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Azadi Ka
Amrit Mahotsav

e-book for Advocates



**HIGH COURT OF JUDICATURE AT
ALLAHABAD**

e-book for advocates

(October, 2022)

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e-book for Advocates

Prepared under the directions of
**THE STATE COURT MANAGEMENT
SYSTEMS COMMITTEE**

*To Enhance the Quality, Responsiveness and
Timeliness of Court*



Prepared by : Judicial Training & Research Institute, U.P.
Vineet Khand, Gomtinagar, Lucknow





MESSAGE

The Courts are often viewed as “shrines of justice” and advocates are the ministers of the “courts of justice robed in the priestly garments of truth, honour and integrity.” Advocates play an important role in society as they form a class of professionals who are trained in law and practice to facilitate interaction between the lay persons and the judiciary.

In fact, if law is viewed as a ‘public good’, meaningful access to law requires assistance of an advocate. The character of the legal profession entails certain high traditions which its members are expected to keep and uphold. Therefore, the advocates play an indispensable role in the mechanism of administration of justice.

However, advocates have onerous and multi-dimensional role to fulfill. Justice Mathew of U.S. Supreme Court said that an advocate has a tripartite relationship: one with the public, another with the court, and third with the client. An advocate is not expected to blindly pursue only the cause of his client as he owes allegiance to higher cause and that is the cause of truth and justice. He has a duty to present before the court a fair picture of the case of his client to help the court to arrive at just resolution of the dispute.

An advocate, therefore, needs to be equipped with legal acumen and developments in law so as to protect the rights of his client as well as assist the court in dispensation of justice.

This e-book is prepared to help the young lawyers in understanding some of the vital aspects of legal profession, substantive and procedural laws in civil and criminal matters and professional ethics.

I am sure that this e-book will be useful for advocates, particularly the young advocates, in not only sharing latest law with them but will turn out to be a helpful tool for them in assisting the courts in dispensation of justice.



(Rajesh Bindal)





Preface

Bar and Bench are interdependent upon each other. Quality of judgements to a great extent, depends on the quality of the assistance provided by counsel appearing for the parties. The justice dispensation system gets strengthened when the new entrants in the profession are given chance to rise and excel.

With this object in mind, the State Court Management Systems Committee (SCMS Committee) of the Allahabad High Court has prepared e-book for guidance and assistance of the Bar. An endeavour has been made to introduce some of the emerging topics like – use of scientific evidence in civil and criminal cases, ADR/Lok Adalat/Mediation, plea bargaining in criminal matters, etc. Topics like moral and ethical values of the profession, importance of Dress Code and Code of Conduct of an Advocate, Act of Advocacy and Arguments have been incorporated keeping in mind the new entrants in the profession.

The book is a result of series of discussions, meetings, seminars and interactions between the members of the Committee and JTRI. I extend my deep appreciation for the great pains taken by JTRI in preparing, compiling and launching the book.

I hope this book will prove to be a valuable asset in disseminating knowledge and information to all the stakeholders.


(Justice Manoj Kumar Gupta)
Chairperson,
SCMS Committee



Allahabad High Court

The Allahabad High Court, also known as High Court of Judicature at Allahabad has jurisdiction over the Indian state of Uttar Pradesh. In the year 1866, the High Court of Judicature for the North-Western Provinces came into existence at Agra under Letters Patent of the 17th March, 1866, replacing the old Sudder Diwanny Adawlat.

Sir Walter Morgan, Barrister-at-Law and Mr. Simpson were appointed the first Chief Justice and the first Registrar respectively of High Court of North-Western Provinces.

The seat of the High Court for the North-Western Provinces was shifted from Agra to Allahabad in 1869 and its designation was altered to 'the High Court of Judicature at Allahabad' by a supplementary Letters patent issued on March 11, 1919.

On the eve of the Republic Day celebrations on the 26th January, 1950 the date of commencement of the Constitution of India, the High Court of Judicature at Allahabad came to have jurisdiction throughout the entire length and breadth of the State of Uttar Pradesh.

At present, sanctioned strength of Judges of the High Court of Judicature at Allahabad is 160. Presently, Hon'ble Mr. Justice Rajesh Bindal is the Chief Justice of High Court of Judicature at Allahabad.



State Court Management Systems (SCMS)

India has one of the largest judicial systems in the world and the judicial system is set to expand significantly over the next three decades. This expansion will increase the need to make the Judicial System 'five plus free' (i.e., free of cases more than five years old). A proposal was placed before Hon'ble the Chief Justice of India emphasizing the need for a comprehensive “National Court Management Systems” for the country that will enhance the quality, responsiveness and timeliness of Court. Therefore, in pursuance of the directions of Hon'ble the Chief Justice of India, National Court Management Systems was established for enhancing timely justice.

In the C.J. Conference held on 5 & 6 April, 2013, it was resolved that

The National Court Management System established in the year 2012 to enhance the quality, responsiveness and timeliness of court, be implemented on uniform basis. The High Courts shall constitute sub-Committees on the lines of NCMS at the State level, which may provide inputs and suggestions to the NCMS for formulation and effective implementation of national policy/plan.

Accordingly, State Court Management Systems (SCMS) Committee was constituted vide order dated 24.11.2014 of Hon'ble Chief Justice of High Court of Judicature at Allahabad for enhancing quality, responsiveness and timeliness of court, on a uniform basis, at the State level.

To fulfill the objectives of NCMS at the district level, District Court Management Systems (DCMS) were also constituted.

OBJECTIVES OF SCMS

SCMS includes following six main elements:

1. A **National Framework of Court Excellence (NFCE)** that will set out of measurable performance standards for Indian Courts, addressing issues of quality, responsiveness and timeliness.
2. A system for **monitoring and enhancing the performance parameters** established in the NFCE on quality, responsiveness and timeliness.
3. A system of **Case Management** to enhance user friendliness of the Judicial System.
4. A **National System of Judicial Statistics (NSJS)** to provide common national platform for recording and maintaining judicial statistics from across the country.
5. NSJS should provide real time statistics on cases and courts that will enable systematic analysis of key factors such as quality, timeliness and efficiency of the judicial system across courts, districts/states, types of cases, stages of cases, costs of adjudication, time lines of cases, productivity and efficiency of courts, use of budgets and financial resources. It would enhance transparency and accountability.
6. A **Court Development Planning System** that will provide a framework for systematic five-year plans for the future development of the Indian Judiciary. The planning system will include individual court development plans for all the courts.
7. A Human Resource Development Strategy setting standards on selection and training of judges of subordinate courts.

Present Composition of SCMS Committee

Hon'ble Sri Justice Manoj Kumar Gupta
Chairman

Hon'ble Sri Justice Anjani Kumar Mishra
Member

Hon'ble Sri Justice Prakash Padia
Member

Hon'ble Sri Justice Krishan Pahal
Member

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Registrar General
Allahabad High Court

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Member Secretary, SCMS Committee
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ABOUT THE BOOK

The judicial system exists for impartial dispensation of justice. Bar and Bench are called as coparcener of the judicial family. They play a lead role in dispensation of justice. The role of both is to ensure justice to aggrieved parties. According to law, they have been appropriately described as two sides of the same coin or as two wheels of the same chariot. Advocates are referred as “learned” as they are supposed to be so, therefore, they should have in-depth knowledge of law coupled with practical learning to enable them to discharge their duties as officers of the Court in effective manner, in judicial proceedings. Once, they join the Bar, they have to equip themselves with intricacies of legal practice and gain requisite legal knowledge, particularly in procedural law. This is the need of hour to evolve a training module for imparting training to the Advocates who are new entrants into legal profession and are having only a short span of practice in Courts.

This necessity was felt by the State Court Management Systems Committee (SCMSC) of Hon’ble Allahabad High Court and it directed the Director, JTRI to prepare an e-study material and new training module for Advocates having experience less than three years in the district Court, on various subjects and for this purpose, this Institute has also been directed to examine the training modules of the other judicial academies. Hon’ble Committee also prescribed certain topics to be included in e-book.

To prepare the e-book and training study/reference material comprehensively on the topics mentioned in the modules, a committee of Additional Directors and Dy. Directors of the Institute was constituted which prepared this e-book for guidance of newly practicing Advocates. I am grateful to Hon’ble Sri Justice R.M.N. Mishra, the then Director, JTRI in whose tenure most of the work of this e-book was carried out for having got it prepared so nicely. I also acknowledge the hard work put in the process of the preparation of this e-book by Sri Rajiv Maheshwaram, the then Additional Director (Administration). I appreciate the efforts made in this direction by my esteemed faculty of Judicial Officers and also staff of the Institute in bringing out this work.

I hope, this e-book prepared by the Institute will be useful for new Advocates in their professional performance before the Court of law. I wish them all success in the legal profession and in their future life.



(Vinod Singh Rawat)
Director

Aims and Objectives of this e-Book

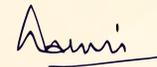
India is governed by the principle of 'Rule of Law' as declared under our Constitution which has created a hierarchy of courts to ensure a fair and due justice to the litigants. In the quest for justice, the District Courts, which act as the first interface between the legal system and the common people have a prominent role to play in providing timely, effective and efficacious justice.

We have adopted the adversarial legal system, where bar, represented by the lawyers play a prominent role. The lawyer as an important constituent of the courts and more particularly the lower courts, collect and arrange the facts of a case, apply the applicable legal principles, bring the evidence as per law and present the arguments before the court. Right from the stage of remand to the final judgment in the criminal matters or preparing the pleadings in the civil cases to judgment and taking up the matter upto execution, the lawyers are an inseparable link.

If lawyers are to be relevantly effective, they must be the trend setters inspiring public confidence. In recent years, the image and status of the legal profession in the eyes of the general public has to some extent been adversely affected. In such a scenario, there is an urgent need to re-discover and reaffirm the moral foundation of the legal profession, as also, inculcate ethical principles in the minds of the young lawyers. The young lawyers, should not only carry the past traditional values, but, should also have the propensity to maintain the decorum of the court and need to develop the habit of learning and acquiring legal knowledge.

The eBook is an effort to provide a wide spectrum of material to render the necessary assistance to develop the basic foundation of young professionals practicing before the lower courts.

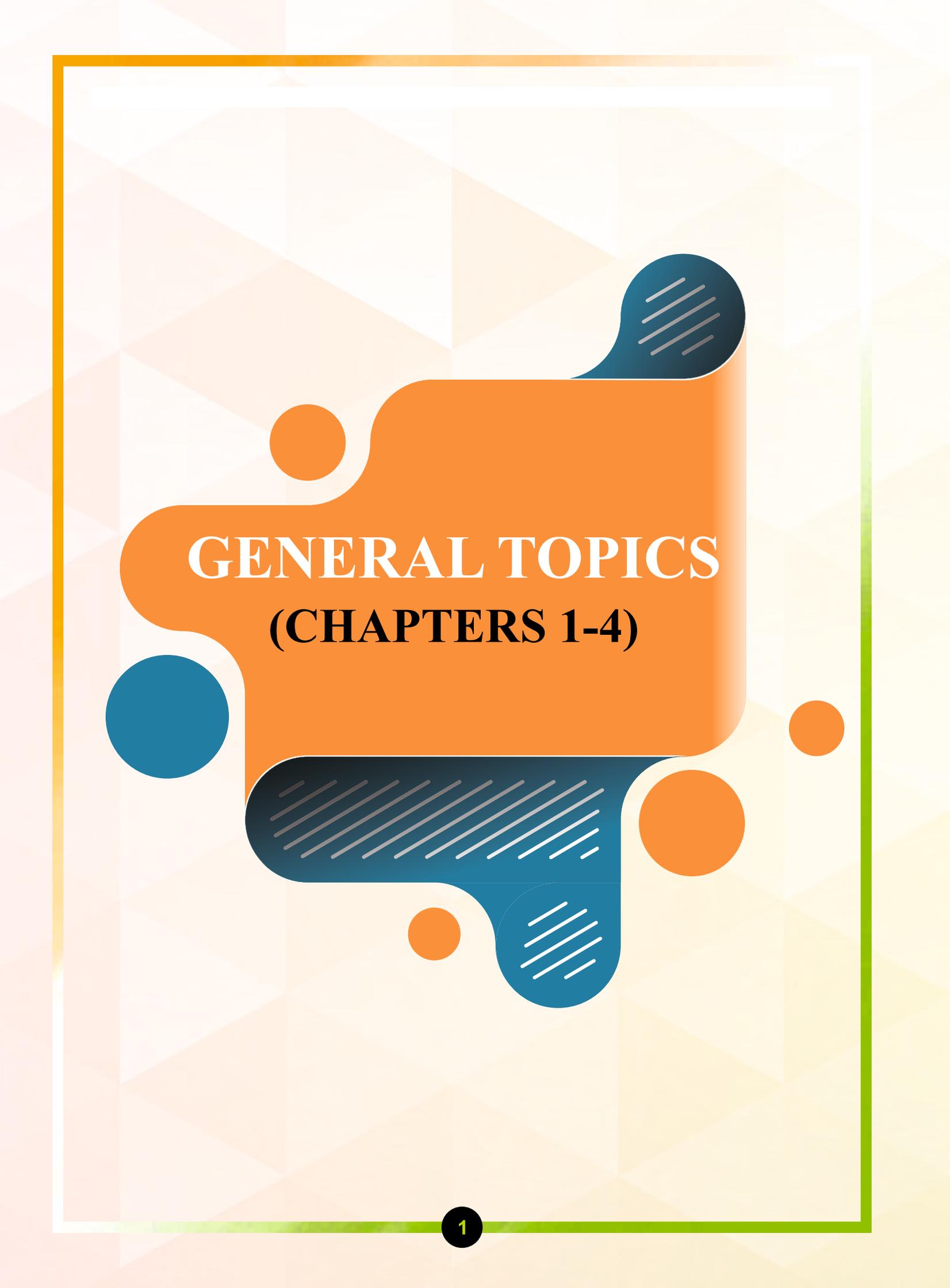
The motto is – 'learning today, leading tomorrow'. The Hon'ble State Court Management Systems Committee (SCMSC) has taken this momentous decision to provide quality reading material to the young and budding lawyers. The faculty of the JTRI, especially its young members are submitting this work for the consistent evolution of the judicial system, so that, the quality of administration of justice is strengthened for the ultimate benefit of the litigants.



(Ashish Garg)
Registrar General,
Allahabad High Court

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GENERAL TOPICS

(CHAPTERS 1-4)

CHAPTER-1

MORAL AND ETHICAL VALUES OF THE LEGAL PROFESSION

“It is a pleasant world we live in, sir, a very pleasant world. There are bad people in it, Mr. Richard, but if there were no bad people, [then], there would-be no-good lawyers.”

— **Charles Dickens**

Etymologically the words moral and ethical appear to have the same origin. They are being used synonymously to refer to behavioural practices. However, there is a thin line of difference between moral and being ethical. Moral denotes conduct, while ethical is the study of moral conduct.

Morality can be a body of standards or principles derived from a code of conduct from a particular philosophy, religion, or culture derived from a standard that a person believes. The word morals originated from the Latin word *Mos*, which means custom. It transcends norms from culture. Morality is the perspective of an individual. It is believed to be the right course of action, and so it is followed.

Ethics is a branch of philosophy. It encompasses structuring, defending, and endorsing the notions or thoughts of right and wrong behaviour. The word ethics has its origination traceable from the Greek word *ethos*, which means a character. It is governed by legal guidelines and professional rules such as the Code of conducts or professional standards or professional and legal ethics.

We can appreciate an ultimate difference from the point that ethics is confined within a particular space and time frame, whereas morality changes based on an individual's beliefs, so ethics may be codified, but morality cannot be codified. Another fundamental difference could be understandable from the situations such as cases where a person of moral may violate his ethics to uphold his moral values and vice-versa. An ethical person may not be a moral person in the eyes of others. Individuals' belief in righteousness has a negligible role in shaping ethical values because ethics is followed based on society's decision on what could be or what ought to be a correct course of action. We can visualise the third difference from the point of belief or perceptions. When we say moral values, it connects with a religious or human consciousness of one's own whereas, ethics depends on the vision or valuation of others. And, this is the main reason behind some grade of flexibility in ethics which is not so visible in moral values.

In the current era, the ethical values of myriad groups or peoples' associations are being codified, particularly in professional fields such as law and medicine.

Moral vs Ethical Values in the Legal Profession

“[T]he fundamental aim of Legal Ethics is to maintain the honour and dignity of the Law Profession, to secure a spirit of friendly co-operation between the Bench and the Bar in the promotion of highest standards of justice, to establish honourable and fair dealings of the counsel with his client, opponent and witnesses; to establish a spirit of brotherhood in the Bar itself; and to secure that [the] lawyers discharge their responsibilities to the community generally.”

- **Chief Justice Marshall**

Ethical values or professional ethics is known as the Code of conduct. Professional ethics in the field of law is also known as legal ethics. It regulates the behaviour or

behaviour of advocates primarily on four counts: behaviour towards himself, behaviour towards their adversary, their clients, and behaviour towards the courts.

The conduct of legal professionals is governed by legal ethics when acting in the capacity of an advocate. However, their relationship with people, in general, is governed by general rules of law. The main object of legal ethics is to maintain the profession's dignity and make cordial relation between the Bar and the Bench. Their obligation can be divided broadly into three heads. That is:

- (1) An obligation towards the profession;
- (2) An obligation towards his clients; and
- (3) An obligation towards the Court.

All professional obligations and duties can be covered under the heads stated above. For instance, the commitment to appear in Court as an advocate dignifiedly is his responsibility towards the Court; however, the other side of the coin reflects that it is also a duty towards the profession because any flagrant disregard will attract the disrepute to whole fraternity also. And, at the same time, if an advocate is taking care of the legal ethics, it will satisfy his conscience and client.

Similarly, suppose an advocate is behaving ethically with the opponent or his counsel. In that case, it will satisfy the needs and grace of the profession, and at the same time, it will harmonise the ambience of the Court in a better manner. In brief, the scope of legal ethics or ethical values is not limited to the evidence stage or the deposition of witnesses before the Court. It is much broader in approach. For instance, while examining a witness, an advocate should remember that he or she is not only the counsel of the client but also the officer of the Court. Thus, their duties during witness examination shall not be limited to the witness, but it shall also extend to others. For instance, the advocate should maintain the court decorum and must not indulge with an opposite party counsel in a disgraceful manner. In addition, co-operation and equal consideration to all professional members, encourage juniors, uphold dignity and privileges, not indulge in corrupt or dishonest conduct or practices, are few examples of professional ethics.

