filing of counters.

VI. FILING OF APPEALS

- A) Appeals will not be filed against ex parte ad interim orders. Attempt must first be to have the order vacated. An appeal must be filed against an order only if the order is not vacated and the continuation of such order causes prejudice.
- B) Appeals must be filed intra court in the first instance. Direct appeals to the Supreme Court must not be resorted to except in extraordinary cases.
- C) Given that Tribunalisation is meant to remove the loads from Courts, challenge to orders of Tribunals should be an exception and not a matter of routine.
- D) In Service Matters, no appeal will be filed in cases where:
 - a) the matter pertains to an individual grievance without any major repercussion;
 - b) the matter pertains to a case of pension or retirement benefits without involving any principle and without setting any precedent or financial implications.
- E) Further, proceedings will not be filed in service matters merely because the order of the Administrative Tribunal affects a number of employees. Appeals will not be filed to espouse the cause of one section of employees against another.

- F) Proceedings will be filed challenging orders of Administrative Tribunals only if
- a) There is a clear error of record and the finding has been entered against the Government.
 - b) The judgment of the Tribunal is contrary to a service rule or its interpretation by a High Court or the Supreme Court.
 - c) The judgment would impact the working of the administration in terms of morale of the service, the Government is compelled to file a petition; or
 - d) If the judgment will have recurring implications upon other cadres or if the judgment involves huge financial claims being made.
- G) Appeals in Revenue matters will not be filed:
- a) if the stakes are not high and are less than that amount to be fixed by the Revenue Authorities;
 - b) If the matter is covered by a series of judgments of the Tribunal or of the High Courts which have held the field and which have not been challenged in the Supreme Court;
 - c) where the assessee has acted in accordance with long standing industry practice;
 - d) merely because of change of opinion on the part of jurisdictional officers.
- H) Appeals will not be filed in the Supreme Court unless:
- a) the case involves a question of law;
 - b) If it is a question of fact, the conclusion of the fact is so perverse that an honest judicial opinion could not have arrived at that conclusion;
 - c) Where public finances are adversely affected;
 - d) Where there is substantial interference with public justice;
 - e) Where there is a question of law arising under the Constitution;
 - f) Where the High Court has exceeded its jurisdiction;
 - g) Where the High Court has struck down a statutory provision as ultra vires;
 - h) Where the interpretation of the High Court is plainly erroneous.

- I) In each case, there will be a proper certification of the need to file an appeal. Such certification will contain brief but cogent reasons in support. At the same time, reasons will also be recorded as to why it was not considered fit or proper to file an appeal.

VII. LIMITATION : DELAYED APPEALS

- A) It is recognized that good cases are being lost because appeals are filed well beyond the period of limitation and without any proper explanation for the delay or without a proper application for condonation of delay. It is recognized that such delays are not always bonafide particularly in cases where high revenue stakes are involved.
- B) Each Head of Department will be required to call for details of cases filed on behalf of the Department and to maintain a record of cases which have been dismissed on the ground of delay. The Nodal Officers must submit a report in every individual case to the Head of Department explaining all the reasons for such delay and identifying the persons/causes responsible. Every such case will be investigated and if it is found that the delay was not bonafide, appropriate action must be taken. Action will be such that it operates as a deterrent for unsatisfactory work and malpractices in the conduct of Government litigation. For this purpose, obtaining of the data and fixing of responsibility will play a vital role. Data must be obtained on a regular basis annually, bi-monthly or quarterly.
- C) Applications for condonation of delay are presently drafted in routine terms without application of mind and resorting to word processed “boiler plate.” This practice must immediately stop. It is responsibility of the drafting counsel to carefully draft an application for condonation of delay, identifying the areas of delay and identifying the causes with particularity. Drafting advocates who fail to adhere to this may be suspended/removed from the Panel.
- D) Every attempt must be made to reduce delays in filing appeals/applications. It shall be responsibility of each Head of Department to work out an appropriate system for elimination of delays and ensure its implementation.

- E) Belated appeals filed beyond the period of limitation cannot be approached merely from the point of view that courts have different approaches towards condonation of delay. Since some courts liberally grant condonation of delay, a general apathy seems to have taken over. The tendency on the part of Government counsel to expect leniency towards Government for condonation of delay must be discouraged. The question of limitation and delay must be approached on the premise that every court will be strict with regard to condonation of delay.

VIII. ALTERNATIVE DISPUTE RESOLUTION : ARBITRATION

- A) More and more Government departments and PSUs are resorting to arbitration particularly in matters of drilling contracts, hire of ships, construction of highways, etc. Careful drafting of commercial contracts, including arbitration agreements must be given utmost priority. The Ministry of Law and Justice recognizes that it has a major role to play in this behalf.
- B) The resort to arbitration as an alternative dispute resolution mechanism must be encouraged at every level, but this entails the responsibility that such an arbitration will be cost effective, efficacious, expeditious, and conducted with high rectitude. In most cases arbitration has become a mirror of court litigation. This must be stopped.
- C) It is recognized that the conduct of arbitration at present leaves a lot to be desired. Arbitrations are needlessly dragged on for various reasons. One of them is by repeatedly seeking adjournments. This practice must be deplored and stopped.
- D) The Head of Department will call for the data of pending arbitrations. Copies of the roznama, etc. (record of proceedings) must be obtained to find out why arbitrations are delayed and ascertain who is responsible for adjournments. Advocates found to be conducting arbitrations lethargically and inefficiently must not only be removed from the conduct of such cases but also not briefed in future arbitrations. It shall be the responsibility of the Head of Department to call for regular review meetings to assess the status of pending arbitration cases.