In simple and plain words, the ethical value of the profession involves the duties of members of the legal profession towards the Court, his clients, professional colleagues and the public at large. The Code is based on social behaviour such as what could be considered good, what is evil, what is right or wrong, what is reasonable or unreasonable, and the evolving laws related to legal ethics.

Ethical is not always moral and vice versa. For instance, if an advocate tells the Court that his client is guilty of a charge framed against him out of his righteous desire to see the Justice is done. But it is unethical as it violates the attorney-client privilege. Similarly, an advocate defends a person knowing that he committed the murder is not moral. Still, it is ethical because the advocate is doing his ethical duty to represent the client before the Court of law from the standpoint of admiration of Justice.

In India, legal ethics has been codified under the Bar Council of India Rules read with Section 49 (1) (c) of the Advocates Act, 1961. The Bar Council of India has the general powers to make the rules relating to professional conduct and etiquette standards. The laws formed by the Bar Council of India is given in Chapter II of Part IV of the Bar Council of India Rules. Here it is relevant to mention that it also consists of punishment in professional misconduct or violation of professional ethics. Section 35 of the Act empowers the State Bar Councils to take disciplinary action against the advocates on their roll. On receipt of the complaint or otherwise, it has reason to believe that the advocate has been guilty of professional or other misconduct. The punishment includes suspension of the advocate from practice for such period as it may deem fit or remove the advocate's name from the State roll of advocates.

Also, there are some rules prescribed which deal with the social or moral responsibility of an advocate. Still, no sanction is attached to them, such as free legal assistance to the indigent, non-fixation of fee for the lawyers. In such cases, the violation of the same does not attract disciplinary action.

Conclusion

Advocates play an essential role in the administration of Justice. The advocates share the responsibility with the judges in administering the Justice to end. They are one of the pillars for the maintenance of peace and order in society. They stand for a legal order. The primary function of the advocates indeed is to act in the best interest of the client. However, an advocate's moral and ethical duties are not limited to that; they play a vital role in law reform also.

The legal profession is formed for public welfare and the public good. It is not for making money but to provide Justice to the right person. The job is honourable, and therefore, it is expected from the advocates to be honest and work in an upright manner.

Immorality per se may not be a crime; however, an advocate's unethical act or conduct may lead to penalties, liabilities, or disciplinary action. So, in case of a dilemma in choosing between morality and ethics, the answer is obvious, an advocate has to keep legal ethics above his moral values. In a nutshell, it poses the obligation on the advocates to maintain the rule of law and secure the objectives. The Nation's future depends upon the maintenance of the shrine of the Justice, pure and unrolled by the advocates. It cannot be maintained unless the advocate's conduct and motives reflect the objectives behind professional ethics.

“

These safeguards are not for the protection of any judge individually but are essential for maintaining the dignity and decorum of the courts and for upholding the majesty of law. Judges and courts are not unduly sensitive or touchy to fair and reasonable criticism of their judgements. Fair comments, even if, out spoken, but made without any malice and without attempting to impair the administration of justice and made in good faith in proper language do not attract any punishment for contempt of court.

In Re Ajay Kumar Pandey v. Virendra Saran, AIR 1998 SC 3299

”

CHAPTER-2

IMPORTANCE OF DRESS CODE AND CODE OF CONDUCT FOR ADVOCATES (IMPORTANT PROVISIONS OF ADVOCATE ACT & RULES FRAMED THERE UNDER)

What is the Dress Code?

The dress code as such is not explicitly defined. Nevertheless, the terms suggest in popular culture a set of rules (often written rules) concerning what dress to be wore together by a particular group of people and in what setting. The dress codes culture is not a new idea; European royalty and nobility were used to dress Code in the seventh centuries. The motive behind the dress code was to differentiate themselves from other classes of people. In brief, dress codes symbolise the different social and ideas such as class, culture, identity and attitude. In the current era, the dress code is considered as a symbol of unity, confidence, discipline and professionalism. Today, people' belongingness to their profession is recognised by their attire. Advocates belong to the legal profession. The professional environment in a court generally reflects through the advocates' attire. A particular dress code also recognises them. In India, the Bar Council of India governs Advocates' dress code under the Advocate Act, 1961.

What is the Dress Code of Advocates in India?

Part VI Chapter IV of Bar Council of India Rules read with Rules under Section 49(1) (gg) of the Advocate Act, governs the dress code for the advocates appearing in the Hon'ble Supreme Court, Hon'ble High Courts, Subordinate Courts, Tribunals or Authorities.

The Rules says that the advocates shall wear the prescribed dress, which shall be sober and dignified. Following is the specified dress code for advocates:

Advocates (Male)	Advocates (Female)
<ul style="list-style-type: none"> • A buttoned-up black coat, chapkan, achkan, black sherwani and white bands with Advocates' Gowns with long trousers (White, Black Striped or grey) or dhoti excluding jeans. • A black open breast coat, white shirt, white collar, stiff or soft, and white bands with Advocates' Gowns with long trousers (white, black striped or grey) or dhoti excluding jeans. 	<ul style="list-style-type: none"> • A black open breast coat, white shirt, White collar, stiff or soft, and white bands with Advocates' Gowns with long trousers (white, black striped or grey) or dhoti excluding jeans; or • Black full sleeve jacket or blouse, white collar, stiff or soft, with white bands and Advocates' gowns; or • White blouse with or without collar, with white bands and with a black open breasted coat; or • Sarees or long skirts (white or black or any mellow or subdued colour without any print or design) or flare • (white, black or black striped or

- grey); or
- Punjabi dress Churidar Kurta or Salwar-Kurta with or without Dupatta (white or black) or traditional dress with black coat and bands.

Note:

- 1) A black tie may be worn instead of bands in courts other than the Hon'ble Supreme Court, Hon'ble High Courts, District Courts, Sessions Courts or City Civil Courts.
- 2) Wearing of Advocates' gown is optional except when appearing in the Hon'ble Supreme Court or High Courts,
- 3) Except in the Hon'ble Supreme Court and High Courts during summer, wearing the black coat is not mandatory.
- 4) An advocate should not wear bands or gowns in public places other than in courts, except on such ceremonial occasions and at such places as the Bar Council of India or as the Court may prescribe.
- 5) According to Rule 615 of General Rule (Civil), 1957, applicable to all district courts of Uttar Pradesh, the following is the prescribed dress code (the same is in addition or supplementary to the dress code stated above):

Pleader (Male)

1. A buttoned-up coat, achkan or sherwani of a black colour, or an open neck coat of the same colour with bands (if they are not entitled to use bands, they shall wear a black tie with it).
2. During the summer, the colour need not be black, and a coat, achkan or sherwani of a light colour may be worn.
3. With the coat, trousers and with the achkan or sherwani churidar pyjama or trousers shall be worn.

Pleader (Female)- a black or a white sari and blouse.

They shall also wear distinctive costumes as indicated below:

Advocates: a gown similar to a barrister's gown with bands; and

Pleaders and Vakils: a gown similar to the gown worn by Presiding Officers, but without sleeves and bands. If it is desired to wear a headdress, a turban may be worn.

- 6) During the Covid-19 pandemic, the Hon'ble Supreme Court has relaxed the dress code for advocates appearing through video conferencing. The circular directs that-

"the advocates may wear "plain white-shirt/white-salwar-kameez/ white saree, with a plain white neckband" during the hearings before the Supreme Court of India through Virtual Court System till medical exigencies exist or until further orders."

Importance of Dress Code

The dress code of the advocate is rules of etiquette and decorum. It is designed and adopted to develop respect and maintain the dignity of the legal profession. In addition, the advocates owe duties towards the Court, the client, their opponents and other advocates. They are also officers of the courts, and they play a crucial role in the administration of Justice. The purpose of the dress code is two-fold.

First, for identity, the dress code distinguishes an advocate from a litigant and other public at large, and

Second, a uniform attire of advocate brings seriousness to work and a sense of decorum that encourages the dispensation of Justice.

In this regard, a case titled **Prayag Das v. Civil Judge Bulandshahr**, [AIR 1974 All 133] is very insightful. In this case, the Hon'ble Allahabad High Court held the provisions of Rule 615, General Rules (Civil), 1957 valid. The Court distinguished between the Right to Practice vs Right of Appearance [Section 34 (1) and Section 49 (ab) of the Advocates Act, 1961]. The Court held that the right to practice and the right to appear are not synonymous. The Court observed that-

"It is thus manifest that the dress of Advocates has been prescribed by rules framed under Art. 227 of the Constitution, Section 122 of the Code of Civil Procedure, as well as under the provisions of the Advocates Acts, Advocates are bound to conform to the prescribed dress, and this explodes the myth of the untrammelled choice of an Advocate in matters of dress while appearing in courts. The petitioner who was wearing a Dhoti and Kurta with a gown violated the prescribed dress, and the learned Civil Judge was within his rights to refuse audience to him, and the impugned orders are valid and legal. We are constrained to hold that under the existing provisions of law, an Advocate cannot appear in Court, dressed in Dhoti and Kurta, even though he may be wearing a gown."

The Hon'ble Court further opined that-

"18. In our opinion, the various rules prescribing the dress of an Advocate serve a very useful purpose. In the first place, they distinguish an Advocate from a litigant or other members of the public, who may be jostling with him in a Courtroom. They literally reinforce the Shakespearian aphorism that the apparel oft proclaims the man. When a lawyer is in prescribed dress, his identity can never be mistaken. In the second place, a uniform prescribed dress worn by the members of the Bar induces a seriousness of purpose and a sense of decorum which are highly conducive to the dispensation of Justice. Of late there has been a lamentable slackness in matters of lawyers' dress. We feel that the lifting of a prescribed dress for Advocates and courts is apt to precipitate sartorial inelegance and judicial indecorum. If the rule is relaxed, it is not unlikely that Advocates may start dressing themselves more and more scantily and even indiscreetly. The apprehension might be well illustrated by a dialogue which is alleged to have transpired between the Australian squatter and his friend who visited him on his estate far away in the wilds of the interior. The friend asked him why, in so remote a place he made it a practice to dress for dinner. "I do it," said the squatter, "to avoid losing my self-respect. If I did not dress for dinner, I should end by coming into dinner in my shirtsleeves. I should end by not troubling to wash. I should

sink down to the level of the cattle. I dress for dinner, not to make myself pretty, but as a spiritual renovation."

One petition concerning the dress code of the senior advocates and other advocates, was challenged before the Hon'ble Delhi High Court title as **Parashar v. Bar Council of India: (AIR 2002 Del 482)**. Senior Advocates' wearing different attire (gown) was questioned on the ground that rule does not discriminate between senior Advocates and other Advocates. The Court dismissed the petition on the observation that the said dress code of the senior Advocates are customarily accepted even before the Advocate Act came into existence. The Court held that-

"While it is true that the rule framed by the Bar Council of India does not make out any distinction in dress or prescribe the design of a different gown or coat for a senior advocate, yet the distinction has been maintained and followed by a practice of long-standing, even prior to the Advocates Act of 1961. The Advocates Act, 1961 itself has recognised a distinction in S.16 of the Advocates Act, 1961 between the senior advocates and advocates. S.23 of the Act provides for the right of pre audience for Senior Advocates, among others. The senior advocates constitute a different class within the advocates.... It is an honor and distinction conferred by the Court in recognition of the ability and standing of the concerned advocate. Once the distinction between an advocate and a senior advocate is accepted and accorded statutory recognition, the wearing of a distinct gown or a coat by a senior advocate, which is different from the one worn by advocates, cannot be questioned or assailed as discriminatory or violative of Art. 14 of the Constitution of India."

The importance of advocates' dress code can be understood from the standpoint of the case laws cited above. Therefore, we can say that the dress code for advocates is part and parcel of their professional conduct. And, thus, violation of the same may be a contempt of Court. The Court has the right to impose a penalty and fine for not adhering to the dress code.

Code of Conduct

Code of conduct is a rule book. A well-written code of conduct clarifies, besides the do's and don'ts, the mission, values, principles, ethics and sanctions linking them with standards of professional conduct. The Code articulates the values that an institution wishes to see in its people. It's a kind of defining desired behaviour. The Code of conduct reflects the character an institution expecting from its people over there. Also, it can be considered as a rule book or a universal guide. A code encourages discussions of ethics and compliance and helps resolve conflicts or confusions that may occur in everyday work.

Code of Conduct for Advocates

A commitment to legal ethics involves a commitment to the introduction of Codes of Ethics or Standards of Professional Practice. An advocate, when entrusted with a brief, is expected to follow the norms of professional ethics. His foremost duty is to protect the interests of his client. Advocates, in addition to, are also officers of the courts and play a vital role in the administration of Justice. The Code of conduct for advocates is a set of

rules governing their professional conduct arising out of the duty they owe towards the Court, the client, their opponents, and other advocates.

Rules on the professional standards are mentioned in Chapter II, Part VI of the Bar Council of India Rules read with Section 49(1)(c) of the Advocates Act, 1961. The rules in brief have been discussed herein below:

I. ADVOCATE'S DUTY TOWARDS THE COURT:

1. Behaviour:

- **Dignified.** An advocate should always act with dignity. He or she should never lower their self-esteem while presenting the case or during the arguments in the Court. They should never be harsh and must avoid unnecessary opinions or comments upon the Court. However, if the advocate feels any serious grievance against a judicial officer, the proper forum is to complain against that officer through the appropriate channel.
- **Respectful.** An advocate must be obedient to the Court. He or she should maintain dignity and respect towards the judicial officer.

2. Communication:

- **Private communication.** There should be no personal communication between the advocate and the judge concerning any matter pending before the judge or any other judge.
- **Influence.** An advocate should not influence the decision of a court in any matter using illegal or improper means such as coercion, threat or bribe.
- **Refusal to illegal acts or conducts.** An advocate should refuse to act illegally or improperly towards the opponent's counsel or party.
- **Best efforts to restrain the client's acts or conducts.** An advocate must make his or her best efforts to restrain and prevent his client from indulging in any illegal, improper or unfair practices concerning the judiciary, opposing counsel or the opposing parties.
- **Refusal to represent who insist on unfair means.** An advocate must refuse to represent any client if the client insists upon indulging in any unfair or improper means. An advocate must not follow the client's instructions blindly; he or she may exercise his judgment in such matters.
- **Language.** An advocate must correspond or argue in the courts dignifiedly. Scandalous, derogatory, abusive, lousy, or unparliamentarily kinds of language should not be used in the Court for any purpose whatsoever.

3. Appearance in courts:

- **Appear in proper dress code.** An advocate should appear in the courts in a presentable manner and be in appropriate attire as prescribed under the Bar Council of India Rules.
- **Not to wear bands or gowns in public places.** Advocates should not wear bands or gowns in any place other than in the courts. However, the same is subject to an exception. They can wear it on such ceremonial occasions and at such places as the Bar Council of India or as the Court may prescribe.

4. No appearance in case of related parties or interested party.

- **Related judicial authority.** In case of any relation with the judicial authority (presiding officer, sole or any member of the Bench), the advocate should not enter appearance, act, plead or practice in any manner whatsoever before it. The related parties mean the judicial authority is related to the advocate as father, grandfather, son, grandson, uncle, brother, nephew, first cousin, husband, wife, mother, daughter, sister, aunt, niece, father-in-law, mother-in-law, son-in-law, brother-in-law daughter-in-law or sister-in-law.
- **Not represent establishments of which he is a member.** An advocate should not appear for or against any establishment if he is a member of the establishment's management in or before any judicial authority.
- **Exception:** This rule does not apply to a member appearing as “amicus curiae” or without a fee on behalf of the Bar Council, Incorporated Law Society or a Bar Association.
- **Matters of pecuniary interest.** An advocate should not act or plead in any matter in which he has financial interests.
- **Not stand as surety for client.** An advocate should not stand as a surety, or certify the soundness of a surety that his client requires for the purpose of any legal proceedings.

II. Advocate’s Duty Towards the Client:

1. Accepting the briefs.

- **Bounden duty.** An advocate is bound to accept any brief in the courts or tribunals or before any other authority, he or she proposes to practice.
- **Fees.** The advocate should levy fees considering two factors; first, it should be at par with the fees collected by the fellow advocates of his standing at the Bar, and second, the nature of the case.
- The advocate may refuse to take brief in any special justifiable circumstances.
- **Not withdraw from service.** An advocate should not ordinarily withdraw from serving a client once he has agreed to serve them. Withdrawal can be done only on sufficient cause and after giving reasonable and adequate notice to that client.
- **Refund on withdrawal from service.** In case of withdrawal, the advocate must refund such part of the fee not accrued to the client.

2. Charging criteria Do’s & Dont’s

- An advocate must not charge his client depending on the success of the matters.
- The advocate also shall not charge for his services as a percentage of the amount of property received after the success of the matter.
- He or she should not trade or agree to receive any share or interest in any actionable claim. However, nothing in this rule shall apply to stock, shares and debentures of government securities or any instruments, which are, for the time being, by law or custom, negotiable or to any mercantile document of title to goods.
- An advocate should not adjust the fee payable to him by his client against his liability to the client, which does not arise in the course of his employment as an advocate.

- **Keep proper accounts.** An advocate should always keep accounts of the clients' money entrusted to him.
- **Divert money from accounts.** An advocate must not divert any part of the amounts received for expenses as fees without written instruction from the client.
- **Intimate the client on amounts.** Where any payment is received or given to him on behalf of his client, the advocate must intimate the client about it without any delay.
- **Adjust fees after the termination of proceedings.**
- After the termination of proceedings, the advocate shall be at liberty to adjust the fees due to him or her from the client's account.
- The balance amount, if any, left after the deduction of the fees and expenses from the account must be returned to the client.
- **Provide a copy of accounts.** An advocate must provide the client with a copy of the client's account maintained by him on demand subject to the necessary copying charge paid by the client.

3. **No appearance in case of being a witness.**

- An advocate should not accept a brief or appear in a case in which he is a witness.
- If the advocate has a reason to believe that he or she will be a witness in the said case, in due course of events, then the advocate should not continue to appear for the client. He should retire from the case without jeopardizing his client's interests.

4. **Full and frank disclosure to client.**

- An advocate should make all the material disclosure to the client at the commencement of his engagement and also during the continuance which may affect client's case.
- The disclosure should be full and frank and must be relating to the advocate's connection with the parties and any interest in or about the controversy as are likely to affect his client's judgment in either engaging him or continuing the engagement.

5. **Uphold interest of the client.**

- An advocate is duty-bound to uphold the interests of his client fearlessly by all fair and honourable means.
- An advocate shall do so without regard to any unpleasant consequences to himself or any other.
- He shall defend a person accused of a crime regardless of his personal opinion as to the guilt of the accused.
- An advocate should always remember that his loyalty is to the law, which requires that no man should be punished without adequate evidence.

6. **Not suppress material or evidence.**

- An advocate appearing for the prosecution of a criminal trial should conduct the proceedings so that it does not lead to the conviction of the innocent.
- An advocate shall not suppress any material or evidence, which shall prove the innocence of the accused.

7. Privilege communication.

- An advocate should not by any means, directly or indirectly, disclose the communications made by his client to him.
- He also shall not disclose the advice given by him in the proceedings. However, he is liable to declare if it violates Section 126 of the Indian Evidence Act, 1872.

8. Must not be the instigator.

- An advocate should not be a party to stir up or instigate litigation.

9. Instruction from others.

- An advocate should not act on the instructions of any person other than his client or the client's authorised agent.

10. Not bid or purchase or transfer property arising of legal proceeding.

- An advocate should not by any means bid for, or purchase, either in his name or in any other name, for his benefit or for the benefit of any other person, any property sold in any legal proceeding in which he was in any way professionally engaged.
- However, the advocate can bid or purchase for and on behalf of his client, on expressed authorisation in writing in this behalf.
- An advocate should not by any means bid in court auction or acquire by way of sale, gift, exchange or any other mode of transfer (either in his own name or in any other name for his own benefit or for the benefit of any other person), any property which is the subject matter of any suit, appeal or other proceedings in which he is in any way professionally engaged.

11. Should not misuse. An advocate should not misuse or takes advantage of the confidence reposed in him by his client.

12. An advocate shall not enter into arrangements whereby funds in his hands are converted into loans.

13. Not lend money to his client.

- An advocate shall not lend money to his client for the purpose of any action or legal proceedings in which such client engages him.
- An advocate cannot be held guilty for a breach of this rule, if in the course of a pending suit or proceeding, and without any arrangement with the client in respect of the same, the advocate feels compelled by reason of the rule of the Court to make a payment to the Court on account of the client for the progress of the suit or proceeding.

14. Not appear for opposite parties. An advocate who has advised a party in connection with the institution of a suit, appeal or other matter or has drawn pleadings, or acted for a party, shall not act, appear or plead for the opposite party in the same matter.

III. Advocate's Duty Towards the Opponents:

1. An advocate must not negotiate or communicate or call for settlement directly with the party. The communication must be through the respective advocates representing the parties.
2. An advocate shall do his best to carry out all legitimate promises made to the opposite party even though not reduced to writing or enforceable under the Court's rules.

IV. Advocate's Duty Towards Fellow Advocates:

- An advocate shall not solicit work or advertise in any manner.
- He shall not promote himself by circulars, advertisements, touts, personal communications, interviews other than through personal relations, furnishing or inspiring newspaper comments or producing his photographs to be published in connection with cases in which he has been engaged or concerned.
- An advocate's sign-board or name-plate should be of a reasonable size.
- The sign-board or name-plate or stationery should not indicate that he is or has been President or Member of a Bar Council or any Association or that he has been associated with any person or organisation or with any particular cause or matter or that he specialises in any specific type of work or that he has been a Judge or an Advocate General.
- An advocate shall not permit his professional services or name to be used to promote or start any unauthorised law practice.
- An advocate shall not accept a fee less than the fee, which can be taxed under rules when the client can pay more.
- An advocate should not appear in any matter where another advocate has filed a vakalatnama or memo for the same party without consent.
- If an advocate cannot present the consent of the advocate, he should apply to the Court for an appearance.

V. Duty in Imparting Training.

- An advocate should not demand or accept fees or any premium from any person as consideration for imparting training in law under the rules prescribed by State Bar Council to enable such person to qualify for enrolment under the Advocates Act, 1961.

VI. Duty to Render Legal Aid.

- Every advocate should keep in mind that if their economic conditions allow them, they should give free legal assistance to the indigent and oppressed people as the highest obligations an advocate owes to society.

VII. Restriction on Other Employments

- An advocate cannot be personally engaged in any business. However, he may be a sleeping partner in a firm doing business provided that the business is not inconsistent with the dignity of the profession.
- They may be Director or Chairman of the Board of Directors of a Company with or without any ordinarily sitting fee, provided none of his duties is executive.
- An advocate shall not be a Managing Director or a Secretary of any Company.

- An advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practice, and shall, on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears and shall thereupon cease to practice as an advocate so long as he continues in such employment.
- An advocate who has inherited or succeeded by survivorship to a family business may continue it but may not personally participate in the management thereof.
- An advocate may review Parliamentary Bills for a remuneration, edit legal text books at a salary, do press-vetting for newspapers, coach pupils for legal examination, set and examine question papers; and subject to the rules against advertising and full-time employment, engage in broadcasting, journalism, lecturing and teaching subjects, both legal and non-legal.
- An advocate may do part-time employment after obtaining the consent of the State Bar Council.

The main objective of the legal profession is the norms of professional ethics to be pursued by a lawyer in the discharge of his professional duties. As discussed above, the Code of conduct has prescribed the manners and methods for the advocates to perform their duties towards Court, their clients, opponents, colleagues and the public smoothly, honestly and with dignity. In case of any misconduct or breach of rules, an advocate has to face disciplinary consequences. The Code provides a set of solutions that may come while performing the duty of being an advocate. Such as, what are the fundamental duties of an advocate towards a court, what could be an action in case of conflict between morality and legal ethics? How to treat a client? Whether advancing money to a client for litigation would be professional misconduct?

For instance, it is well settled that an advocate has a fiduciary duty to his or her client, which carries twin responsibilities firstly, advocate's obligation to avoid conflict between his commitment to his client and his interests. Secondly, full disclosure of interest. An advocate should never profit or secure a benefit at the expense of his client's expense. Conflicts of interest and non-disclosure are the cause of actions for disciplinary actions in most cases. The consequences of a conflict of interest situation can be severe and costly. It may lead to civil liability for professional malpractice as well as disciplinary action. Some dire consequences also flow from a proven claim in contract, tort or equity. Thus, it is clear that lawyers have to be very careful while dealing with potential and current clients to ensure that conflict of interest situation does not arise.

The importance of Code of conduct for advocates can be culled out from the following facts:

- The advocates are a crucial part of the justice administration system. Therefore, if they do not adhere to and promote ethical values, then the Rule of Law will fail with a rise of public discontent.
- Advocates are professionals, and undoubtedly, the issues concerning ethical responsibility or duty are an inherent part of their legal profession. Therefore, if an advocate does not follow the legal ethics and brought shame, it affects the whole fraternity.
- Advocates are officers of the Court and therefore must serve the Court and the administration of Justice.
- Advocates are a privileged class and have burdened duty towards society also.
- Law is a profession, and advocates have certain obligations towards others, as stated earlier. These obligations are generally articulated in a Code of Ethics or Rules of Practice.

Conclusion

Rules of etiquette and attire facilitate the smooth and orderly functioning of a complex system. Most rules of etiquette are designed to ensure respect for authority and to maintain dignity within a profession. On the one hand, the dress code enhances the appearance and presentable value; on the other hand, the Code of conduct allows an advocate to showcase their professional characters such as confidence, dignity, professionalism, authority, trustworthiness, intelligence and competence.

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Justifiable grounds mean grounds of incurring any disqualification while holding post. An act is justified by law if it is warranted, validated and made blameless by law.

J.S. Yadav v. State of U.P., (2011) 6 SCC 570.

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CHAPTER-3

ART OF ADVOCACY & ARGUMENTS

“Some people think that a lawyer’s business is to make white black; but his real business is to make white in spite of the stained and soiled condition which renders its true colour questionable. He is simply an intellectual washing machine”

– J. Bleckley

Introduction

Justice is the great interest of man on earth. It is an oft-quoted saying of Daniel Webster that, deep as foundations of society, almost as wide as human thought itself, "Justice" in all generations has been "the great interest of the man". If justice is the great interest of a man on earth, then assuredly those who make it a special study and by whose efforts its great ends are measurably attained must occupy in our infinitely complicated modern society a position of pre-eminent usefulness, power and honour.

As Law is essentially "applied morality", the lawyer enforcing its principles without litigation does more to promote justice between man and man than any other profession. He rarely can secure absolute right because absolute right in a complicated human society is rarely attainable. Many a disappointed litigant has had a poor opinion of the Law, and therefore of lawyers, either because he has not obtained full absolute justice, or because he is a victim of those general rules of human society, such as the statutes of limitations, which though they work hardship in individual cases, are most necessary and salutary as rules of general application. Before condemning the legal professional, the public should always appreciate that the administration of justice is necessarily but an approximation toward that ultimate and absolute justice which may come with the millennium, but never before. There is between the justice of the courts and absolute justice".

Moreover, the average case is a tangled skein of disputed facts, in which the lawyer necessarily accepts his client's version. In the average litigated case, no one side is wholly right. Upon the Court, and not upon the lawyer, rests the ultimate responsibility of determining the Law and the facts, and even then, it must be said of legal justice.

What is Advocacy?

Advocacy is a skill. When a legal advisor puts forward a particular argument to a court to persuade the Court to decide a matter favourable to their client, it is advocacy.

However, advocacy can be both written and oral; it encompasses a whole range of invaluable skills to lawyers. Advocacy encompasses a range of abilities, including case analysis, drafting and using skeleton arguments, making oral submissions, cross-examining witness trials and being able to put forward a strong persuasive case.

Advocacy begins when you meet a client and continues as you research the case, prepare documents for trial and finally present the case in Court. It is often said that oral advocacy, in particular, is an art rather than a science. It is best done when the advocate says the truth to their personality while putting forward a strong argument.

The advocate must have a quick mind, an understanding heart, and a charm of personality. For he has often to understand another man's life-story at a moment's notice, and catch up overnight a client's or a witness's lifelong experience in another profession; moreover, he must have the power of expressing himself clearly and attractively to simple people, so that they will listen to him and understand him. He must, then, be

histrionic, crafty, courageous, eloquent, quick-minded, charming and great-hearted. These are the salient qualities that go to make a great advocate.

Great courage, independence and presence of mind are essentially necessary to make a successful advocate. A timid person will never shine at the bar or win the confidence of the client and the judge. Witnesses have broken down, unexpected difficulties have cropped up, things look back from every quarter, yet the advocate has to keep his head cool, rehabilitate himself, and regain the lost ground by coping with such extraordinary situations. The tide has to be turned back by devising remedy from the resource of the moment.

Art of Advocacy

The words 'Advocate' and 'Lawyer' are colloquially and interchangeably used as alternative to each other. The word 'lawyer' may be described as "a professional person qualified (by a law degree or bar exam) and authorised to practice law, i.e., represent parties in law suits or trials and give legal advice, by extension a legal layman who argues point of law and includes an advocate, attorney and counselor" by standard English dictionary meaning. Thus a lawyer may or may not be an "advocate" as clarified by the definition following. For example, a tax expert even though not an "advocate" by following definition, may be acclaimed as a lawyer irrespective of the fact that he is not a member of an Institute or Bar Council as far as he has acquired the knowledge and expertise in a specialised field or branch of Law. According to section 2(1) (a) of the Advocates Act, 1961, "advocate" means an advocate entered in any roll under the provisions of this Act. (h) "law graduate" means a person who has obtained a bachelor's degree in Law from any University established by Law in India; (i) "Legal practitioner" means an advocate or vakil of any High Court, a pleader, mukhtar or revenue agent; (k) "roll" means a roll of advocates prepared and maintained under this Act.

By elaboration of the above definitions and the rules framed under the Act, an advocate is a person, who is primarily a law graduate, obtains certificate of practice by qualifying in the All India Bar Examination (AIBE) conducted by the Bar Council of India to assess the capability of advocates who want to practice Law in India. This is the qualifying examination to get the Certificate of Practice for the legal profession and finally gets his/her name entered into the role of Advocates prepared and maintained by the Bar Council. Each of the Advocates is issued an identity card, certificate of practice and Bar Association/Library membership admission/subscription receipts to confirm his/her clearance to practice advocacy in a Court of Law and write the word "Advocate" after his/her name. While a lawyer may or may not be an Advocate, definition under section 2(1) (i) may be a pleader or mukhtar or revenue agent. Understanding these provisions is very important before claiming oneself as an advocate, as hitherto noticed, to claim fame by many that go unchallenged under the Act.

The art of advocacy is nothing new or codified. Any advocate visiting and attending a court on regular basis may be learning the art by following the senior practicing members of the Bar and the learned members of the Bench during court session under varied circumstances.

The advocate is a representative but not a delegate. He gives to his client the benefit of his learning, his talents and his judgments, but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law, he will not willfully misstate the facts, though it be to gain the case for his client. He will ever bear in mind that if he be an advocate of an individual and retained and remunerated often inadequately, for valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice. There is no crown or other license that can discharge him from that primary and paramount retainer in any case or for any party or purpose.

“In its widest sense advocacy is the art of convincing others, that is to say, *the art or persuasion*. It is a valued accomplishment in many departments of life, such as commerce and finance, labour relations and politics, as well as in Law. In its legal context, advocacy is the art of conducting cases in the Court, both by argument and by the manner of bringing out the evidence, to convince the Court or jury, as the case may be”.

Equipments of an Advocate

Honesty, Integrity and Character: –An advocate is to be honest and a man of integrity and character. An advocate who is straight forward and is possessed of these three jewels is appreciated by the Court and the client alike. These three virtues go a long way towards the success of an advocate.

Patience and Perseverance: –Nothing pays in this profession more than unremitting industry. Even mediocre men go far ahead in the profession than those who are better than they by sheer dint of industry. On the portal of the temple of Law is written a specific inscription; 'only those capable of labour, with maximum patience, self-confidence, and faith are welcome. Let none with a defeatist and pessimist mentality and irresolute mind enter it'. To such person only shall the great portal swing open, and his feet be set on the path.

Legal Learning: – An advocate should be well equipped in legal learning. He should study the Law and not merely read it. The Law should be studied in a spirit of enquiry. The enquiry must be in a spirit of doubt. The spirit of an advocate should be spirit of unsatisfied research. It does mean that he should come to no conclusions of his own or desist from presenting them. As an advocate he has to present conclusions with force, even when he is in doubt. He should never take anything for granted, but examine it and satisfy himself what it is or is not.

General Education: – An advocate should not only be well versed in legal lore, but he should also be a man of wide culture. He should have full acquaintance with history, with economics and with other sociological sciences. His general ability and knowledge of international Law also should be up to date. There never was a time when the profession of an advocate was of greater importance or responsibility than today. He should be fully alive to the great obligation that lies upon him to play his part in shaping the community's life and the country. The profession of Law, therefore, calls for greater knowledge or greater intellectual grasp. The magnitude and intricacy of many of the trials in this decade of ours call for the highest mental capacity.

Memory: – An advocate should possess tenacious memory. It is no use of gathering treasures, if you cannot store them. It is equally useless to learn what you cannot retain in the memory. An advocate may have in memory many cases, but if he has not the skill to use them they are of little benefit to him.

Study of Law Reports: – an advocate should keep himself in touch with the growth of the Law by reading the current law reports. It will be greatly helpful to an advocate if he draws up head notes for the reports that he studies to clarify his ideas and give him accurate knowledge.

The Use of legal phraseology: – An advocate should use legal phraseology in legal parlance. Just as poetry has a structure and phraseology peculiar to itself, so has Law a form of its own language. The effect which is produced by using legal phraseology cannot be obtained by using any other common expression. The elegance and dignity of arguments in Court are enhanced if the language employed is correct.

Manners in Court: – More important than intellectual equipment is moral equipment. An advocate is always expected to maintain calmness and self-possession and a pleasant humour. He should be respectful to a court. He owes this duty not for the sake

of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. He can be deferential without being abject, and independent and fearless while being respectful.

What the counsel owes to the Court:

- a) The first duty which the counsel owes to the Court is to maintain its honour and dignity— this is the cardinal principle determining the advocates' relation in Court.

The advocate owes courtesy and respect to the Court for the following reasons:

- Because he is the like judge himself, an officer of the Court and an integral part of the judicial machinery. The legal position consists of the Bar and Bench, and both have common aims and ideals.
 - In theory, the Sovereign presides in the Court of justice, and the judge is merely the mouthpiece and representative of the Sovereign. Respect shown to the Court is, therefore, respect shown to the sovereign whose representative the judge is.
 - Because not only litigants and witnesses but the general public will get their inspiration in this respect from the examples of advocates. It is necessary for the administration of justice that judges should have esteem of the people.
 - Because it is good manners, and advocates before anything else are “gentleman of the Bar.”
 - Even from the purely practical standpoint, there is nothing to be gained but there is much too loose by antagonizing the Court. Conflict with the judge renders the trial disagreeable to all and generally a detrimental effect on clients' interests.
- b) The Advocate must not do anything which lowers public confidence in the administration of justice.
- c) The Bar must support judges in their independence because in the integrity of judges lies the greatest safeguard of a nation's laws and liberties. Judicial independence is the only protection against tyranny and whims of the executive.
- d) The Advocate must not do anything which is calculated to obstruct, divert or corrupt the stream of justice, for instance, he must not advise disobedience to the courts order and decrees.
- e) Another duty which the advocate owes to the Court is that of fidelity, he must be honest in his representation of the case. He must not deceive the Court.
- f) The counsel is under an obligation to present everything to the judge openly and in the Court and nothing privately. He must not attempt any private influence upon the judge; seek opportunities for the purpose; or take opportunities of social gatherings to make ex parte statements or to endeavour to impress his views upon him.
- g) The Advocate must not place himself in a position which he cannot effectively discharge his obligations to the Court as minister of justice. He should not have any personal interest in the litigation he is conducting. It will be misconduct on his part to stipulate with his client to share in litigation results.
- h) He should always remember that precedents are more efficacious than arguments; (Valindoria sunt expla quam verba; el plentus opera docetur quam voce). Even if there is any decision against him, the lawyer must disclose it. He may later on distinguish it on the facts of particular case, or even contend that the decision does not lay down sound Law; if he does so, he will win the esteem of the judge.