- E) Lack of precision in drafting arbitration agreements is a major cause of delay in arbitration proceedings. This leads to disputes about appointment of arbitrators and arbitrability which results in prolonged litigation even before the start of arbitration. Care must be taken whilst drafting an arbitration agreement. It must correctly and clearly reflect the intention of the parties particularly if certain items are required to be left to the decision of named persons such as engineers are not meant to be referred to arbitration.
- F) Arbitration agreements are loosely and carelessly drafted when it comes to appointment of arbitrators. Arbitration agreements must reflect a well defined procedure for appointment of arbitrators. Sole arbitrator may be preferred over a Panel of three Arbitrators. In technical matters, reference may be made to trained technical persons instead of retired judicial persons.
- G) It is also found that certain persons are “preferred” as arbitrators by certain departments or corporations. The arbitrator must be chosen solely on the basis of knowledge, skill and integrity and not for extraneous reasons. It must be ascertained whether the arbitrator will be in a position to devote time for expeditious disposal of the reference.
- H) It is found that if an arbitration award goes against Government it is almost invariably challenged by way of objections filed in the arbitration. Very often these objections lack merit and the grounds do not fall within the purview of the scope of challenge before the courts. Routine challenge to arbitration awards must be discouraged. A clear formulation of the reasons to challenge Awards must precede the decision to file proceedings to challenge the Awards.

IX. SPECIALISED LITIGATION

- A) Proceedings seeking judicial review including in the matter of award of contracts or tenders :

Such matters should be defended keeping in mind Constitutional imperatives and good governance. If the proceedings are founded on an allegation of the breach of natural justice and it is found that there is substance in the allegations, the case shall not be proceeded with and the order may be set aside to provide for a

proper hearing in the matter. Cases where projects may be held up have to be defended vigorously keeping in mind public interest. They must be dealt with and disposed off as expeditiously as possible.

B) Cases involving vires, or statutes or rules and regulations :

In all such cases, proper affidavits should be filed explaining the rationale between the statute or regulation and also making appropriate averments with regard to legislative competence.

C) PUBLIC INTEREST LITIGATIONS (PILS) :

➤ Public Interest Litigations must be approached in a balanced manner. On the one hand, PILs should not be taken as matters of convenience to let the courts do what Government finds inconvenient. It is recognized that the increase in PILs stems from a perception that there is governmental inaction. This perception must be changed. It must be recognized that several PILs are filed for collateral reasons including publicity and at the instance of third parties. Such litigation must be exposed as being not bonafide.

➤ PILs challenging public contracts must be seriously defended. If interim orders are passed stopping such projects then appropriate conditions must be insisted upon for the Petitioners to pay compensation if the PIL is ultimately rejected.

D) PSU LITIGATIONS :

➤ Litigation between Public Sector Undertakings inter se between Government Public Sector Undertakings is causing great concern. Every effort must be made to prevent such litigation. Before initiating such litigation, the matter must be placed before the highest authority in the public sector such as the CMD or MD. It will be his responsibility to endeavour to see whether the litigation can be avoided. If litigation cannot be avoided, then alternative dispute resolution methods like mediation must be considered. Section 89 of the Code of Civil Procedure must be resorted to extensively.

X. REVIEW OF PENDING CASES

- A) All pending cases involving Government will be reviewed. This Due Diligence process shall involve drawing upon statistics of all pending matters which shall be provided for by all Government departments (including PSUs). The Office of the Attorney General and the Solicitor General shall also be responsible for reviewing all pending cases and filtering frivolous and vexatious matters from the meritorious ones.

- B) Cases will be grouped and categorized. The practice of grouping should be introduced whereby cases should be assigned a particular number of identity according to the subject and statute involved. In fact, further sub-grouping will also be attempted. To facilitate this process, standard forms must be devised which lawyers have to fill up at the time of filing of cases. Panels will be set up to implement categorization, review such cases to identify cases which can be withdrawn. These include cases which are covered by decisions of courts and cases which are found without merit withdrawn. This must be done in a time bound fashion.

WORKSHOP FOR II BLOCK OF YEAR 2009-2010

Resume of Discussion and papers submitted by officers

Workshop for II block of year 2009-2010 was organized on various dates during 01.11.2009 to 28.02.2010 at 13 places. The particulars of participating judgeships and officers as also names of Hon'ble Judges who presided over are shown in Appendix-A. The topic for first session was "Trial of case related to false evidence and offence against public justice". The topics for second session were "Fundamentals of Criminal Trial including summary procedure", and "Cognizance of offence by Magistrate and powers under Sec. 156(3) Cr.P.C."

All the three topics were elaborately discussed. To streamline discussion, questionnaires were also provided to the participants. These questionnaires were as per Appendix-B.

The discussion made and the papers submitted by the participants may be broadly summarized as under:

TOPIC-I :

Trial of case related to false evidence and offence against public justice:

The purpose of such prosecution is to curb the evil of perjury therefore, where conscious and deliberate false depositions are made in order to thwart administration of justice or to obstruct the Court in coming to a right conclusion only than recourse to such prosecution should be taken. It is not the gravity of personal injury which may carry the weight but it is the impact upon the administration of justice which is required to be looked into. Reference of judgments delivered in

Umrao Lal v. State⁶⁴, State v/s Bijli Pathak⁶⁵ , Mohd. Ibrahim v/s B.R. Rao⁶⁶ , K Karunakaran v/s TV Eachara Warriar & oths.⁶⁷, Mahila Vinod Kumar v/s State of M.P.⁶⁸, Purshottam Ishwar Amin v/s Emperor⁶⁹ , PP v/s Nagalinga Reddy⁷⁰ , State of Maharashtra v/s Pandurang K. Pangare⁷¹, Chhajoo Ram's Case⁷² and Godhara Case was also given.