- i) If in case there is a conflict between the duty to the client and duty towards the Court, Lord Denning, M.R. in *Rondel v. W.*, (1966) 3 All ER 657, has rightly observed;

"... he (counsel) has time and again to choose between his duty to his client and his duty to the Court. This is a conflict often difficult to resolve; and he should not be pressured to decide it wrongly. When a Barrister or an advocate puts his first duty to Court, he has nothing to fear....it is a mistake to suppose that he is the mouthpiece of his client to say what he wants.... he must disregard the most specific instructions of his client, if they conflict with his duty to the Court. The code which requires a Barrister to do all this is not a code of Law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to indiscipline."

Presentation of Case: – An advocate should first present his best point. He should not be in hurry. He should be cool and calm to be able to arrange his thoughts in proper sequence without confusion. To no one else is self-possession of greater value and productive of better results than to the advocate. An advocate should avoid the bad habit of using inaccurate expressions. A lapse into inaccuracy or deliberate mis-statement of fact, any one of these easily creates an unjust impression upon the Court. An advocate should not conceal adverse points.

Examination of Witness:

As to examination-in-chief, the first requisite is a firm grasp of the main lines of the evidence and its place in the unfolding of the case. The ideal advocate does not examine from his proof but has absorbed the essentials of the story, so that the evidence is alive for him and comes out effortlessly. The second requisite is skill in the use of words, to be able to guide the witness in the right direction without leading him. It has been said that the essence of successful examination-in-chief is 'to lead, without appearing to lead'. The true technique is to guide the witness without leading him.

Throughout the evidence-in-chief, the examiner must be in control, deflect the story in the right direction and away from the irrelevances: he must be ready to check a loquacious witness and encourage one who is timid or hesitant.

Cross-examination aims to destroy the material parts of the evidence-in-chief; to weaken the evidence, where it cannot be destroyed; to elicit new evidence, helpful to the party cross-examining; and to undermine the witness (or shake his credit) by showing that he cannot be trusted to speak the truth, or that he is deposing (however honestly) to matters of which he has no real knowledge.

Advocates Duty Towards Client: -

An advocate owes a duty towards client in several ways like: -

1. He must give a patient hearing to the client.
2. He must examine all his papers.
3. He must after discussing the case with his clients, advise him
4. He should account for the clients' money strictly and return the unspent amount to him.
5. He must represent his client in Court with undivided fidelity and not divulge his secrets or confidences.
6. He should not appear for two clients whose interest conflicts.
7. He should not in any way encourage an illegal transaction.

While discussing the relationship between an Advocate and a client, the Hon'ble Supreme Court in **State of U.P. v. U.P. State Law Officers' Association, AIR 1994 SC 1654: 1994(2) SCC 204**, very categorically, sums up the relationship as follows; "The relationship between the lawyer and his client is one of trust and confidence. The client engages the lawyer for personal reasons and is at liberty to leave him for the same reasons. He is under no obligation to give reasons for withdrawing his brief from his lawyer. The lawyer in turn is not an agent of his client but his dignified, responsible spokesman. He is not bound to tell the Court every fact or urge every proposition of Law, which his client wants him to, however irrelevant they may be. He is essentially an adviser to his client and is rightly called a counsel in some jurisdictions. Once acquainted with the facts of the case, it is the lawyer's discretion to choose the facts and the points of Law which he would advance. Being a responsible officer of the Court and an important adjunct of the administration of justice, the lawyer also owes a duty to the Court and the opposite side. He has to be fair to ensure that justice is done. He demeans himself if he acts merely as a mouthpiece of his client. This relationship between the lawyer and the private client is equally valid between him and the public bodies."

Art of Compelling and Persuasive Argument

Arguments are what make the crux of the whole case. If you fail in making them compelling and persuasive, you will not be able to convince the judge and that will make you lose the case. For framing an argument regarding your legal issue, you need to have in-depth knowledge on the subject matter. You also need to know the laws which govern that particular case. For making a compelling argument in the Court, you'll need tact, knowledge and the ability to see both sides of the debate.

Firstly, before framing arguments what you need to do is that you have to identify the legal issues. The issues around which the subject matter of your case revolves are legal issues.

Then, you need to apply the Law to the facts of the case. Secondly, you need to see what section of a particular legislation applies to your case.

Thirdly, read up commentaries on that section for a clear and better understanding. You will also find arguments with legal backing from various precedents of Hon'ble Supreme Court and High Courts. In this arena of finding arguments, reading matters a lot, if you want to find good arguments for your case, you'll need to have that particular skill-set through which you would apply your research to the facts of the case. You shall be able to make compelling arguments after doing so.

And, lastly, it depends upon you how you can structure the arguments to bring out the case's decision in your favour. Certain arguments are fact related as there might be certain facts in the case which you could use to make your argument sound more persuasive.

The Subject Matter and Law Governing the Case:

To make a compelling and persuasive argument in the Court, it is essential to know the subject matter concerned in the case you have taken on the behalf of your client. This means that you need to know all the ins and outs of the case to overthrow your opponent in the Court. You need to go through the law governing the case profoundly. Knowing that particular law extensively will help you come up with persuasive arguments, but it will also help you figure out the arguments that the other side might make. In furtherance of this, it would also help you in making counter-

arguments. If you're not thorough with the Law or the subject matter of that case, the opposite side will find the weaknesses in your argument which can end up in your losing the case.

How to Make the Arguments Compelling?

- The first and the foremost step to make an argument is to provide that argument with a persuasive legal backing and make the best use of authorities that you've referred to in the case. While preparing the sheet of arguments that you're going to present in front of the judge(s) you need to use certain case laws and authorities that support your case. For making an argument sound more persuasive, you need to cite those authorities in the argument that are most relevant to your case.
- Citing authorities just for the sake of it will not leave a good impression on the judge and he/she will not be able to understand your issue and the analogy that you've drawn between the issue and the authority.
- Moreover, the arguments need not be very bulky. You need to present them briefly so that it is not taxing for the judge(s) to listen to them.
- You could put in various practical examples which would help in furthering the case of your client.
- Think logically and draw analogies between the subject matter and the Law. Your arguments should be logical and, in a sequence, to make them more compelling.

How to Recognise and Discard Weak Arguments:

Making the arguments more compelling is really necessary as making weak submissions before the Court can make you lose the case. Thus, you need to identify where a particular argument is weak. A strong argument has a good analogy, is logical and is supported by facts or law in certain cases. A weak argument is one which is based on poor analogy and fallacies. Weak arguments are those, which do not have legal backing supporting them. Arguments which are out of context, as in which do not concern the subject matter of the case and might mislead the bench are also weak arguments and need to be discarded. These are some ways by which you recognize a weak argument and then you might discard such arguments for refining your oral submissions.

Identify the Issues to be Dealt with and Research Accordingly:

Once you're done with analysing the subject matter of your case and knowing the Law profoundly, you will have a good idea about the issues and the sub-issues. This is the part where the crux of the case lies. So, you'll have to be particular while making your issues and their sub-issues.

After making the issues and their sub-issues, you start with your research for knowing the ins and outs of the case.

You need to be thorough in your research as well. For making compelling arguments, you'll need to do this part with utter diligence. Only while researching, you might find certain precedents which would support your argument, making it compelling and persuasive. For example– If you find a case in which a court has enunciated a leading principle, then you can cite that particular case and draw an analogy to make your argument compelling and persuasive.

For another instance, if you need to understand a principle of law that is relatively misunderstood, you can cite that case and present your understanding of that principle to make your argument crispier and more appealing.

Doing this would not only strengthen your case but will also help you in making arguments which are backed by legal principles. You also need to cite judgments which a court has already decided. Such judgments are also binding upon them. This will further enhance your case by making the arguments sound more compelling and persuasive.

The Opening Sentence of Your Arguments Should Make an Effect:

As it goes without saying, the first impression is the last. Thus, this means that we do not get to make a second first impression. It is the same in the Court as well. Your opening sentence or how you begin to present your arguments also matters a lot. Most of the advocates fail to make an effect with their opening sentences.

You need to grab the judge's attention to make your case look stronger in front of him. However, dry the case might be, you can always pick up and speak something out of the box to make your arguments more compelling. Writing an opening statement might be tougher and a more time-consuming task than all your other tasks combined. At the same time, it is extremely crucial as it might come out to be rewarding and fruitful to you.

Creating a Roadmap:

After acquainting the bench with the issues at hand, give them a roadmap as to how you're going to channelize your arguments for presenting it before the Court. This in turn, creates clarity in the judges' minds and they understand how the issues are going to be addressed by you. For instance, if they need your input on a particular issue or believe that there is some issue that needs to be addressed and resolved prior to the other issues, they can first ask you to present that issue. This also ensures that you do not miss out on any of your arguments and if there is a paucity of time, most of the important arguments would have already been heard by the bench.

Suppose you have given down the roadmap to the judges. In that case, everything eventually becomes easy for you to present before the judge and the judge to understand it. For an instance, you can also use this technique in answering judge's questions and if you have multiple responses, you can tell the judge before you start listing them.

Don't Let Emotions Drive You:

It is natural for people to be driven by emotions when they come across something they inherently care about, but for an advocate, the strength for his arguments lies in logic and reasoning. Therefore, you cannot let your emotions control your arguments.

For an instance, if you let your anger control yourself before making an argument, you will not make it a compelling one. You should look back again at your subject matter to find any weaknesses in the argument of the opposite party.

It is usually a tactic which your opponent uses to make you angry in an argument and make you commit mistakes. In turn, these mistakes make you lose credibility in your arguments. So, this is when you fail to make compelling arguments which might make you lose the case.

Keep the Subject Matter to the Point:

The arguments that you're putting in front of the bench should be to the point. If you circumvent the legal issue involved, it would also make the issue for the judge quite

difficult to understand. So, the arguments that you present should be comprehensive, but you should also be very precise and clear in your arguments.

Your Head Should be Clear:

Before making your arguments, you need to be extremely clear about the subject matter contained in your issue. If you anyhow get distracted from the issue, then making compelling arguments might become extremely difficult. Your head should not be clouded with thoughts that are irrelevant and unimportant for your case. For instance, your head should not have doubtful thoughts while arguing before the Court presenting your arguments. If the Judge asks you a question about your legal issue, your head should be clear while answering the question. You should not fluster while making the arguments or answering the judge's questions.

You Should be a Good Listener:

A good lawyer in the Court is also a good listener. Listening and acknowledging the opposite side while the other side argues shows that you understand the opposing argument. When you understand the opposing argument, you could give counter-arguments and make your case stronger.

What do Famous Indian Lawyers Have to Say:

There was a YouTube interview with Mr. Ram Jethmalani in which he had advised lawyers to always speak in a clear tone and put the point in front of the judges clearly and simply. "*Avoid unnecessary histrionics and be straightforward in your submissions*", he said.

Another stalwart of law, Mr. Fali S Nariman in his autobiography "Before Memory Fades" has set out some priceless & practical tips on how lawyers must prepare for and argue important cases. He says that "*when you argue a case in Court, be clear and precise, not confused. Your mental outpost must flow. And for it to flow you must be well equipped and well prepared*". He adds that "*the skill of a practicing lawyer is not flamboyance or verbosity but hard work*". "*Avoid histrionics and stick to the record; you will find the judge receptive to your pleas*".

Make the Most Out of the Time that You Get:

You need to give it your best shot the duration for which you are there presenting your arguments. It might be the last time that you're arguing on behalf of your client for the case. You might win the case; even if not, you can always make a triumphant comeback later. It would be best if you did not rely on this strategy, so give it your one hundred per cent and make the best out of the time you get. In the end, it is this job well done that gets you your success.

Conclusion

In the first place there is the technique involved in the speeches and the formulations of arguments. This is the art of *oratory*, which has been studied since before the time of Aristotle, with the result that it is well understood. In the second place it is necessary to know how to ask questions in examination-in-chief and cross-examination. This is the art of interrogation, and there is a technique for this, though it has not been

analysed as fully as the technique of speaking. Finally, there is the question of strategy and tactics in the conduct of the entire case. There is a little technique in this because it is mainly a matter of practical judgment, but at the same time there are some useful lines of approach which can be suggested.

We conclude that the profession of law is a great calling, and to discharge the responsibility the member of this profession must make himself equal to the task. Law is a great profession of talents and calls for great knowledge, high mental capacity and wide culture. It is bound to make headway through any vicissitudes of circumstance, and through any reversal of fortune.

“

*While the man who succeeds may think justice is on his side, the man who loses is prone to think that injustice has been done to him. Most litigants who have not won, presume that injustice has been unreasonably inflicted upon them. Their approach is subjective and personalized.**

”

*G. Colman - Cross Examination: A Practical Handbook, CreateSpace Independent Publisher (2017)

CHAPTER - 4

RIGHT TO STRIKE IN LEGAL PROFESSION

"It would be against professional etiquette of a lawyer to deprive his client of his services in the Court on account of strike. No advocate can take it for granted that he will appear in the Court according to his whim or convenience."

-Ramon Services Private Ltd. vs. Subhash Kapoor & Others
[(2001) 1 SCC 118]

Introduction

The legal profession is a solemn occupation. It is a noble calling. The persons belonging to this profession are the elite of the society. Therefore, these elites' honour of this profession has to be maintained by their exemplary conduct in their professional, private and public life. The Constitution of India entrusted a duty on the judiciary to strike a balance between the government's organs and rights of the citizens by constituting various courts and conferring the right to practice in such courts by Advocates. An Advocate's conduct affects an individual and involves the administration of justice, which is the foundation of any civilized society. They are the citizenry's hopes who approach them with quest for justice. Indeed, that makes the legal profession different from other professions.

In *Hussain and Anr vs Union of India* (2017)5 SCC 702 the Hon'ble Supreme Court observed that "Judicial service as well as legal service are not like any other services. They are missions for serving the society. The mission is not achieved if the litigants who is waiting in the queue does not get his turn for a long time."

According to the Bar Council of India Rules, 1975 "an Advocate shall, at all times, comport himself in a manner befitting his status as an officer of the Court, a privileged member of the community and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar or for a member of the Bar in his non-professional capacity, may still be improper for an Advocate."

In recent years, the effectiveness of the judicial system, increasing awareness about the legal rights of the masses, including the nature of litigation, diversified laws, and redressal mechanisms, has brought forward the participation of advocates in every field of socio-economic growth and development of the nation. The advocates are an indispensable part of our judicial system; however, regrettably, the opening of new panoramas in the legal profession has also brought the inherent problems of deficiency in professionalism, ethical decline, and lack of devotion. Notably, for the last couple of decades, the role of advocates has come under sharp criticism especially, their act of going on frequent strikes on irrelevant issues coupled with various untoward incidents of violence. It has been viewed as an eyesore by the public at large and time and again being pointed out so by the constitutional courts of India.

Advocates are also officers of the courts, and they owe a duty towards their client and Court. One such responsibility of advocates is to attend the Court for and on behalf of their clients and assist the Court as per law. Therefore, the non-appearance of any counsel holding a brief of their client without justifiable reasons is unprofessional. One of the significant issues of advocates' unprofessionalism is their resorting to strikes and boycotts to the detriment of the litigants. The Bars and their members try to justify strikes sheltering it as a fundamental right under Article 19(1) (a) & (c) of the Constitution of India; however, it needs no special mention that the same is not an absolute right. As per

the Law Commission 266th Report The case of Uttar Pradesh appears to be the worst. The figures of strike for the years 2011-2016 in the subordinate courts are alarmingly high. In the State of Uttar Pradesh, the District Courts have to work for 265 days in a year. The period of strike in five years' period in worst affected districts has been as Muzaffarnagar (791 days), Faizabad (689 days), Sultanpur (594 days), Varanasi (547 days), Chandauli (529 days), Ambedkar Nagar (511 days), Saharanpur (506 days) and Jaunpur (510 days). The average number of days of strike in eight worst affected districts comes to 115 days a year.

Law is not a Trade and Brief of the Litigants are not Merchandise

Strikes are primarily considered the antithesis of progress, prosperity, and development. It is not open for debate as it is a settled proposition held by our highest Court of law that neither the law is a trade nor the litigants' briefs are the merchandise. The role of the advocates is to access justice for their clients. Undoubtedly, advocates are guardians of the modern legal system. The relationship between the advocate and his client is trust and confidence. The services rendered by advocates to their clients are regulated by a contract attached with statutory limitations, guidelines, and restrictions under the Advocate Act and corresponding Rules therein.

Can strikes by professionals such as advocates be put on the equitable rung with strikes by industrial workers? The answer can hardly be in the affirmative. Our constitution courts hold in various cases that the strikes by the advocates are an obstruction in the process of the justice delivery system, and that is unwarranted under the Advocates Act. The Law Commission has opined that unless there are compelling circumstances and the approval for a symbolic strike of one day is obtained from the Bar Council concerned; the advocates must not resort to strike or abstention from the court work. The Law Commission notes in its 266th Report that most of the time, the strike by advocates or their abstinence from the Court are hardly for any justifiable reasons. Few reasons that the Commission has noted for strike call or abstinence from work is varied from local, national to international issues such as bomb blast in Pakistan school, amendments to Sri Lanka's Constitution, inter-State river water disputes, attack on/murder of advocate, earthquake in Nepal, to condole the death of their near relatives, to show solidarity to advocates of other State Bar Associations, moral support to movements by social activists, heavy rains, or on some religious occasions such as shraadh, Agrasen Jayanti, etc. or even for kavi sammelan that certainly have no relevance at all to the working of the courts.

Strike or abstention from work by advocates- not permissible:

The Hon'ble Supreme Court has held in a catena of cases that abstaining counsels from appearing in the Court on account of the strike is not acceptable. No court is obliged to adjourn a case because of any strike call by any association of advocates or a decision to boycott the courts in general or any particular court. The relevant paras of the judgment passed in **Mahabir Prasad Singh vs. Jacks Aviation Pvt. Ltd. [1999 (1) SCC 37]** are as follows:

"Judicial function cannot and should not be permitted to be stonewalled by browbeating or bullying methodology, whether it is by litigants or by counsel. Judicial process must run its even course unbridled by any boycott call of the Bar, or tactics of filibuster adopted by any member thereof. High Courts are duty bound to insulate judicial functionaries within their territory from being demoralised due to such onslaughts by giving full protection to them to discharge their duties without fear. But unfortunately, this case reflects apathy on the part of the High Court in affording such

protection to a judicial functionary who resisted, through legal means, a pressure strategy slammed on him in open Court."