Before launching prosecution for offences attracting Sec. 195 Cr.P.C., the Court concerned must be satisfied that it is expedient in the interest of justice to prosecute the accused and a speaking finding to this effect shall have to be recorded, preferably using the same phraseology as is used in the Section 340 of Cr.P.C.. At least in essence, such conclusion has to be recorded in writing and the language used should not leave any doubt that it was a fit and proper case wherein it was in the Interest of Justice to launch the prosecution. The case law cited on this point was as follows : Nimmakayala Audi Narayanamma V/s State of A.P.⁷³, Liaqat Husain v/s Vinay Prakash⁷⁴, Santokh Singh Vs Izhar Hussain⁷⁵, Taskhir Ahamad v/s Emperor⁷⁶, Venkataswami v/s Lakshminarayan⁷⁷, Pritish vs. State⁷⁸.

It emerged from the discussion that where a person who makes two patently irreconcilable statement on oath in a judicial enquiry, which can not be true at a time and an alternative charge, as illustrated in illustration (c) to Sec. 221(1)

⁶⁴ A.I.R. 1954 Allahabad 424,

⁶⁵ AIR 1961 Patna 387 (relevant page 389),

⁶⁶ 1976 AIR (SC) 1822

⁶⁷ AIR 1978 SC 290

⁶⁸ AIR 2008 SC 2965

⁶⁹ AIR 1921 Bombay 3

⁷⁰ AIR 1959 Andhra 250

⁷¹ AIR 1995 SC 1202

⁷² (1970) 1 SCR 172

⁷³ AIR 1970 A.P. 119

⁷⁴ AIR 1946 Allahabad 156

⁷⁵ AIR 1973 SC 2190

⁷⁶ AIR 1945 All. 397

⁷⁷ AIR 1959 A.P. 204

⁷⁸ (2002) 1 SCC 253

Cr.P.C., is leveled against him, then he can be convicted for committing perjury, even without further proving that which of the two statements is false, provided, accused fails to prove that at the time of making first statement, he believed in good faith that it is true but subsequently he discovered its falsehood and thereafter, he gave the second contradictory statement.

Pleadings are required to be verified stating specifically the facts which are verified on the basis of personal knowledge, the facts which are verified on the basis of belief and information etc.. A person who knowingly makes verification of false pleading may also be liable of perjury. Apart from provisions of Order VI Rule 15 CPC, the relevant authoritative pronouncement referred by the participants were Emperor v/s Padan Singh⁷⁹, Asgarali Mulla Ibbrahimji v/s Emperor⁸⁰, Ranjeet Singh v/s State of Pepsu⁸¹, Gurubasaya v/s Siddalingappa⁸².

While discussing the ratio of Sheoraj v/s. State⁸³, Ramprasad v/s State of Maharashtra⁸⁴, P.I. Amin v/s Emperor⁸⁵, the general view was that a person who gives false reply to a question put to him during investigation u/s 161 Cr.PC, can not be held guilty of an offence of perjury.

It has been held in Mahesh Chandra Dhupi V/s Emperor⁸⁶ that inadmissibility in evidence can not bring a false document out of the mischief of Sec. 193 IPC because here, the intention and act of accused and not the admissibility of document is important. Other judgments which were cited on the subject were Baban Singh v/s

⁷⁹ AIR 1930 All. 490

⁸⁰ AIR 1943 Nagpur 17

⁸¹ AIR 1959 SC 843

⁸² AIR 1940 MAD 677

⁸³ AIR 1964 ALL. 290

⁸⁴ AIR 1999 SC 1969

⁸⁵ AIR 1921 (Bombay) 3 (F)

⁸⁶ AIR 1940 Cal. 449

Jagdish Singh⁸⁷, Mangal Singh v/s State⁸⁸, K Karunakaran vs. TV Eachara Warriar & oths.⁸⁹, Emperor v/s Kari Bekanna Patroodu⁹⁰.

Difference between fabrication of false evidence and causing disappearance of evidence was also highlighted and it was pointed out that causing disappearance of evidence does affect administration of justice but here, this offence may take place only after commission of some other offence of which evidence is being destroyed, whereas false evidence can be fabricated before or after commission of another offence and even in Civil or Revenue matters also. In fabricating false evidence, something is brought into existence while it is made to disappear in the case of Sec. 201 Cr.P.C..

An offence punishable u/s 228 IPC can be dealt with either by taking recourse provided under Sec. 345 & 346 Cr.P.C. or a complaint to the Court having jurisdiction can also be filed after making enquiry u/s 340 Cr.P.C. in appropriate cases. Other Sections referred during discussion were 195(1)(b), 175,178,179,180,199,200,202 Cr.P.C. as also Section 340,343 to 346 & 348 Cr.P.C.. Principles propounded in *Daroga Singh v/s B.K. Pandey*⁹¹ were also pointed out.