It is further held:

"If any counsel does not want to appear in a particular court, that too for justifiable reasons, professional decorum and etiquette require him to give up his engagement in that Court so that the party can engage another counsel. But retaining the brief of his client and at the same time abstaining from appearing in that Court, that too not on any particular day on account of some personal inconvenience of the counsel but as a permanent feature, is unprofessional as also unbecoming of the status of an advocate. No court is obliged to adjourn a cause because of the strike call given by any association of advocates or a decision to boycott the courts either in general or any particular court. It is the solemn duty of every Court to proceed with the judicial business during court hours. No court should yield to pressure tactics or boycott calls or any kind of browbeating."

The Hon'ble Delhi High Court in **B. L. Wadehra (Dr.) vs. State (NCT of Delhi) [AIR 2000 Delhi 266]** held that the advocates have no right to strike, i.e., to abstain from appearing in Court in cases in which they hold vakalatnama for the parties, even if it is in response to or in compliance with a decision of any association or body of advocates including a strike called by the Bar Association or any other body of advocates. If he so abstains, he commits professional misconduct, a breach of professional duty, a breach of contract, and a breach of trust. He will be liable to suffer all the consequences thereof. There is no fundamental right, either under Article 19 or under Article 21 of the Constitution, which permits or authorizes an advocate to abstain from appearing in Court in a case in which he holds the vakalatnama for a party in that case. On the other hand, a litigant has a fundamental right to speedy trial of his case.

In **Ex. Capt. Harish Uppal vs. Union of India & Anr. [(2003) 2 SCC 45]**, the Hon'ble Supreme Court held that the advocates have no right to strike or give a call for boycott, not even on a token strike. It is unprofessional and unbecoming for an advocate who has accepted brief to refuse to attend Court even in pursuance of a call for strike or boycott by the Bar Association or the Bar Council.

Obstructing the Advocates from appearing in courts by some of their members of fraternity or office-bearers of Bar lowers the dignity of the legal profession in the eyes of the public. Moreover, it leads to distrust in the justice delivery system. Kathua Rape case is one of the striking instances wherein, **Hon'ble Justice Rajesh Bindal writing for the High Court of Jammu and Kashmir in case of Suo Motu Writ Petition (C) No. 46 of 2019** discussed, in the light of directions issued by the Hon'ble Supreme Court, the illegality and unconstitutionality of call of strike by Advocates. In this case, the members of Kathua Court Bar Association, Jammu and Kashmir, were obstructing the advocate who was appearing on behalf of the family of a rape victim in proceedings in Court. The action of the said Bar Association was supported by the Jammu and Kashmir High Court Bar Association. The Hon'ble Court held that such acts of the Bar Associations affect the dispensation of justice and interfere with the administration of justice. Accordingly, the Hon'ble High Court has issued show-cause notices for proceedings against the criminal contempt of Court to the protesting advocates. In para 60 the judgment, Hon'ble Jammu and Kashmir High court observed as "The Supreme Court has unequivocally declared that it is only "in the rarest of rare cases", "where the dignity, integrity and independence of the Bar and/or the Bench are at stake, courts may not ignore (turn a blind eye) to a protest abstention from work for not more than one day"

It is worth noting that in another recent judgment reported at **2018 SCC Online 304, Krishnakant Tamrakar vs. the State of M.P.**, the Hon'ble Supreme Court has

taken strong views against the Bar Associations and shown its intention to take some stringent steps against them to deprecate such illegal and unprofessional practice. The Hon'ble Supreme Court has held that strikes/abstaining from work may be considered as contempt. Accordingly, it will hold the office-bearers of the Bar Association /Bar Council who passed the resolution for the strike or abstaining from work in a given factual condition and thereof. They may be restrained from appearing before any court for a specified period or until they purge themselves of contempt to the satisfaction of the Chief Justice of the High Court concerned. The Hon'ble Court further held that they might also be liable to be removed from the position of office-bearers of the Bar Association forthwith besides any other action in law that may be taken against them for the said illegal acts of obstructing access to justice.

Recently the Hon'ble Supreme Court of India observed in **District Bar Association, Dehradun, through its Secretary vs. Ishwar Shandilya & Ors. Special Leave Petition (Civil) NO. 5440 OF 2020 [28.02.2020]** that the Advocates owe a duty to their clients and strikes interfere with the administration of justice; thus, they cannot disrupt court proceedings and put the interest of their clients in jeopardy. It is reiterated and reaffirmed that the advocates have no right to strike. In this case, the petitioner pleaded that right to go on strike or boycotts courts is a fundamental right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution of India. The strike is a mode of peaceful representation to express the advocates' community's grievances in the absence of no other available forum; therefore, the act of the bar association be protected under Section 48 of the Advocates Act being an act done in good faith. The Hon'ble Court held that such right to freedom of speech could not be exercised at the cost of the litigants and or at the cost of the justice delivery system as a whole. Nobody has the right to go on strike/ boycott courts. Even if there is such a right, it cannot affect the rights of others, particularly the right of Speedy Justice guaranteed under Articles 14 and 21 of the Constitution. Therefore, it is held that boycotting courts every Saturday in the entire District named therein in the State of Uttarakhand is not justifiable at all and tantamounts to contempt of the courts.

From the case laws cited above, it is clear that the advocates have no right to go on strike or abstain from appearing in cases in which they have been engaged or in which they hold vakalatnama. If an advocate, holding a Vakalat of a client, abstains from attending Court due to a strike call, they shall be personally held liable to pay costs that shall be in addition to damages they might have to pay their client for the loss suffered.

The strikes and boycotts have been declared illegal by the Hon'ble Supreme Court and the High Courts in a catena of cases; however, the same has continued unabated.

The Courts have on various occasions viewed that it is for the members of the profession to introspect and take the corrective steps in time. However, suppose they fail in deprecating such illegal acts. In that case, the courts shall take their recourse to remove the obstruction and to secure the administration of justice that may include punishments or debars from practice.

Protest by advocates- permissible form:

In Para 61 of landmark judgment of **Suo Motu Writ Petition (C) No. 46 of 2019** of High Court of Jammu and Kashmir authored by Hon'ble Justice Rajesh Bindal observed as

“So far as the form which the protest can take is concerned, the Supreme Court has clearly stated that lawyers must appear in all cases in which they stand engaged and cannot abstain from court appearance under any circumstance. The protest can only "outside and away from court premises". It can only be in the form of "giving press

statements, TV interviews, carrying of banners and/or placards, wearing black or white or any colour arm bands, peaceful protest marches, going on dharnas or relay fasts etc".

This view was again reiterated by the Hon'ble Supreme court in **District Bar Association, Dehradun, through its Secretary vs. Ishwar Shandilya & Ors. Special Leave Petition (Civil) NO. 5440 OF 2020 [28.02.2020]** as

"In conclusion, it is held that lawyers have no right to go on strike or give a call for boycott, not even on a token strike. The protest, if any is required, can only be by giving press statements, TV interviews, carrying out of court premises banners and/or placards, wearing black or white or any colour armbands, peaceful protest marches outside and away from court premises, going on dharnas or relay fasts, etc. It is held that lawyers holding vakalats on behalf of their clients cannot refuse to attend courts in pursuance of a call for strike or boycott. All lawyers must boldly refuse to abide by any call for strike or boycott. No lawyer can be visited with any adverse consequences by the Association or the Council and no threat or coercion of any nature including that of expulsion can be held out. It is held that no Bar Council or Bar Association can permit calling of a meeting for purposes of considering a call for strike or boycott and requisition, if any, for such meeting must be ignored. It is held that only in the rarest of rare cases where the dignity, integrity and independence of the Bar and/or the Bench are at stake, courts may ignore (turn a blind eye) to a protest, abstention from work for not more than one day. It is being clarified that it will be for the court to decide whether or not the issue involves dignity or integrity or independence of the Bar and/or the Bench. Therefore, in such cases the President of the Bar must first consult the Chief Justice or the District Judge before advocates decide to absent themselves from court. The decision of the Chief Justice or the District Judge would be final and have to be abided by the Bar. It is held that courts are under no obligation to adjourn matters because lawyers are on strike. On the contrary, it is the duty of all courts to go on with matters on their boards even in the absence of lawyers. In other words, courts must not be privy to strikes or calls for boycotts. It is held that if a lawyer, holding a vakalat of a client, abstains from attending court due to a strike call, he shall be personally liable to pay costs which shall be in addition to damages which he might have to pay his client for loss suffered by him."

Therefore, the advocates should adopt other modes of protest that would not interrupt or disrupt court proceedings or adversely affect the litigant's interest.

Boycott of a court:

Boycott of courts in general or any particular court or judge is not permissible, and it tantamounts to obstruction of the judicial process.

No right to obstruct access to courts:

No advocate/ Bar Associations/ Bar Councils have any right to obstruct or prevent any advocate from discharging their professional duty of appearing in Court even in the name of a strike or otherwise. Such obstruction shall be a criminal offence and a contempt of Court being considered interference with the administration of justice (para 71 the Hon'ble High Court of Jammu and Kashmir in **Suo Motu Writ Petition (C) No. 46 of 2019**).

In Re Vs Zila Adhivakta Sangh Allahabad, Public Interest Litigation (PIL) No.- 15895 of 2015, Hon'ble bench of Seven judges including Justice Dr D Y Chandrachud the then Chief Justice took serious note on the obstruction and derailment of work caused by the strikes called by the members of bar in the Hon'ble High Court of Judicature at Allahabad and also in the District Courts across the State.

The Hon'ble court showed the concern and observed that "The judgment of the Supreme Court has been flouted by the associations representing the lawyers. Even the restriction that strikes should not be resorted to, even in an exceptional matter, for a period in excess of one day, is observed in the breach. One day strikes are extended from day to day, almost indefinitely. In view of the clear statement of the law which has been laid down by the Supreme Court, there can be no doubt about the principle that a strike by the members of the Bar on the call of the office bearers of the Bar Associations is without the authority of law and is illegal. An officer convening a meeting for the purpose would be liable to be held personally responsible along with others who interfere in the functioning of the Court".

The Seven Judges Bench led by Hon'ble Mr. Justice Rajesh Bindal, Chief Justice, Allahabad High Court is monitoring these matters of vital importance

Court's duty when advocates are on strike:

A litigant must not suffer a penalty because his advocate had boycotted the Court pursuant to a strike call made by the Association of which the advocate was a member; therefore, courts must not be privy to strikes or boycotts. It is settled law that Courts are obligated to hear and decide cases brought before it and cannot adjourn matters merely because advocates are on strike. In other words, the courts are under no obligation to adjourn matters based on strike calls by the advocates. The courts shall be duty-bound to go on with matters on their boards even in the absence of advocates. In **K. John Koshy vs. Dr. Tarakeshwar Prasad Shaw [(1998) 8 SCC 624]**, the Hon'ble Supreme Court held that the Court should not refuse to hear the matter, as, otherwise, it would be tantamount to the Court becoming privy to the suit to the strike [also referred **Hussain & Anr. vs. Union of India, (2017) 5 SCC 702]**.

Threat to advocates from Bar:

It is observed that despite the mandate of the law laid down by the Hon'ble Supreme Court and the High Courts, open threats to advocates who chose to oppose the strike call or appears in courts is not uncommon; the primary threat is removing them from the membership of the Bar. It is to be noted that Hon'ble Apex court has held explicitly in Ex-Capt. Harsh Uppal case that the all the advocates must boldly refuse to abide by any call for strike or boycott. The Associations or the Councils cannot draw any adverse consequences against such advocates neither any threat nor coercion of any nature, including that of expulsion, can be held out.

Conclusion

The strike by advocates cannot be equated with strikes resorted to by other sections of the society because the members of the legal profession are officers of the Court and by the very nature of the calling required to aid and assist in the dispensation of justice. The act of going on frequent strikes, particularly for irrelevant issues, boycotting courts, forcing working advocates to absent themselves from work, or obstructing them from appearing in courts by the Bar Associations results in the loss of opportunity to litigants to get their grievances redressed.

The advocates are well aware, at least since 1999 (Mahabir Singh Case), that the participation in strikes or boycotting courts is unprofessional or professional misconduct on their part. Also, at least since the year 2001 (Ramon Service Case), it is within the knowledge of all concerned that the Advocates would be answerable for the consequences suffered by their clients due to non-appearance on the grounds of strikes or

boycotts. Only in rarest of rare cases, advocates can go for strikes even then, and the same cannot be a license for creating obstructions for other advocates who want to appear in the Court for their clients. Also, in such necessity, the mode of protest cannot be allowed to disrupt the administration of the justice delivery system in any manner whatsoever.

In a nutshell, the mere call for a meeting, or the very decision to proceed on strike, remaining absent from Court and boycott of judicial proceedings, locking the courts, preventing entry to those wanting to enter are completely illegal. On various occasions, the Hon'ble Courts have reminded the Bar members to conduct themselves by law and ensure the rights of the public guaranteed under the Constitution of India. However, the conduct of those who have indulged themselves in such an act is unpardonable, and stringent action must be taken against them in accordance with the law. Such conduct shall fall under the severe category of criminal contempt of Court, professional misconduct, and even criminal offences.

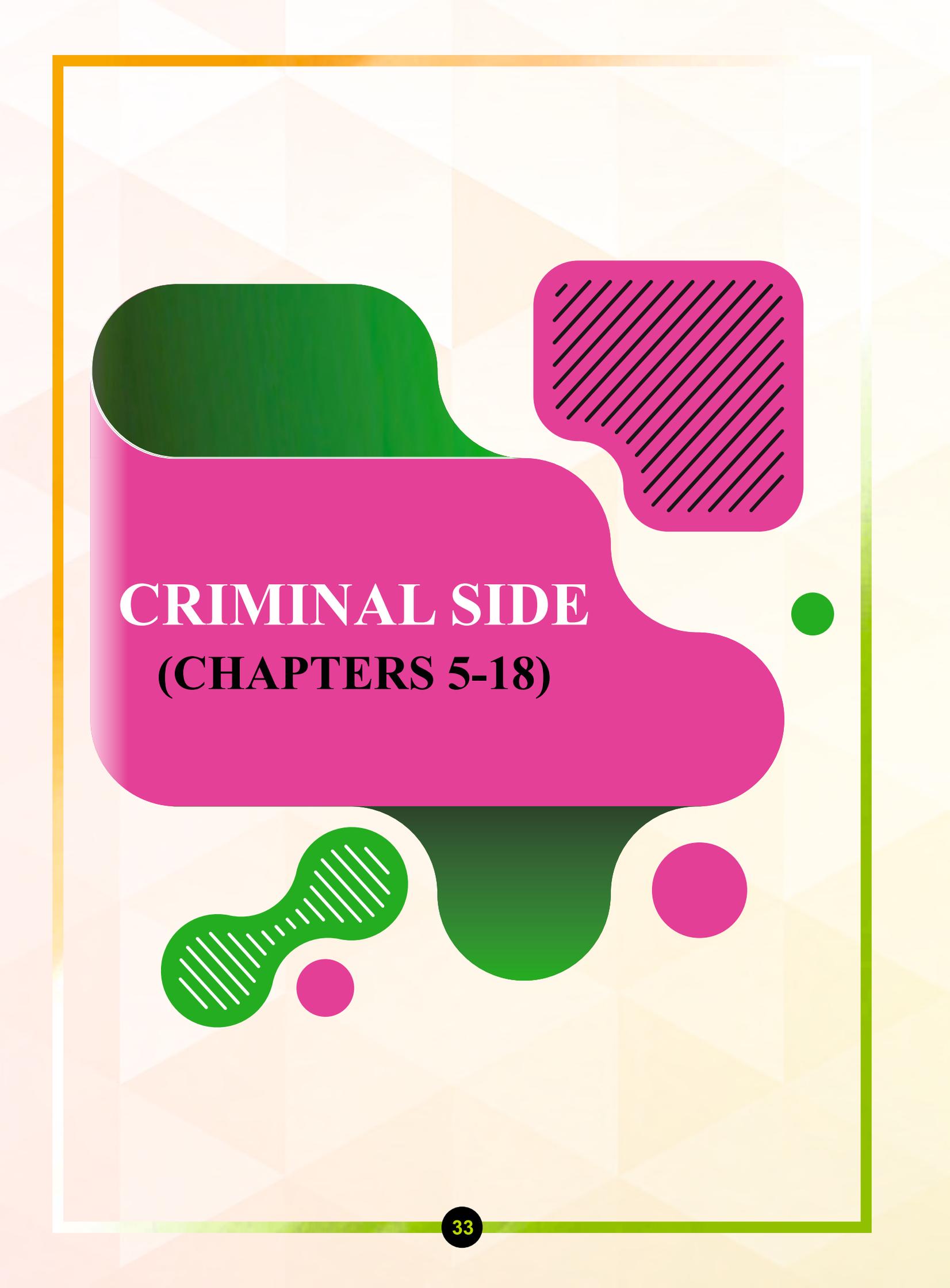
Therefore, an advocate who is found guilty of such misconduct may be held guilty of contempt of Court, of professional misconduct, or may also be held under criminal offence in a given case. The punishment may be extreme, such as imprisonment in a given case, debarring him from practice, or suspending his license. The Hon'ble Apex Court points out that now the courts may be constrained to frame specific rules debarring advocates guilty of contempt and/or unprofessional or unbecoming conduct from appearing before the courts if the advocates fail to exercise self-restraint.

“

Obstruction of court's work through ongoing strike by lawyers amounts to contempt of court in view of earlier Supreme Court Judgements holding such strike to be impermissible and illegal. It is also contrary to oath of profession of the Advocates.

***PLR Projects Pvt Ltd v. Mahandi Coal Field Ltd.
and others, (2022) SCC (Cri) 144***

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CRIMINAL SIDE
(CHAPTERS 5-18)

CHAPTER-5

CRIMINAL PROCEEDINGS: FROM INSTITUTION TO JUDGMENT

Any act or omission which is prohibited by law and is punishable by law is a crime. The punishment for such crime is decided by following procedures of criminal trial. The criminal trials in India are well established under statutory, administrative and judicial frameworks. The whole criminal law consists of three main Acts –

- Indian Penal Code, 1860
- Code of Criminal Procedure, 1973
- Indian Evidence Act, 1872.

Indian Penal Code and Code of Criminal Procedure are together known as “*twin sisters*” of criminal law.

Code of Criminal Procedure (Cr. P. C.) is the procedural law for conducting a criminal trial in India. The procedure includes the manner for collection of evidence, examination of witnesses, interrogation of accused, arrests, safeguards and procedures to be adopted by Police and Courts, bail, the process of criminal trial, a method of conviction, and the rights of the accused of a fair trial by following the principles of natural justice.

Indian Penal Code (IPC) is the primary penal law of India, which applies to all offences. Indian Evidence Act (IEA) is a comprehensive treatise on the law of “evidence”, which can be used in the trial, the manner of production of the evidence in a trial, and the evidentiary value which can be attached to such evidence.

Types of Criminal Trials

- Summary Trial
- Summon Trial
- Warrant Trial
- Trial by Court of Sessions

Warrant Cases

According to Section 2(x) of Code of Criminal Procedure, 1973 a warrant case is one which relates to offenses punishable with death, imprisonment for life or imprisonment for a term exceeding two years. The trial in warrant cases starts either by the filing of FIR in a police station or by filing a complaint before a magistrate. Later, if the magistrate is satisfied that the offense is punishable for more than his legal authority, he sends the case to the sessions court for trial. The process of sending it to sessions court is called “committing it to sessions court”.

Important features of a warrant case are:

- Charges must be mentioned in a warrant case
- Personal appearance of accused is mandatory
- A warrant case cannot be converted into a summons case
- The accused can examine and cross-examine the witnesses more than once.

- The magistrate should ensure that the provisions of Section 207 are followed -
- Section 207 of Cr. P.C. 1973, include the supply of copies such as police report, FIR, statements recorded or any other relevant document to the accused.

The stages of trial in warrant cases are given from Section 238 to Section 250 of the Code of Criminal Procedure, 1973.

Different Stages of Criminal Trial in a Warrant Case when instituted on the police report

- **First Information Report:** Under Section 154 of the Code of Criminal Procedure, a FIR or First Information Report is registered. FIR puts the case into motion. A FIR is information given by someone (aggrieved) to the police relating to the commitment of an offense.
- **Section 156 (3). Judicial magistrate's power to investigate cognizable case**

Section 156(3) entails that any Magistrate empowered under Section 190 may order an investigation by a police officer performing its duties under Chapter XII of Cr.P.C

The above-mentioned sections highlight the chronology/series of remedies available to a person.

Firstly, filing a complaint before the police official and secondly, in the event of failure of the registration of the complaint by the official, one shall approach the SSP/SP for the said purpose.

However, if the complaint is not registered even after that, then the next remedy is to seek help from the Judicial Magistrate:

- **Investigation:** The next step after the filing of FIR is the investigation by the investigating officer. A conclusion is made by the investigating officer by examining facts and circumstances, collecting evidence, examining various persons and taking their statements in writing and all the other steps necessary for completing the investigation and then that conclusion is filed before the magistrate as a police report.
- **Charges:** If after considering the police report and other important documents the accused is not discharged then the court frames charges under which he is to be tried. In a warrant case, the charges should be framed in writing.
- **Plea of guilty:** Section 241 of the Code of Criminal Procedure, 1973 talks about the plea of guilty. After framing of the charges the accused is given an opportunity to plead guilty, and the responsibility lies with the judge to ensure that the plea of guilt was voluntarily made. The judge may upon his discretion convict the accused.
- **Prosecution evidence:** After the charges are framed, and the accused pleads guilty, then the court requires the prosecution to produce evidence to prove the guilt of the accused. The prosecution is required to support their evidence with statements from its witnesses. This process is called "examination in chief". The magistrate has the power to issue summons to any person as a witness or orders him to produce any document.
- **Statement of the accused:** Section 313 of the Criminal Procedure Code gives an opportunity to the accused to be heard and explain the facts and circumstances of the case. The statements of accused are not recorded under oath and can be used against him in the trial.

- **Defence evidence:** An opportunity is given to the accused in a case where he is not being acquitted to produce so as to defend his case. The defense can produce both oral and documentary evidence. In India, since the burden of proof is on the prosecution the defense, in general, is not required to give any defense evidence.
- **Judgment:** The final decision of the court with reasons given in support of the acquittal or conviction of the accused is known as judgment. In case the accused is acquitted, the prosecution is given time to appeal against the order of the court. When the person is convicted, then both sides are invited to give arguments on the punishment which is to be awarded. This is usually done when the person is convicted of an offense whose punishment is life imprisonment or capital punishment.

Stages of Criminal Trial in a Warrant Case when instituted on Private Complaint (Chapter XV)

- On the filing of the complaint, the court will examine the complainant and its witnesses on the same day or any other day to decide whether any offense is made against the accused person or not.
- After examination of the complainant, the Magistrate may order an inquiry into the matter and submit a report for the same.
- After examination of the complaint and the investigation report, the court may come to a conclusion whether the complaint is genuine or whether the prosecution has sufficient evidence against the accused or not. If the court does not *prima facie* find any sufficient material through which it can convict the accused, then the court will dismiss the complaint and record its reason for dismissal.
- After examination of the complaint and the inquiry report, if the court thinks that the prosecution has a genuine case and there are sufficient material and evidence with the prosecution to charge the accused then the Magistrate may issue a warrant or a summon depending on the facts and circumstances. In the normal circumstances the court should initially issue a summon and only for special recorded reasons of warrant may be issued.

Summon Cases

According to Section 2(w) of Code of Criminal Procedure, 1973, those cases in which an offense is punishable with an imprisonment of less than two years is a summon case.

Important points about summons case

- A summons case can be converted into a warrant case.
- The person accused need not be present personally.
- The person accused should be informed about the charges orally. No need for framing the charges in writing.
- The accused gets only one opportunity to cross-examine the witnesses.
- The different stages of criminal trial in a summon case are given from Section 251 to Section 259 of the Code of Criminal procedure.

Stages of Criminal Trial in a Summons Case

1. **Pre-trial:** In the pre-trial stage, the process such as filing of FIR and investigation is conducted.
2. **Charges:** In summons trials, charges are not framed in writing. The accused appears before the court or is brought before the court then the Magistrate would orally state the facts of the offense, the accused is answerable.
3. **Plea of guilty:** The Magistrate after stating the facts of the offense will ask the accused if he pleads guilty or has any defense to support his case. If the accused pleads guilty, the Magistrate records the statement in the words of the accused as far as possible and may convict him on his discretion.
4. **Plea of guilty and absence of the accused:** In cases, where the accused wants to plead guilty without appearing in the court, the accused is supposed to send Rs.1000/- by post or through a messenger (lawyer) to the Magistrate. The absentee should also send a letter containing an acceptance of guilt and the amount of fine provided in the summons. The Magistrate can on his discretion convict the accused.
5. **Prosecution and defense evidence:** In summons cases, the procedure followed is very simple and elaborate procedures are eliminated. If the accused does not plead guilty, then the process of trial starts. The prosecution and the defense are asked to present evidence in support of their cases. The Magistrate is also empowered to take the statement of the accused.
6. **Judgment:** When the sentence is pronounced in a summons case, the parties need not argue on the amount of punishment given. The sentence is the sole discretion of the judge. If the accused is acquitted, the prosecution has the right to appeal. This right to appeal is also extended to the accused.

Summary Trial

Cases which generally take only one or two hearings to decide the matter comes under this category. The summary trials are reserved for small offenses to reduce the burden on courts and to save time and money. Those cases in which an offense is punishable with an imprisonment of not more than six months can be tried in a summary way. The point worth noting is that, if the case is being tried in a summary way, a person cannot be awarded a punishment of imprisonment for more than three months.

The trial procedure is provided from Section 260 to Section 265 of the Code of Criminal Procedure.

Stages of Criminal Trial in Summary Cases

- The procedure followed in the summary trial is similar to summons-case.
- Imprisonment up to three months can be passed.
- In the judgment of a summary trial, the judge should record the substance of the evidence and a brief statement of the finding of the court with reasons.

Trial by Court of Sessions

Initial steps in the trial

Initially, except for certain Special Acts like POCSO or NDPS Act etc. a Magistrate takes cognizance of an offence and thereafter as per Section 209, he will commit the case to the Court of Sessions. A Magistrate is empowered under Section 190 to take cognizance of an offence upon receiving a complaint; upon a police report; upon information received from a person other than a police officer; or upon his knowledge. According to Section 193, Court of Session cannot take cognizance of an offence directly but the Court of Session is permitted to take cognizance of an offence without a case

being committed to it if the Magistrate commits the case to it or if it acts as a special Court, such as Special Judge SC/ ST, Gangster, POCSO etc.

The procedure for trial before a Court of Session is mentioned from Section 225 to Section 237. As per Section 225, every trial before a Court of Session is conducted by a Public Prosecutor

Opening case for prosecution

When the magistrate commits a case under Section 209 to the Court of Session and the accused appears or is brought before the Court, the prosecutor is required under Section 226 to open his case by explaining the charge against the accused and also states the evidence by which he will prove the guilt of the accused. At this stage, full details of the evidence need not be stated. The opening of the prosecution case must only be to matters which are necessary to follow the evidence

Discharge

The Court, on considering the documents and records of the case, and hearing the prosecution and the accused on the matter, shall discharge the accused if the Judge thinks that there is no sufficient ground to proceed against the accused. The Judge is required to record his reasons for discharging the accused under Section 227.

Framing of charge

Under Section 228, The Judge after considering the records of the case and the documents submitted along with it in evidence and hearing the prosecution and the defence, he thinks that there is a ground to presume that the accused has committed the offence and is exclusively triable by the Court of Session, he will frame a charge against the accused.

If the case is not exclusively triable by the Court of Session then the Judge may frame a charge against the accused and by order, transfer the case to the Chief Judicial Magistrate or any other Judicial Magistrate of First Class. He shall direct the accused to the Judicial Magistrate to whom the case has been transferred. The Magistrate shall then try the case in accordance with the procedure laid down for the trial of the warrant-cases instituted upon a police report.

Explaining the charge to the accused

Section 228(2) says that when a case is exclusively triable by the Court of Session and the Judge frames a charge against the accused he has to read and explain the charge and ask the accused if he wants to plead guilty or claims to be tried. The Judge shall ensure that the charge read and explained to the accused have been fully understood by him before he is asked to plead guilty.

Conviction on plea of guilty

The accused may plead guilty under Section 229 or he can refuse to plead. The Court under Section 229 has the discretion to accept the plea of guilty. This discretion has to be applied with care and not arbitrarily. Also, the Judge has to ensure that the plea has been made voluntarily and not under any inducement, otherwise, it would be violative of the provisions of the Constitution of India and process of fair trial.

Date for prosecution evidence

Under Section 230, the Judge will fix a date for the examination of witnesses if the accused has refused to plead guilty or does not plead guilty, or if he claims to be tried or if he is not convicted under Section 229. On an application of the prosecution, the Judge will issue a process for compelling the attendance of witnesses or to produce any document or any other thing.

Evidence for prosecution

As provided by S 273, all the evidence must be taken in the presence of the accused or in his absence in the presence of his pleader during the course of a trial or proceeding.

Examination of witnesses

When the date is so fixed (as mentioned under Section 230), the Judge will proceed to take all the evidence that may be produced by the prosecution in his support as per S 231. The Judge has the discretion to permit cross-examination of any witness to be deferred until the other witness or witnesses have been examined or recall any witness for further cross-examination.

Section 137 of the Indian Evidence Act, 1872 ('IEA') states that the examination of a witness shall be done by the party who calls him (prosecution) and it shall be called examination-in-chief. The cross-examination of the witness is done by the adverse party (defence). The re-examination is done subsequent to cross-examination by the prosecution. Re-examination is permitted, in case, the witness has been declared as hostile.

Section 138 of the IEA, 1872 lays down the order of examination of the witnesses. It says that the witness should be first examined in chief and then cross-examined. The examination in chief is done by the party who calls the witness and cross-examination is done by the adverse party. If the party, who called the witness, so desires, can re-examine the witness with the permission of the Court.

The examination-in-chief and cross-examination should be connected to the relevant facts of the case. However, the cross-examination does not need to be restricted to the facts to which the witness has testified in examination-in-chief. The re-examination shall be related to the explanation of the matters referred to in the cross-examination. If any new matter has arisen in the re-examination, the defence may further cross-examine the witness upon that matter. The objective behind re-examination is to offer the witness a chance to clarify any issues raised during the cross-examination and is therefore confined only to those issues that were raised during the cross-examination.

Recording of the evidence

According to Section 276, the evidence of each witness in all trials before a Court of Session shall be written down by the Presiding Judge himself or under his dictation or under his direction and superintendence by the officer of the Court appointed by the Judge in this behalf. Such evidence is usually taken down in a narrative form. The presiding Judge may also write it down in question-answer form as per his discretion. The evidence so taken down must be signed by the Judge and form a part of the record.

It has been provided under Section 278(1) that when the evidence of each witness is complete, it shall be read over in the presence of the accused or in his absence in the presence of his pleader and shall if necessary be corrected. Also, as per Section 279, if

any evidence is given in a language that the accused or his lawyer does not understand, it shall be interpreted to the accused or his lawyer in the language understood by him.

Oral arguments and memorandum of arguments on behalf of the Prosecution

Under Section 314 the prosecutor has to submit his oral arguments after the conclusion of prosecution evidence and before any other steps in the proceedings are taken. It is also necessary to submit a memorandum, in brief, stating the arguments in his favour and a copy of that memorandum should be given to the opposite party. Adjournment for filing of written argument shall only be given if the court thinks it proper and record reasons for the same. The court will regulate an oral argument if it thinks it is irrelevant or not concise. The prosecution argument at this stage helps the court to conduct an examination of the opposite party and seeking his explanation on the issue raised by the prosecution.

Explanation of the accused

Under Section 313, the Court may examine the accused after the evidence for the prosecution has been taken. The object of this Section is to give an opportunity to the accused of explaining any circumstances that seem to appear against him. After the witness for the prosecution have been examined and before the accused is called upon for his defence, Section 313(1)(b) requires the court to question the accused person generally on the case for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him.

Hearing of the parties

Section 232 gives an opportunity to both the prosecution and defence to address the court before calling upon the accused to enter upon his defence and to adduce evidence in support of it. The comments of the parties should be related to the evidence given by the prosecution and the examination of the accused.

Order of the acquittal

An accused may be acquitted if there is no evidence against him that he has committed the offence. Under Section 232 the Judge will record an order of acquittal in favour of the accused if he thinks that there is no evidence against the accused that he has committed the offence.

Steps to follow for defence evidence

As per Section 233 when the accused is not acquitted under Section 232 he shall be called upon to produce evidence he may have in his support. If the accused desires he can give evidence in his defence in a written form and the Judge shall file it with the record. The steps to be followed for obtaining the evidence of the defence are discussed below.

As per S. 311 the Court can at any stage of any inquiry, trial or other proceedings, summon and examine any person as a court witness if his evidence appears to the court that it is essential for the just decision of the case.

Arguments

Under Section 234, the prosecution shall sum up his case and the accused or his pleader shall be entitled to reply, and if any point of law is raised by the accused or his pleader, the prosecution may with due permission of the Judge make his submission with regard to any point of law. It is to be noted that Section 314 also talks about the arguments of the parties. However, Section 234 provides that after the evidence for the defence is concluded it is for the prosecution to sum up the case, and then the defence will be entitled to reply. Section 234 is a special one regarding argument whereas Section 314 is a general provision and therefore Section 234 would prevail over Section 314. The reason being it is a well-settled law that when there is any inconsistency between a general and a special law, the special one would prevail.

Judgment and connected matters

After hearing the arguments of the prosecution and defence the Court will give judgment in a case. It is the stage where the accused is either acquitted or convicted.

Judgment

As per Section 235, a Judge will pronounce a judgment of acquittal or conviction after hearing the arguments of the parties i.e, the prosecution and defence and on point of law (if any). However, considering the character of the offender, the circumstances of the case and the nature of the offence, the Judge may as per Section 360 decide to release the offender on probation of good conduct. If the accused is acquitted, the acquittal will be done according to the procedure laid down under Section 232 and if he is convicted he shall be dealt according to Section 235.

It is settled view that, in case of non-compliance with this provision, the case may be remanded to the Sessions Judge for retrial on the question of sentence only. It is not necessary for the Judge to hold a new trial altogether; it will be restricted to the question of sentence only.

Procedure to follow the order of conviction

After conviction, the Judge will hear the accused and then pass a sentence under Section 235. The Judge while passing a sentence shall try to gather all information that influences or relates to the sentence of the accused. The provisions of Section 235(2) are mandatory and should be complied with strictly as held by the Court. The purpose of Section 235 is to offer a chance to the accused to adduce evidence of any mitigating circumstances in his favour. The accused should be explicitly asked with respect to what he needs to state about his sentence and whether he wants to give any proof on his side in order to mitigate his sentence.

The question as to whether the Judge intends to proceed in accordance with the provisions of S. 360 should also be considered and only if no such proceeding for giving the benefit of probation is undertaken, the question of appropriate sentence be proceeded with.

SOME LANDMARK JUDGMENTS

The Hon'ble Apex Court in *Rang Bahadur Singh V. State of U.P.* reported in AIR 2000 SC 1209 has held as follows:

“The time-tested rule is that acquittal of a guilty person should be preferred to conviction of an innocent person. Unless the prosecution establishes the guilt of the accused beyond reasonable doubt a conviction cannot be passed on the accused. A criminal court cannot afford to deprive liberty of the appellants, lifelong liberty, without having at least a reasonable level of certainty that the appellants were the real culprits.”

In the **State of U.P. V. Ram Veer Singh and Another reported in 2007**, the Hon'ble Apex Court has held as follows:

“The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent”

Appreciation of FIR & its contents:

The FIR is not the encyclopedia of all the facts relating to crime. The only requirement is that at the time of lodging FIR, the informant should state all those facts which normally strike to mind and help in assessing the gravity of the crime or identity of the culprit briefly. **State of MP Vs. Chhaakki Lal, AIR 2019 SC 381.**

Daily Diary entry not FIR: Where on receiving telephonic message about the incident, SI made entry in Daily Diary report that after receiving the information he was proceeding to the spot alongwith other constables, it has been held that that was not an FIR u/s 154 CrPC.

Thaman Kumar Vs. State, (2003) 6 SCC 380.