There is a conflict between the law laid down in *Chhajoo v/s Radheshyam*⁹² on the one hand and the law laid down in *Rampati Kuer v/s Jadaunathan Thakur*⁹³ and *Bahadurmali v/s State*⁹⁴ on the other hand. In *Chhajoo's* case, an application u/s 476 Cr.P.C. was moved and High Court recorded a finding that it was expedient in the interest of justice that a complaint be made under Sec. 193 read with Sec. 199 Penal Code. It further directed that a complaint be preferred by the Deputy Registrar

⁸⁷ AIR 1967 SC 68

⁸⁸ AIR 1956 Pat. 154

⁸⁹ AIR 1978 SC 290

⁹⁰ AIR 1917 Madras 971 (FB)

⁹¹ 2004 Cr.LJ 2084

⁹² AIR 1968 Allahabad 296 (FB)

⁹³ AIR 1968 Patna 100 (FB)

⁹⁴ AIR 1965 (Raj.) 224

under his signature. The complaint was accordingly drafted but before it was approved and signed by the Deputy Registrar, an appeal under Sec. 476-B was preferred against that order. Considering whether the appeal was premature, it was answered in negative. The right of appeal under Sec. 476-B arises as soon as the finding is recorded under Sec. 476(1) that it is expedient in the interests of justice that a complaint be filed and an order is made for the filing of a complaint. The giving of the finding and the passing of such an order must be treated to be the making of a complaint.

The Patna High Court is of the view that a distinction must be made between the 'order of the Court directing the filing of the complaint' and 'the subsequent action of the Court in filing complaint'. It is only after the filing of the complaint that the right of appeal can be exercised under this section. The Rajasthan High Court is also of the same view.

Other cases discussed on the subject were M. Namberumal Chetty v/s M. Maniappa Mudali⁹⁵, Narotam Das Agarwal v/s Bhagwan Das⁹⁶, Pritish vs. State⁹⁷, Surendra Gupta v/s Bhagwani Devi⁹⁸.

Apart this, (i) the essentials of an offence of issuing or signing false certificate, (ii) over riding effect of Sec. 351 Cr.P.C. over Sec. 376 Cr.P.C., (iii) Escape from custody particularly where the custody was not strictly legal, were also discussed.

TOPIC-II

Fundamentals of Criminal Trial including summary procedure.

&

⁹⁵ AIR 1931 Mad. 16

⁹⁶ AIR 1939 All. 79

⁹⁷ (2002) 1 SCC 253

⁹⁸ AIR 1996 SC 509

Cognizance of offence by Magistrate and powers under Sec. 156(3) Cr.P.C.

During deliberations about true import of word "May" as used in Sec. 156(3) Cr.P.C., some of the officers were of the view that the finding of Division Bench of Allahabad High Court in Sukhwasi v/s State of U.P.⁹⁹ is based upon the findings given by Hon'ble Supreme Court in Gopal Das Sindhi & Ors. v/s State of Assam¹⁰⁰, as also in Suresh Chand Jain v/s State of M.P. & Anr.¹⁰¹ and Hon'ble Allahabad High Court has concluded in para 23 of the Judgment as follows :

“The reference is, therefore, answered in the manner that it is not incumbent upon a Magistrate to allow an application under Section 156(3) Cr.P.C. and there is no such legal mandate. He may or may not allow the application in his discretion. The second leg of the reference is also answered in the manner that the Magistrate has a discretion to treat an application under Section 156(3) Cr.P.C. as a complaint.”

Reference was also made of Raghuraj Singh Rousha v/s Shivam Sundaram Promotors (P) Ltd.¹⁰². The facts and relevant order as mentioned in para 5 of the judgment were as follows:

It is not necessary for us to deal with the allegations made in the said complaint petition in detail. Suffice it to say that by reason of an order dated 7-2-2008, the Metropolitan Magistrate, New Delhi in whose court the aforementioned complaint petition was transferred, refused to direct investigation in the matter by the Station House Officer in terms of Section 156(3) of the Code, stating:

"In the present case all the facts and circumstances of the case are within the knowledge of the complainant. Both the complainant and the accused Company have been dealing with one another by way of contractual agreement

⁹⁹ 2008 Cr.LJ 472

¹⁰⁰ AIR 1961 SC 986

¹⁰¹ AIR 2001 SC 571

¹⁰² (2009) 2 SCC 363

and an MoU dated 5-8-2005 was entered into between them as alleged in the complaint. From the complaint and the documents placed on record, it appears that there is some dispute between the parties in respect of immovable property and the payments pertaining to the sale of the same. The complainant submits that the accused had cheated him. In the facts and circumstances of the case there is no requirement of collection of evidence by the police at this stage as the complainant can lead his evidence. In view of this, present application under Section 156(3) Cr.PC is dismissed. The complaint can be conveniently dealt with under Section 200 CrPC and subsequent provisions. If there is necessity, however, of police, that shall be taken under Section 202 CrPC."

On the aforementioned premise, the complainant was asked to lead pre-summoning evidence. It was directed to furnish list of witnesses, if any.

This order of the magistrate was successfully assailed by way of revision before the High Court. Criminal Appeal was filed against revision order wherein Hon'ble Apex Court opined and adjudicated as follows :

"In Mohd. Yusuf, whereupon reliance has been placed by Mr. Jaspal Singh, this Court made a distinction between a pre-cognizance stage and post-cognizance stage. It was opined that an order under sub-section (3) of Section 156 of the Code need not be passed when the Magistrate intends to take cognizance. Extensively referring to the decisions in Gopal Das Sindhi v. State of Assam and Supdt. and Remembrancer of Legal Affairs v. Abani Kumar Banerjee as also other decisions, it was held that in those cases cognizance had not been taken.