Evidentiary value of FIR not lost if informant turns hostile: Once registration of the FIR is proved by the police and the same is accepted on record by the Court and the prosecution establishes its case beyond reasonable doubt by other admissible, cogent and relevant evidence, it will be impermissible for the Court to ignore the evidentiary value of the FIR.

Bable Vs. State of Chhattisgarh, AIR 2012 SC 2621.

Information regarding cognizable offence from two or more sources & FIR: Where two information regarding commission of cognizable offence are received and recorded and it is contended before the court that the one projected by the prosecution as FIR is not the real FIR but some other information recorded earlier (in GD) is the FIR, that is a matter which the court trying the accused has jurisdiction to decide.

Superintendent of Police, CBI Vs. Tapan Kumar Singh, 2003 (46) ACC 961

Cognizance

Taking judicial notice is nothing but perusing the report of the police officer, proceeding further on that report by opening the file and thereafter taking further steps to ensure the presence of the accused and all other consequential steps including at a latter stage and depending upon the nature of offence alleged to pass a necessary order of committal to a court of session.

Prasad Shrikant Purohit Vs. State of Maharashtra, (2015) 7 SCC 440.

Section 190 of the criminal procedure code provides that any magistrate of the first-class and any magistrate of the second-class specifically empowered by the

Chief Judicial Magistrate can take cognizance of any offence on the following grounds

- upon receiving a complaint
- upon a police report
- upon information received from any person other than a police officer or upon his own knowledge that such offence has been committed.

In Nupur Talwar versus CBI, (2012) 11 SCC 465, one of the latest pronouncements of the Hon'ble Supreme Court on cognizance held that whenever the magistrate takes cognizance of an offence, there is no pronouncement upon the guilt of the accused

Meaning of "charge-sheet" & "final report" u/s 173(2) CrPC: Neither charge-sheet nor final report has been defined in the CrPC. Charge-sheet or final report, whatever may be the nomenclature only means a report u/s 173 CrPC which has to be filed by the police on completion of investigation.

Srinivas Gundluri Vs. SEPCO Electric Power Corporation, (2010) 8 SCC 206

Final Report & Powers of Magistrate Thereon:

The Magistrate has following four options on receipt of a final report from investigating officer:

- To accept a formal form
- In the event a protest petition is filed, to treat the same as a complaint petition and if a prima facie case is made out, to issue process to the accused
- To take cognizance of the offences against a person, although a final form has been filed by the police, in the event he comes to the opinion that sufficient materials exist in the case diary itself therefor.
- To direct further investigation into the matter:
 - Popular Muthiah Vs. State, (2006) 7 SCC 296 (para 54)*
 - Minu Kumari Vs. State of Bihar (2006) 4 SCC 359er.*

Primary police report u/s 173(2) & supplementary police report u/s 173(8) to be read conjointly: Supplementary police report received from police u/s 173(8) CrPC shall be dealt with by the court as part of the primary police report received u/s 173(2) CrPC.

Both these reports have to be read conjointly and it is the cumulative effect of the reports and the documents annexed thereto to which the court would be expected to apply his mind to determine whether there exists grounds to presume that the accused has committed the offence and accordingly exercise its powers u/s 227 or 228 CrPC.

Vinay Tyagi Vs. Irshad Ali, (2013) 5 SCC 762.

Police has right of further investigation u/s 173(8) CrPC even after submission of charge-sheet u/s 173(2) CrPC:

Re-investigation of a case is forbidden in law. Even after submission of charge-sheet u/s 173(2) CrPC, police has right to further investigate but not for fresh investigation or re-investigation.

(i) Rama Chandrana Vs. R. Udhayakumar, (2008) 5 SCC 413

(ii) Mithabhai Pashabhai Patel Vs. State of Gujarat, 2009 (4) Supreme 368.

Charge

Charge can be framed on the basis of FIR, complaint or accompanying document or material brought on record during trial:

Charge must be founded on the material available on record. It can be framed on the basis of the complaint or the FIR or accompanying documents or the material brought on record during the course of trial.

Anant Prakash Sinha @ Anant Sinha Vs. State of Haryana, 2016 (93) ACC 951 (SC).

Standard of scrutiny of evidence at the stage of framing of charges: *The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise is not exactly to be applied at the stage of Sections 227 or 228 and Sections 239 or 240 CrPC. Superintendent and Remembrancer of Legal Affairs, West Bengal vs. Anil Kumar Bhunja, AIR 1980 SC 52.*

When only suspicion & not grave suspicion, the accused to be discharged: If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial judge will be empowered to discharge the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. **Sajjan Kumar Vs. CBI, 2010(71) ACC 611 (SC).**

Hearing of prosecution and accused before charge or discharge mandatory:

Sections 226 & 227 CrPC and Sections 239 & 240 CrPC require hearing of the prosecution and the accused before framing of the charge or discharge of the accused. Trial courts should give opportunity to prosecution and the accused to be heard before the charge or discharge.

No discharge of accused after framing of charge: Once charge has been framed, accused cannot be discharged:

(i) **Bharat Parikh Vs. CBI, 2008 CrLJ 3540 (SC)**

(ii) **Rati Lal Vs. State of Maharashtra, AIR 1979 SC 94**

Alteration of Charge

Section 216 CrPC empowers the court to alter or add any charge at any time before the pronouncement of judgment.

Anant Prakash Sinha Vs. State of Haryana, (2016) 6 SCC 105.

Defective charge and its effect: If it is so grave that prejudice will necessarily be implied or imported, it may be described as an illegality. The seriousness of the omission is of a lesser degree, it will be an irregularity and prejudice by way of failure of justice will have to be established.

(i) **Abdul Sayeed Vs. State of M.P., (2010) 10 SCC 259**

(ii) **Sanichar Sahni Vs. State of Bihar, 2009 (66) ACC 926 (SC)**

(iii) **Willie Slaney Vs. State of M.P., AIR 1956 SC 116 (Five Judge Bench)**

(iv) **Gurpreet Singh Vs. State of Punjab, (2005) 12 SCC 615**

Appreciation of Evidence

Statement of witness u/s 161 CrPC not substantive piece of evidence:

The statement of a witness made during investigation u/s 161 CrPC is not a substantive piece of evidence but can be used primarily for the following limited purposes:

(i) To contradict such witness by the accused u/s 145, Evidence Act.

(ii) To contradict such witness also by the prosecution but with the leave of court.

(iii) To re-examine the witness, if necessary.

V.K. Mishra Vs. State of Uttarakhand, (2015) 9 SCC 588 (Three-Judge Bench)

Statement u/s 164 CrPC not to be used as substantive piece of evidence:

Statement recorded u/s 164 CrPC cannot be used as substantive evidence. It can be used only to corroborate or contradict the witness in accordance with the provisions u/s 145 and 157 Evidence Act. *Utpal Das Vs. State of WB, AIR 2010 SC 1894*

Whether conviction can be based on the evidence of a sole witness?

As per Section 134 of the Evidence Act, no particular number of witnesses is required to prove any fact. If the testimony of a sole witness is found reliable on the touchstone of credibility, accused can be convicted on the basis of such sole testimony: *Veer Singh Vs. State of UP, (2014) 2 SCC 455*

In the case of Krishna Kumar Malik v. State of Haryana (2011) 7 SCC 130, it has been observed and held by this Court that no doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be **absolutely trustworthy, unblemished and should be of sterling quality**.

Non-examination of injured witness held fatal: Where an injured witness had not been examined by the prosecution despite the fact that he attended the trial court regularly, the Supreme Court held that his non-examination was fatal to the prosecution since his presence at the place of occurrence was beyond doubt.

State of UP Vs Wasif Haider and others, (2019) 2 SCC 303

It has been laid down by the Hon'ble Supreme Court that there is no legal bar against relying on the testimony of a child witness to whom oath could not be administered due to her incapacity to understand the meaning of oath.

Paras Ram Vs. State of H.P., 2001(1) JIC 282 (SC)

Deaf and dumb witness & his reliability (Section 119):

Section 119, Evidence Act provides that a deaf and dumb person is also a competent witness provided he can make his evidence intelligible, by writing or by signs and such evidence can be deemed to be oral evidence under Section 3 of the Evidence Act.

State of Rajasthan Vs Darshan Singh alias Darshan Lal, AIR 2012 SC 1973.

Evidence of police officer as witness to recovery not to be ordinarily disbelieved:

If anything or weapons etc. are recovered at the instance of the accused (u/s 27, Evidence Act) only in the presence of police party and there is no public witness to such recovery or recovery memo, the testimony of the police personnel proving the recovery and the recovery memo cannot be disbelieved merely because there was no witness to the recovery proceedings.

Kalpna Rai Vs. State Through CBI, (1997) 8 SCC 732

Recovery of fire arm, possession thereof & standard of proof required for offence u/s 25 of the Arms Act, 1959:

The first pre-condition for an offence under Section 25 (1) (a) is the element of intention, consciousness or knowledge with which a person possessed the firearm. That possession need not be physical possession but can be constructive, having power and control over the gun.

Serious defects on part of investigating agency affecting fair investigation and fair trial amounts to violation of fundamental rights of accused irregularity in TIP, delayed recording of statements, not matching of finger prints and DNA, etc *Ankush Maruti Shinde Vs. State of Maharashtra, AIR 2019 SC 1457*

Conflict between ocular and medical evidence—what to appreciate:

If the direct testimony of eye witnesses is reliable, the same cannot be rejected on hypothetical medical evidence and the ocular evidence, if reliable, should be preferred over medical evidence.

Opinion given by a medical witness (doctor) need not be the last word on the subject. It is of only advisory character. Such an opinion shall be tested by the court.

Punjab Singh vs State of Haryana AIR 1984 SC 1233

Inquest report u/s 174 CrPC not substantive evidence: Inquest report is not substantive evidence. But it may be utilized for contradicting witnesses of inquest.

The object of the proceedings u/s 174 CrPC is merely to ascertain whether a person died under suspicious circumstances or met with an unnatural death and if so what its apparent cause was.

Tahseen Poonawala vs Union of India &anr SC (19 April 2018)

Yogesh Singh vs Mahabeer singh (2017) 11 SCC 195

Appreciation of evidence in cross cases:

The rule as regards cross cases is only one of prudence to avoid different standards as far as may be and not one of law. Legally both cases are separate and have to be decided on their own evidence on record.

Subhash Chandra Vs. State of UP, 1981 ALJ 458 (All.)

Plea of alibi needs to be proved by defence only when the prosecution has proved its case against the accused:

The word alibi means "elsewhere" However, plea of alibi taken by the defence is required to be proved only after prosecution has proved its case against the accused.

Darshan Singh Vs. State of Punjab, (2016) 3 SCC 37

Degree of proof of alibi:

Plea of alibi has to be established by accused by leading positive evidence. Failure of said plea would not necessarily lead to success of prosecution case which has to be independently proved by prosecution beyond reasonable doubts.

Shaikh Sattar vs State of Maharashtra on 27 August, 2010, CRIMINAL APPEAL NO.928 OF 2

Conclusion

The basics of a criminal trial are more or less the same. The fundamental need is to adhere to the provisions of statute and follow the guidelines of Hon'ble Courts in this regard so that the goal to ensure fair trial could be achieved.

“

*Due course of law in each particular case means such an exercise of the powers by duly constituted tribunal or court in accordance with the procedure established by law under such safeguards for the protection of individual rights. A course of legal proceedings according to the rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights.**

”

CHAPTER-6

LAW OF REMAND UNDER SECTION 167 OF THE CODE OF CRIMINAL PROCEDURE, 1973

- The dictionary meaning of the word ‘remand’ is to send back specially a prisoner into custody. Under the procedural law it is used both under CrPC as also CPC. Under the CrPC it means to send back the accused in the custody of the competent authority and under the CPC it is used in the sense that a matter is sent back for certain reasons by the appellate court to the original court.
- Largely the provision regarding remand under CrPC has been provided under section 167, 209 and 309.
- Remand u/s 167 (2) relates to the stage of investigation.
- Remand u/s 209(b) relates to the stage when the case is committed by Magistrate.
- Section 309 (2) relates to the stage after cognizance where accused can be sent only to judicial custody.
- S. 81 Transit Remand
- S. 267 Production Warrant/Prisoner Transit Remand
- Section 167 is supplementary to S. 57. Thus if investigation cannot be completed within 24 hours, the arrested person shall be produced before the Magistrate. Thus S. 167 has two objectives:
 - Law does not favour detention in police custody except for special reasons.
 - Secondly, the accused be given opportunity to make representation before the Magistrate.
- The primary powers of authorizing remand lies with the nearest judicial magistrate. Limited powers have been extended to the executive magistrate (only during the absence of JMFC) and judicial magistrate second class.
- Remand application has to be made by the officer Incharge of the Police Station or the person making the investigation, if not below the rank of Sub Inspector.
- Remand only when investigation cannot be completed within 24 hours and there are grounds to believe that the accusations are well founded.

Other Preconditions:

- Accused to be produced before the Magistrate for the first remand or when police custody remand is sought. Subsequent judicial remand can also be extended through video conferencing. Under special circumstances when police escort not available production of accused not necessary.
- Police remand only during the first 15 days of custody after first remand.
- The mentioning period for which an accused can be placed under remand without submission of police report is 60 or 90 days depending upon the gravity of the alleged offence. Though special enactments like the UAPA or NDPS Act provides for longer period of detention conditionally.

Remand on Surrender of Accused:

The cumulative effect of sections 44(2), 167 & 167A CrPC is that when an accused surrenders before a magistrate, he may arrest or direct arrest of the accused and remand him to custody. U/s 167A (UP Amendment) it has been provided – “..... the provisions of section 167 shall, so far as may be, apply also in relation to any person

arrested by, or under any order or direction of, the magistrate, whether executive or judicial”.

Meaning of word ‘Diary’:

- A Division Bench of the Allahabad High Court has observed that the ‘diary’ contemplated by section 167 is the diary which is commonly known as “case diary” and has to be maintained in accordance with section 172 of the CrPC. **Sri Krishna v. State of U.P., (1979 Lucknow Law Journal 123).**
- **Para 121 of Police Regulations** provides that a police officer should apply for police custody only when he shows definite and satisfactory grounds. A general statement regarding information that can be provided by the accused is not sufficient. The application for police custody (PC) should be made through gazetted police officer.

Physical Presence of Accused:

- Always desirable to physically produce the accused before a Magistrate, non production on special grounds beyond the control of the prosecution or police would not vitiate the order of remand. **Sandeep Kr. Dev v. Officer-In-Charge, Sakchi, AIR 1974 SC 871.**
- **The Hon’ble Supreme Court with respect to remand in general and police custody in particular has laid down the following principles:**
- Remand is fundamentally a judicial function.
- Obligatory on the part of the magistrate to satisfy himself whether the materials justify grant of remand.
- Investigating agency to send the CD along with remand report for appreciation of factual scenario. This also enables the magistrate to determine whether there is justification for police remand or only judicial remand be granted or whether remand be refused. (See – **Manubhai R. Patel v. State of Gujarat, (2013) 1 SCC 314; Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273).**
- Obligatory for magistrate to apply his mind and not to pass an order automatically or in a mechanical manner.
- Grant of PC should be an exception and not a rule and a strong case has to be made by the investigating agency. Special circumstances should be judicially scrutinized. No PC after first 15 days even if commission of more serious offence in same transaction subsequently comes to light. **Satyajit B. Desai v. State of Gujarat, (2014) 14 SCC 434.**

Important Guidelines with respect to PC:

- Maximum period of 15 days which can be changed *inter se with judicial custody (JC)* for the first 15 days.
- Time period runs from the date of remand.
- Limitation to apply if more serious offence discovered in the same transaction. Not applicable for distinct transaction.
- Power can be exercised only if accused produced before Magistrate.
- The IO shall transmit a copy of entries in the CD.
- Accused medical examination by a medical officer both before and after PC.
- Accused should be given the option to be accompanied by his lawyer.
- Conditions as may be imposed for PC – See **Narain Pasi v. State of U.P., 1989 CrLJ 2552.**

- Police custody can be ordered only during the period of first 15 days if found necessary. There is an exception to this rule. The accused can be remanded in PC if he is involved in another case or is remanded after the expiry of 15 days. (**CBI v. Anupam J. Kulkarni, (1992) 3 SCC 141.**)

Alteration of Police Custody to Judicial Custody and vice versa:

- The words “from time to time” appearing in S. 167 (2) shows that several orders can be passed u/s 167(2) and the nature of the custody can be altered from judicial custody to PC and vice versa during the period of first 15 days. Thereafter it can only be judicial custody. This change in custody can be either pursuant to a single order or more than one when such orders are for lesser number of days but on the whole such custody cannot be beyond 15 days. (**Chaganti Satya Narayana v. State of A.P. (1986) 2 SCC 1128.**)

Bilateral Proceeding Between Prosecution and the Court:

- Grant or refusal of authorization for detention of an accused in PC is bilateral proceeding between the prosecuting agency and the court. The accused does not come in the picture at all. It is for the magistrate to be satisfied. The accused is not required to have notice of the proceedings for the determination of the authorization of PC of the accused by any rule of law. (**Amarpal v. State of U.P., 1995 CriLJ 52 (All); State of U.P. through ATS v. Vishwa Vijay @ Kamal, Cr. Misc. Recall Application No. 119854/2010 DoJ 07.07.2010; Chandra Dev Ram Yadav v. State of U.P., Cr.Misc. Case No. 812/2013, DoJ 29.08.2013.**)

Permissibility of More Than One Applications:

- Second application for Police remand, post the rejection of the first application is maintainable, provided the same is made within the first 15 days after the accused has been remanded by the court for the first time. (**CBI v. Anupam J. Kulkarni, (1992) 3 SCC 441; Devendra Kumar v. State of Haryana, (2010) 6 SCC 753.**)

Police Custody – Essentials:

- PC to be allowed in special circumstances.
- Granted for reasons to be judicially scrutinized and for limited purposes as necessary.
- During the first 15 days, custody can be partially judicial or police and there can be more than one order.
- Post the first 15 days custody can be only judicial.
- No detention in police custody thereafter even if commission of serious offence comes to light.
- Bar does not apply if the same person is accused of the involved in a different matter out of other transaction.
CBI v. Anupam J. Kulkarni, AIR 1992 SC 1768; Devender Kumar v. State of Haryana, (2010) 6 SCC 753.