Here, however, the learned Magistrate had taken cognizance. He had applied his mind. He refused to exercise his jurisdiction under Section 156(3) of the Code. He arrived at a conclusion that the dispute is a private dispute in relation to an immovable property and, thus, police investigation is not necessary. It was only with that intent in view, he directed examination of the complainant

and his witnesses so as to initiate and complete the procedure laid down under Chapter XV of the Code.

We, therefore, are of the opinion that the impugned judgment cannot be sustained and is set aside accordingly. The High Court shall implead the appellant as a party in the criminal revision application, hear the matter afresh and pass an appropriate order.

The appeal is allowed."

Maksud Saiyed v/s State of Gujarat¹⁰³, Head Note-A was also referred which is as follows:

"Criminal Procedure Code, 1973- Ss. 482 and 156(3) - Quashing of proceedings by High Court - Exercise of discretionary power - Principles - Allegations in the complaint petition to be examined with regard to correct statutory provision vis-a-vis conduct of parties - Magistrate ordering police investigation under S. 156(3) CrPC without applying mind on these principles - Magistrate not considering the bona fide mistake of respondent Directors in publishing the prospectus of the company - Therefore, quashing of the proceedings by High Court upheld - Penal Code, 1860, Ss. 120-B, 177, 181, 191, 192, 425 and 500."

On the other hand, most of the officers referred judgment of Hon'ble Rajasthan High Court delivered in Babulal v/s State of Raj. & Ors.¹⁰⁴ and were of the view that the scope of an application U/s 156(3) Cr.P.C. doesn't permit the Magistrate concern to take cognizance u/s 190(1) (a) Cr.P.C. and to proceed u/s 200 Cr.P.C.. The judgments relied upon and discussed in Babulal's case were also discussed.

Other cases which were referred by the officers are:

¹⁰³ (2008) 5 SCC 668

¹⁰⁴ 2009 (1) Cr.LR Raj. 76

Tularam & ors.v/s Kishore Singh¹⁰⁵, State of Haryana v/s Bhajan Lal¹⁰⁶, State of Assam v/s Abdul Noor¹⁰⁷, Mohd. Yousuf v/s Afaq Jahan¹⁰⁸, Sakiribasv v/s U.P. State¹⁰⁹ and M.S. Nando v/s Bharat Gowda¹¹⁰.

As regards standard of evidence required at the stage of charge, Sec. 245 (1) Cr.P.C. provides that the accused shall be discharged if no case against the accused has been made out which, if unrebutted, would warrant his conviction. Sec. 240 & 246 Cr.P.C. provides that if there is ground for presuming that the accused has committed an offence triable under this chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, charge shall be framed. It is no more res-integra that the standard of evidence required for framing charge is not at par with the standard which is required to convict the accused. If there is a grave suspicion, the Court must frame charge and proceed with the trial. State of M.P. v/s S.B. Johari¹¹¹, Superintendent & Remembrancer of Legal Affairs West Bengal v/s Anil Kumar Bhunja & Ors.¹¹², Bihar State v/s Ramesh Singh¹¹³, Mohd. Akbar Dar v/s State of J&K¹¹⁴, State v/s S. Bangarappa¹¹⁵, Subramanyam v/s Swamikannu¹¹⁶, Dilawar Babu v/s State of Maharashtra¹¹⁷, Soma Chakravarty v/s State through CBI¹¹⁸, Niranjan Singh K.S. Punjabi v/s Jitendra Bhimraj Bijjaya¹¹⁹, Sanghi Brothers (Indore) Pvt. Ltd. Vs. Sanjay Choudhary & ors.¹²⁰, Lalsuraj urf Surajsingh &

¹⁰⁵ AIR 1977 SC 2401

¹⁰⁶ AIR 1992 SC 604

¹⁰⁷ AIR 1970 SC 1365

¹⁰⁸ 2006 (1) SCC 627

¹⁰⁹ 2008 (1)Cr.LR (SC)62

¹¹⁰ AIR 1957 A.P. 864

¹¹¹ AIR 2000 SC 665

¹¹² AIR 1980 SC 52

¹¹³ AIR 1977 SC 2018

¹¹⁴ AIR 1981 SC 1548

¹¹⁵ AIR 2001 SC 222

¹¹⁶ AIR 1933 Madras 413

¹¹⁷ AIR 2002 SC 564

¹¹⁸ (2007) 5 SCC 403

¹¹⁹ (1990) 4 SCC 76, Para 6

¹²⁰ 2009 Cr.L.R. (SC) 6

ors. v/s Jharkhand State¹²¹, Yogesh v/s Maharashtra State¹²² were referred by the participant officers.

Power to convert Summon's case into Warrant case can be exercised only after commencement of trial and a trial commences with the stating substance of accusation to the accused.

It also emerged from the discussion that a Court takes cognizance of an offence and not of a person. As soon as Court applies its judicial mind towards the facts mentioned in complaint or the Police Report with a view to proceed under relevant chapter of Cr.P.C., it takes cognizance of offence and an order under Sec. 204 or 319 Cr.P.C. is passed on the basis of a conclusion as to whether there are sufficient grounds for proceeding against a particular person. D. Laxmi Narayan v/s Narayan¹²³, Ajit Kumar v/s W.B. State¹²⁴, Gopal Das v/s State of Assam¹²⁵, Swil Ltd. v/s State¹²⁶, State v/s Pukhia¹²⁷, En. Ri Raju Thevan¹²⁸, State of Bihar v/s Sakaldip Singh¹²⁹, R.R. Chari v/s State of U.P.¹³⁰, S.K. Sinha, Chief Enforcement Officer v/s Videocon International Ltd.¹³¹, Chief Enforcement Officer v/s Videocon International Limited¹³², Bissen Singh v/s Prameswari Singh¹³³, Narayan Das Bhagwan Das v/s West Bengal State¹³⁴, Darshan Singh Ram Krishan V. State of Maharashtra¹³⁵, State of West Bengal v/s Mohammed Khalid¹³⁶, Raghuvansh Dube v/s State of Bihar¹³⁷, Hareram v/s

¹²¹ 2009 Cr.L.R. (SC) 1, Para 15

¹²² 2008 Cr.L.R. (SC) 355

¹²³ AIR 1976 SC 1672

¹²⁴ AIR 1963 SC 765

¹²⁵ AIR 1961 SC 986

¹²⁶ (2001) 6 SCC 670

¹²⁷ AIR 1963 Raj. 48

¹²⁸ AIR 1966 Mardas 349

¹²⁹ AIR 1966 Patna 473

¹³⁰ AIR 1951 SC 207

¹³¹ AIR 2008 SC 1213

¹³² (2008) 2 SCC 492

¹³³ AIR 1950 Cal. 99

¹³⁴ AIR 1959 SC 1118

¹³⁵ AIR 1971 SC 2372

¹³⁶ AIR 1995 SC 785

¹³⁷ AIR 1967 SC 1167

Tikaram¹³⁸, Anil Saran v. State of Bihar & Anr.¹³⁹ were referred by the participant officers.

Before proceeding under Sec. 200 Cr.P.C., the Court has to take cognizance of offence as provided under Sec. 190(1)(a) and a pre-cognizance enquiry can also be made with a view to find out whether the cognizance is time barred or the Court has/has'nt territorial jurisdiction or Sec. 195 to 199 etc. are attracted or not. State of West Bengal V. Bijoy Kumar Bose¹⁴⁰, Rajkumar Khurana v/s Delhi State¹⁴¹, Jagdish Ram v/s State of Raj.¹⁴², Mangroop v/s State¹⁴³, State v/s P. Raju¹⁴⁴, P.K. Pradhan v/s State of Sikkim¹⁴⁵, Romesh Lal Jain v/s Naginder Singh Rana¹⁴⁶, Dharendra Nath V. Nurul Huda¹⁴⁷, Gujarat, Boruka Steel Pvt. Ltd. & Ors. v/s Manish N. Vora & Ors.¹⁴⁸, Pancham Singh v/s State¹⁴⁹ and Purshottam Jethanand v/s State¹⁵⁰ were referred by the participant officers.

While discussing scope and application of Sec. 197 Cr.P.C., following cases were pointed out:

Nagwant Sahay v. D.W. IFE¹⁵¹, Amrik Singh v/s State of Pepsu¹⁵², Somchand Singhvi v/s Bibhuti Bhushan Chakrawarty¹⁵³, Shankaran Moitra v/s Sudhna Das¹⁵⁴, Jayasingh v/s K.K. Velayutham¹⁵⁵, Surendra Pandey v/s State of Bihar & Ors¹⁵⁶.

¹³⁸ AIR 1978 SC 1568

¹³⁹ AIR 1996 SC 204

¹⁴⁰ AIR 1978 SC 188

¹⁴¹ 2009 Cr.LR (SC) 414

¹⁴² AIR 2004 SC 1734

¹⁴³ 2006 Cr.LR (Raj.) 997

¹⁴⁴ AIR 2006 SC 2825

¹⁴⁵ AIR 2001 SC 2547

¹⁴⁶ AIR 2006 SC 336

¹⁴⁷ AIR 1951 Cal. 133

¹⁴⁸ 2006 Cr.LJ 2437

¹⁴⁹ AIR 1967 Patna 416

¹⁵⁰ AIR 1954 SC 700

¹⁵¹ AIR 1946 Pat. 432

¹⁵² AIR 1955 SC 309

¹⁵³ AIR 1965 SC 588

¹⁵⁴ AIR 2006 SC 1599

¹⁵⁵ AIR 2006 SC 2407

¹⁵⁶ 2000 (9) SCC 199

Scope and applicability of Sec. 249 & 256 Cr.P.C. as also restoration of complaint in such circumstances were discussed in light of pronouncements made in Pramatha Nath Taluqdar v/s Saroj Kanwar Ranjan Sarkar¹⁵⁷, Major General A.S. Gauraya & Anr. v/s S.N. Thakur & Anr.¹⁵⁸, Bindeshwari Prasad v/s Kali Singh¹⁵⁹ and Hari Singh Man v/s Harbhajan Singh Bajwa¹⁶⁰.

Apart it, committal of a case which is not exclusively triable of Court of Sessions and other issues were also discussed.

¹⁵⁷ AIR 1962 SC 876

¹⁵⁸ AIR 1986 SC 1440

¹⁵⁹ AIR 1977 SC 2432

¹⁶⁰ AIR 2001 SC 43

Appendix – A

| S.No. | Date | Place | Participating Judgeships | Name of Chairperson | No. of Participating Judges |
|--------------|-------------|--------------|--------------------------------------|--------------------------------------|------------------------------------|
| 1. | 31.01.10 | UDAIPUR | UDAIPUR DUNGARPUR BANSWARA | Hon'ble Mr. Justice Dalip Singh | 39 |
| 2. | 31.01.10 | BIKANER | BIKANER GANGANAGAR HANUMANGARH | Hon'ble Mr. Justice G.K. Vyas | 50 |
| 3. | 07.02.10 | JODHPUR | JODHPUR JAISALMER BALOTRA | Hon'ble Mr. Justice P.C. Tatia | 43 |
| 4. | 07.02.10 | SIKAR | SIKAR JHUNJHUNU CHURU | Hon'ble Mr. Justice N.K. Jain | 38 |
| 5. | 07.02.10 | TONK | TONK SAWAI MADHOPUR BUNDI | Hon'ble Mr. Justice R.S. Rathore | 32 |
| 6. | 21.02.10 | ALWAR | ALWAR DAUSA | Hon'ble Mr. Justice Ajay Rastogi | 47 |
| 7. | 21.02.10 | CHITTORGARH | PRATAPGARH BHILWARA RAJSAMAND | Hon'ble Mr. Justice R.S. Chauhan | 57 |
| 8. | 21.02.10 | AJMER | AJMER MERTA | Hon'ble Mr. Justice M.C. Sharma | 62 |
| 9. | 21.02.10 | JAIPUR CITY | JAIPUR CITY | Hon'ble Mr. Justice M.N. Bhandari | 51 |
| 10. | 21.02.10 | BHARATPUR | BHARATPUR | Hon'ble Mr. Justice | 51 |

| | | | | | |
|-----|----------|--------------|---|--------------------------------------|----|
| | | | KARALI DHOLPUR | K.S. Chaudhari | |
| 11. | 21.02.10 | PALI | PALI JALORE SIROHI | District Judge, Pali | 38 |
| 12. | 21.02.10 | KOTA | KOTA BARAN JHALAWAR | District Judge, Kota | 51 |
| 13. | 07.03.10 | JAIPUR DIST. | JAIPUR DIST. & OFFICERS ON DEPUTATION | Hon'ble Mr. Justice Govind Mathur | 47 |

Questionnaire

Subject (1)

Trial of case related to false evidence and offence against public justice

Questions :

1. Whether a person who makes two contradictory statements on oath can be held guilty of perjury without specific proof as to which of these two statements is false ?
2. Whether a person who, in a suit, submits a written statement containing false averments can be held guilty of an offence of perjury ?
3. Whether falsely answering investigation question attracts Sec. 193 of IPC ?
4. A false evidence is fabricated which, because of its nature itself, is inadmissible in evidence will constitute an offence u/s 193 IPC or not ?
5. What are the essentials of an offence of issuing or signing false certificate ?
6. What is the basic difference between fabrication of false evidence and causing disappearance of evidence ?
7. What is the procedure to deal with an offence u/s 228 of I.P.C. ?
8. Whether it should be expressed in so many words that "prosecution is expedient in the interest of justice" before proceeding further in the matters attracting Sec. 195 Cr.P.C. ?
9. Whether an appeal u/s 341 Cr.P.C. can be filed even before filing of complaint ?
10. Whether an appeal u/s 351 Cr.P.C. lies when the fine imposed does not exceed the limit prescribed by Sec. 376 Cr.P.C. ?
11. A person escapes from custody of competent authority but the custody was not strictly legal. Whether he can be convicted of an offence u/s 224 IPC ?
12. A person is taken in custody on verbal order of the Court but such person escapes from custody. Whether he can be convicted of an offence u/s 224 IPC ?

Subject (2)

Fundamentals of Criminal Trial including summary procedure.

Questions :

1. Whether it is permissible to convert summon trial into warrant trial and vice-versa ?
2. Whether it is permissible to convert summary trial into warrant trial and vice-versa ?
3. Under what provisions, a case which is not exclusively triable by court of session can be committed to it for trial ?
4. Whether pre-charge evidence u/s 244 Cr.P.C. should be recorded where a case is instituted upon a complaint file u/s 340 or 341 Cr.P.C. ?
5. When an accused has denied charge, whether he can plead his guilt before closing of evidence for prosecution ?
6. Whether strong suspicion is sufficient for framing charge in a Criminal Trial?
7. Whether it is essential to hear the accused in a session trial before asking him to enter upon his defence ?
8. What legal recourse is open in a trial instituted upon complaint for an offence u/s 326 IPC when the complainant does not appear before Court on given date ?
9. Whether a complaint can be restored after passing an order u/s 256 or 249 of Cr.P.C. ?
10. Whether every Magistrate can conduct summary trial ?
11. What is difference between summary trial under chapter 21 of Cr.P.C. and summary procedure as prescribed in Sec. 344 & 345 Cr.P.C. ?

Subject (3)

Cognizance of offence by Magistrate and powers under Sec. 156(3) Cr.P.C.

Questions :

1. Whether an order u/s 190 (1) (a) is a pre requisite for proceeding u/s 200 Cr.P.C. and whether such an order should be speaking one ?
2. A complaint is filed before a Court alleging commission of an offence of which cognizance is barred by any of the provisions contained in 195 to 199 Cr.P.C.. What can be the appropriate order of the Court ?
3. What is the meaning of "Taking Cognizance of an offence" ?
4. What is the difference between "Cognizance of an offence" and "Cognizance against person" ?
5. Whether cognizance of offence can be taken without there being territorial jurisdiction ?
6. What is the true import of term "May" in sub section 3 of Sec. 156 Cr.P.C. ?
7. Whether pre-cognizance enquiry is permissive ?
8. Whether a Court of Session can take cognizance of offence ?
9. An Executive Magistrate (not removable from service without approval of State Government) gives beating to a person who is committing riot. He believes in good faith that otherwise it is not possible to prevent him in committing riot. A complaint u/s 323 IPC is filed before a Magistrate. What should be the appropriate legal order on it ?
10. Whether complainant can be asked to produce his all witnesses during enquiry u/s 202 Cr.P.C. ?
11. Whether evidence can be taken by way of affidavit at the stage of enquiry u/s 200/202 Cr.P.C. ?

EVENT BOOK

PARTICIPATION:

Hon'ble Mr. Justice P.C. Tatia, Chairman, RSJA participated in National Consultation for Strengthening the Judiciary. It was held at Vigyan Bhawan, New Delhi on 24th & 25th of October, 2009. His Lordship also attended Annual Calendar Meeting to develop NJA's Annual Calendar for the Academic year 2010-2011. The meeting took place at Bhopal on 03rd April, 2010.

CONTINUOUS JUDICIAL EDUCATION FOR IN-SERVICE OFFICERS:

The process of continuous judicial education through organizing Workshop/Seminar for in-service Judicial Officer was maintained during the years 2008 - 2009 and 2009-2010 also.

After seeking approval of subjects from Hon'ble Governing Council of the Academy, the workshops/seminars were organized at 13 district headquarters in each block. The detail of such subjects is as follows:-

I block 2008-2009 (July-October, 2008)

1. Suits by or against Government, including Sec. 80 CPC.
2. Discussion on law relating to appreciation of evidence of: Child witness, Interested Witness, Chance witness, Trap witness, Accomplice, Hostile witness and Police Witness.

II block 2008-09 (November-February, 2009)

1. The law relating to maintenance in the light of Sec. 125 CrPC and statutory provisions contained in the personal law
2. Gender awareness by judges to gender issue in Indian Legal System.

III block 2008-09 (March- May, 2009)

1. Scope of Section 89 CPC and Its use in curtailing pendency in Civil Cases.

2. Use of Sec. 265-A CrPC (Scope and usefulness of plea-bargaining) in administration of Criminal Justice System.

I block 2009-10 (July- October, 2009)

1. Judicial behaviour, ethics and conduct.
2. Application and evaluation of medical evidence and forensic evidence by the trial judge and appeal judge.

II block 2009-10 (Nov,2009 - Feb, 2010)

1. Trial of case related to false evidence and offence against public justice.
2. Fundamentals of Criminal Trial including summary procedure.
3. Cognizance of offence by Magistrate and powers under Sec. 156(3) CrPC.

III block 2009-10 (March - June, 2010)

1. Procedure for recording of statements under Section 164 CrPC, holding of test identification parade of a person as well as case property. What is needed so that statements become substantive piece of evidence?
2. Principles governing sentence in criminal cases, use of probation of offenders act, 1958 and of Section 360 CrPC Concept of suspended sentence.

These seminars were supervised by Hon'ble Judges of Rajasthan High Court. The participants thoroughly deliberated & interacted on the topics. To facilitate discussion, a questionnaire was also provided by the Academy.

Proposed Topics for year 2010-2011 are as follows :

I block (from 01.07.2010 to 31.10.2010):-

- Suits for specific performance of contract with special reference to the relief to be given and admissibility in evidence of unsigned/ unstamped document.
- Legal aspects of counter claim and set-off.

II block (from 01.11.2010 to 28.02.2011):-

1. Balancing 'the hazards of sex based division of society' and 'implementation of law relating to reservation, domestic violence etc.'
2. Examination of party or the pleader under Order 10 CPC.

III block (from 01.03.2011 to 30.06.2011):-

1. Legal rights of an arrested person.
2. Seizure of property u/s 102 CrPC and subsequent procedure with special reference to Section 451 and 457 CrPC Disposal of property u/s 452 CrPC.

PROGRESS TOWARDS CONSTRUCTION OF BUILDING OF R.S.J.A.:-

The primary requirement of the Academy is construction of its building and raising necessary infrastructure. The State Govt. has allotted 80 bighas land bearing khasara no. 677 near Jhalamand Circle, Jodhpur. Since it is adjacent to DVOR, the competent authority has been requested to grant NOC. The nature of land has been converted in to "land for institutional purposes". Jodhpur Development Authority, Jodhpur has issued permission to raise construction over the land and State Government has announced a provision of Rs. 15 crores for construction of building which will include Class Rooms, Conference Hall, Auditorium, Library, Hostel, Administrative Block, Guest House and residential accommodation etc. 13th Financial Commission also contains provision for it.

The layout plan prepared by the Chief Architect, P.W.D. has been approved by the Hon'ble Governing Council in its meeting dated 14.07.2009. The Specifications (Civil & Electrical) for construction of proposed building have been also approved by the Hon'ble Governing Council.

DEVELOPMENT OF WEB-SITE:

The web-site of Rajasthan State Judicial Academy, Jodhpur is developed with collaboration of NIC and Rajasthan High Court, and the domain name is <<http://www.rajasthanjudicialacademy.nic.in>> . The readers are requested to visit the web-site regularly.

TRAINING TO NEWLY APPOINTED CIVIL JUDGE (JD):

During 16.01.10 to 15.05.10, four month long field training was imparted to a fresh appointee CJ (JD) and thereafter, he is getting institutional induction training.