Police Custody at the Stage of Further Investigation:

- Police remand can be sought in respect of accused arrested at the stage of further investigation, if interrogation is necessary. The expression ‘accused if in custody’ in

Section 309(2) does not include the accused who is arrested on further investigation before supplementary charge sheet is filed.

State v. Dawood Ibrahim Kaskar (2000) 10 SCC 438; Dinesh Dalmia v. CBI, (2007) 8 SCC 770; CBI v. Rahin Dandapet (2016) 1 SCC 507.

Right of Default/Compulsive/Statutory Bail:

S 167(1)(a)(i) provides that the total period of custody shall not exceed 90 days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than 10 years. For other offences 60 days time period has been prescribed. On the expiry of above time period the accused is entitled to be released on bail if he is prepared to and does furnish bail.

Indefeasible Right u/s 167(2) – Principles:

- **Key Words:** The indefeasible right does not survive or remain enforceable on the challan being filed, “if already not availed of” (as laid down in **Sanjay Dutt v. State, (1994) 5 SCC 410 (Constitution Bench)**).
- An accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail.
- Not to taken to mean – “actually being released on bail after furnishing the necessary bail required”.
- Once an accused files an application for bail on the ground that no challan (chargesheet) had been filed, there is no discretion left in the Magistrate and he is required only to see whether the specified time period has lapsed or not –
- Whether a charge sheet has been filed or not?
- No other contingency under CrPC (except Exp. 1) to permit the further detention of accused.
- But if an order of bail is passed on certain terms and conditions but the accused fails to furnish the bail, and at that point of time a challan is filed, then possibly the right of accused stands extinguished.
- The Prosecution cannot frustrate the object of 167(2) by subsequently filing a charge sheet or additional complaint while the bail application is pending. **Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453.**
- Similar proposition also in -
- **Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 SCC 602.**
- **State Through CBI v. Mohd. Ashraff Bhat, (1996) 1 SCC 432.**
- **Dr. Bipin S Panchal v. State of Gujarat, (1996) 1 SCC 718.**
- **Sayed Mohd. Ahmad Kazmi v. State (Govt. of NCT of Delhi), (2012) 12 SCC 1.**
- **Union of India v. Nirala Yadav, (2014) 9 SCC 457**
- **Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67)**
- **S. Kasi v. State, 2020 SCC Online SC 529 (19 June, 2020)**
- **M. Ravindran v. Intelligence Officer, DRI (Crim. Appeal No. 699/2020; 26 October, 2020)**

Contrary Opinion:

- **Pragyna Sigh Thakur v. State of Maharashtra, (2011) 10 SCC 445**
- Right to bail u/s 167(2) is absolute. It is a legislative command and not court’s discretion. **Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 SCC 602.**

- At that stage, merits of the case are not to be examined.
- The application for grant of default bail need not even be in writing.
- No effect if such application not disposed before chargesheet is filed or time is extended under special Acts like NDPS (S. 36A) or UAPA, 1967 (S. 43-D(2)) or U.P. Gangster Act.
- If a second application, after disposal of first application is submitted, but if the first application wrongly decided, the effect of earlier application not wiped out.
- **See – Hitendra Vishnu Thakur vs. State of Maharashtra, (1994) 4 SCC 602; Rakesh Kumar Paul v. State of Assam (2017) 15 SCC 67 and Bikramjit Singh v. The State of Punjab, (2020) 10 SCC 616.**
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- **See – Hitendra Vishnu Thakur vs. State of Maharashtra, (1994) 4 SCC 602; Rakesh Kumar Paul v. State of Assam (2017) 15 SCC 67 and Bikramjit Singh v. The State of Punjab, (2020) 10 SCC 616.**

Imposition of Conditions:

- Imposition of conditions as may be imposed while granting regular bail u/s 437, like depositing amount to the credit of crime no. in offence involving such amount u/s 420 IPC not to be imposed in default bail.
- Conditions for cooperation in proper investigation, not intimidating the witness, periodic appearance before the police, restrictions on movement, surrender of passport, etc. may be imposed but it should not be too harsh.
- **Saravanan v. State Represented by Inspector of Police (3 Judges) – Crim. Appeal Nos. 681-682/2020, decided on October 15, 2020; M. Ravindran v. Intelligence Officer, DRI, (2020) 2 SCC 485.**

Cancellation of Default Bail:

- **When?**
If granted before the expiry of 60 days or 90 days time period, it can be cancelled u/s 437(5) and 439(2). **Pandit Dnyanu Khot v. State of Maharashtra, (2008) 17 SCC 745.**
- If a person is illegally or erroneously released on default bail u/s 167(2). Such order of setting aside an unjustified, illegal or perverse order is different from cancelling bail.
- If the case is registered in more than one jurisdictional police station under different crime numbers, it would be sufficient to submit the charge sheet before any jurisdictional court. If fact not brought to the court, where, the limitation u/s 167(2) has lapsed, but bail granted, it can be rectified by cancelling the bail granted by the court not aware about grant of remand by the other court, which has granted default bail.

Application of Time Period of 60 or 90 days:

- The Hon'ble Supreme Court interpreting the phrase “**imprisonment for a term not less than 10 years**” (Section 167(2)(a)(i)) has held 90 days time period will be applicable in cases where the accused is charged with: -
 - (i) Offences punishable with death and any lower sentence;
 - (ii) Offences punishable with life imprisonment and any lower sentence and
 - (iii) Offences punishable with minimum sentence of 10 years.

In all cases where the minimum sentence is less than 10 years but the maximum sentence is not death or life imprisonment than 60 days time period u/s 167(2)(a)(ii) will apply. **Rajeev Chaudhary v. State, (2001) 5 SCC 34 & Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67.**

Even Oral Application Sufficient:

- The court in **Rakesh Kr. Paul Case** has further held that is not necessary that a specific application for default bail should be made. Even oral application/argument is sufficient.
- It has also been held that it is the duty and responsibility of the Magistrate/Court on coming to know that the accused before it is entitled to default bail, to at least apprise him of the indefeasible right.
- The non submission of police report within the prescribed time period entitles the accused under custody to bail. The objective of this is:
 - (i) to ensure fair trial in accordance with the accepted principles of natural justice.
 - (ii) to ensure timely completion of investigation
 - (iii) to ensure fair deal to the poorer sections of the society.

Computation of the Period of 90 days or 60 days:

Question: - Whether the day of remand is to be included or excluded?

- Detention can be authorized by the Magistrate only from the time the order of remand is passed. The earlier period when the accused is in custody of the police cannot constitute detention pursuant to an authorization issued by the Magistrate. Therefore, period of 90 days or 60 days can begin to run only from the date of order of remand. Provisions of the General Clauses Act, 1897 (Ss. 9 & 10) and Limitation Act not to be involved. **Chaganti Satyanarayan v. State of A.P. (1986) 3 SCC 141. Followed in CBI v. Anupam Kulkarni (1992) 3 SCC 141 and Pragyna Singh Thakur v. State of Maharashtra, (2011) 10 SCC 445.**
- On the other hand, the Hon'ble Supreme Court in **State of Madhya Pradesh v. Rustom (1995) Supp. 3 SCC 221** and in **Ravi Prakash v. State of Bihar, (2015) 8 SCC 340**, has held that the day on which remand is granted has to be excluded. By implication in **Pandi Dnyanu Khot v. State of Maharashtra, (2008) 17 SCC 745; M. Ravindran v. Intelligence Officer, DRI, (2021) 2 SCC 485.**

COVID Lockdown and Limitation:

- Restrictions imposed during the lockdown cannot restrict the rights of an accused as protected by S. 167(2) regarding the indefeasible right to get default bail on non submission of charge sheet within the time period. **S. Kasi v. State Through the**

Inspector of Police, 2020 SCC Online SC 529; Abhishek Srivastava v. State of U.P., Bail No. 5384/2020 (Lucknow Bench) Order dated 25.11.2020.

Remand on holidays:

- **Under Rule 186, GR (Criminal) 1977**, it has been provided that on a holiday a criminal court may dispose urgent work like granting of bail or remand and it cannot be refused on the plea that it's a gazetted holiday.
- **In Circular No. 102/VIIb-47, dated 05 August, 1975**, it has been provided that Judicial Magistrates detained on duty for granting bails and remands on holidays/Sundays should perform this work at a fixed time duly notified and intimated to all concerned including public prosecutors.
- In case the accused is released on interim bail on the date of surrender the concerned day cannot be counted for the purpose of remand, as the accused has technically not been taken in custody. (**Chandra Dev Ram Yadav v. State of U.P., 2013 (83) ACC 350 (Allahabad)**).

Legal position through Judgments:

- In the remand papers of other accuseds name of other conspirators not yet arrested not to be mentioned. **State of Maharashtra v. Ramesh Taurani (1998) 1 SCC 41.**
- If the court takes time to take cognizance of a matter benefit cannot be given to the accused u/s 167(2) CrPC. **Jeewan Kr. Raut v. CBI, (2009) 7 SCC 526.1**

Cognizance not taken for grant of sanction:

- Notwithstanding the fact that the prosecution had not been able to obtain sanction to prosecute the accused, the accused was not entitled to grant of statutory bail since the charge sheet had been filed well within the period contemplated under Section 167 (2)(a)(ii) CrPC. Sanction is an enabling provision to prosecute which is totally separate from the concept of investigation which is concluded by the filing of the charge sheet. The two are on separate footings. **Suresh Kumar Bhikamchand Jain v. State of Maharashtra, 2012 (82) ACC 35 (3 Judges).**

Initial Illegality:

- Any **illegal order of remand** u/s 167 not to negatively affect the decision during trial – **State of Tamil Nadu v. V.K. Naidu, AIR 1979 SC 1255.**
- It has also been held that **in case any illegality is committed** in making a remand order the **same is cured** by the subsequent legal remand order – **Umakant Yadav v. Superintendent District Jail, Azamgarh, 1995 CrLJ 906 (All) (DB).**

Additional of new Sections:

- Even if the accused has been under illegal detention of the police for sometime, but once he is produced before the magistrate, for remand, it will be lawful for the magistrate to pass the appropriate the remand order provided he considers such detention to be necessary. A writ of habeas corpus will not lie. (**Sadhwi Pragyna Singh Thakur Case (Supra)**); **Manubhai R. Patel v. State of Gujarat, (2013) 1 SCC 314.**

- Even if assumed that there was violation by the police of not producing the accused within 24 hours of arrest, the accused can seek her liberty only so long as she is in custody of the police and not after grant of remand by Magistrate.
- Even if accused has been under illegal detention of police when she is produced before Magistrate for remand, it will be lawful for the Magistrate to pass an order of remand provided he considers further detention necessary.
- Magistrate **can add/alter new sections** in remand order – **Arshad v. State of U.P., 2008 (61) ACC 863; Dinesh Kumar v. State of U.P., 1997 UP CrR 776 (All).**

Absconding Accuseds:

- There may be cases where some of the accused may remain absconding even when charge sheet is filed. During the course of further investigation such accused may be arrested. In respect of such factual conditions, the Hon'ble Supreme Court has held that police remand u/s 167(2) CrPC can be granted in respect of such accused. The expression 'accused if in custody' in section 309(2) CrPC does not include the accused who is arrested on further investigation before supplementary charge sheet is filed.
- **State v. Dawood Ibrahim Kaskar, (2000) 10 SCC 438;**
- **Dinesh Dalmia v. CBI, (2007) 8 SCC 770;**
- **CBI v. Rathin Dandapet and others, (2016) 2 SCC 507.**

Distinction Between Remand under Section 167 and 309 CrPC:

- With respect to the modality of remand u/s 167(2) and 309(2) CrPC the parameters laid down by the Hon'ble Supreme Court is –
- The accused can be remanded u/s 167 (2) CrPC during investigation till cognizance has not been taken by the court.
- Even after taking cognizance when an accused is subsequently arrested during further investigation, the accused can be remanded u/s 167(2) CrPC.
- When cognizance has been taken and the accused was in custody at the time of taking cognizance or when inquiry or trial was being held in respect of him, he can be remanded to JC only u/s 309(2) .
- **Special Investigation Cell-I, New Delhi v. Anupam J. Kulkarni, (1992) 3 SCC 141;**
- **CBI v. Dawood Ibrahim Kashar, (2010) 10 SCC 438 (3 Judges);**
- **Dinesh Dalmia v. CBI, (2007) 8 SCC 770;**
- **Mithabhai Pashabhai Patel v. State of Gujarat, (2009) 6 SCC 332;**
- **Pradeep Ram v. State of Jharkhand, 2019 SCC Online SC 825.**

Effect of Stay on Investigation:

- Any order of stay by higher court regarding stay of investigation will have bearing on the action of investigating agency. The order of remand being a judicial act does not suffer from any infirmity. (**Manubhai R. Patel v. State of Gujarat, (2013) 1 SCC 354.**)

Non-Submission of Full Set of Documents:

- Accused not entitled to bail u/s 167 (2) when charge sheet is filed on the last day i.e. 60th or 90th day without full set of documents. The provision of section 173 (5)

requiring filing of full set of documents with the police report/charge sheet is only directory and not mandatory. **Narendra Kumar Amin v. CBI (2015) 3 SCC 417.**

- The Hon'ble Bombay High Court in **Manik Sahebrao Chaugule v. State of Maharashtra, 2017 SCC online Bom. 3402**, has observed that where charge sheet *inter alia* was filed under the NDPS Act, without report of chemical analyzer it was held that the charge sheet was incomplete and the accused was entitled for default bail.

Remand Outside the Court Premises:

- **Remand in Hospital** – Remand order can be passed u/s 167 CrPC by the magistrate and surrender can be taken even in hospital. **Smt. Rahmat Jahan v. State of U.P., 1998 (37) ACC 718 (Alld.).**
- Magistrate not to decline to dispose of the matters of remand when the accused is produced at his residence. Likewise **Rule 186 of GR (Criminal)** provides “On a holiday a criminal court may dispose of such work of urgent nature, like granting of bail or remand”. **PC Kakkar v. DG Police, 1986 (1) Crimes 620 (AP).**

Effect of Extension of Investigation:

- The CrPC does not empower anyone, except where a special act makes any such provision, to extend the period within which investigation must be completed nor does it admit of any such eventuality. The remand also cannot be extended when an incomplete report is submitted or the report is returned by the court on the ground of any technical default. The magistrate is required to treat the ground of remand only on the basis of investigation. (**Achpal @ Ramswaroop v. State of Rajasthan, AIR 2018 SC 4647.**)

Notional Surrender or Position When Production Warrant Issued:

- The notional surrender or custody in another case cannot be included for some other case registered against the accused in the same or other place. The period for the other case would be counted from the time when the accused is presented before the court at the same place or at another court that has issued the Production Transit (PT) warrant. **State of WB v. Dinesh Dalmia, (2007) 5 SCC 773.**
- If accused is named in more than one matter before different police stations and the accused is summoned through prisoner transit warrant/production warrant u/s 267 CrPC – the accused on being produced before the jurisdictional magistrate, may be given to PC or JC, irrespective of the date of original remand in the first matter. **CBI v. Anupam J. Kulkarni, (1992) 3 SCC 14; Manoj v. State of U.P., 1999 SCC (Cri) 478; Inspector of Police v. K.N. Nehru, Crim OP (MD) No. 13683/2011, 3 November, 2011 (Mad) (DB).**

Remand and Recording of Confession u/s 164 CrPC:

- Under sub-section (3) of S 164 CrPC, if any accused refuses to make any confessional statement, Magistrate shall not authorize detention of accused in PC.
- PCR after recording of confessional statement is not justified.
- Accused should be cautioned that if he refuses to make confessional statement he would not be remanded to PC.

- If accused produced from PC, confession be recorded only after lapse of reasonable time. **Devendra P. Tiwari v. State of U.P., (1978) 4 SCC 474; State of Maharashtra v. Damu, (2000) 6 SCC 269; Rabindra Kumar Pal @ Dara Singh v. Rep. of India, (2011) 2 SCC 490.**

Duration of Default Bail:

- Bail granted u/s 167 (2) is to be deemed to have been granted under chapter XXXIII of the CrPC i.e. u/s 437 or 439 CrPC and the same will remain valid till it is cancelled u/s 437 (5) or 439(2). The receipt of charge sheet in court after grant of bail u/s 167(2) can itself be no ground for cancellation of bail. **Dr. Bipin S. Panchal v. State of Gujarat, (1996) 1 SCC 718 (3 Judges Bench); Aslam B. Desai v. State of Maharashtra, (1992) 4 SCC 272 (3 Judges Bench).**

Transfer of Investigation to Another Agency:

- If investigation in a matter has been undertaken and charge sheet has been filed, but subsequently the further investigation is transferred to a different agency i.e. SIT and the substituted agency adding new section carries out further investigation police remand u/s 167 cannot be granted. **Mithabhai Pashabhai Patel vs. State of Gujarat, (2009) 6 SCC 332.**

Important Circular Letters:

- Vide C.L. No. 124/VII-b-47, dated Allahabad, 24th October, 1979 & C.L. NO. 42/VII-b-47, dated Allahabad 28th April, 1978 – Remand order and release orders passed by the Magistrate and Judges must contain their full name, clear signature, designation and seal of the court (Also under Rule 9 GR (Criminal)).
- C.L. No. 53/VIII-a-18-Admin 'G', dated 07.08.1986 – Release order must be prepared by the court clerk. Further vide C.L. No. 114/VII-b-47, dated 07.10.1978 – it has been directed release orders must contain details regarding case no., name of PS, name of accused, his father's name, age, residential address, crime no., sections of IPC, Acts etc.
- Vide C.L. No. 19/2006, dated 10.05.2006 – The limitations on the powers of outline magisterial courts with respect to bail and remand in certain offences has been classified.
- No arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police to do so.
- The existence of the power to arrest is one thing, the justification for the exercise of it is another.
- No arrest can be made in a routine manner on a mere allegation of commission of an offence.
- Prudent and wise for a police officer that no arrest is made w/o a reasonable satisfaction reached after some investigation as to genuineness of the allegation.

Power of Police to Arrest:

Section 41(1)(b) CrPC in this regard provides that police officer to effect arrest without warrant against whom a reasonable complaint made or credible information received or a reasonable suspicion exists of having committed an offence punishable by a term less than or upto 07 years only when arrest is necessary -

- Prevent such person from committing any further offence, or
- for proper investigation of the offence, or
- to prevent such person from causing the evidence of the offence to disappear
- tempering with such evidence in any manner, or
- to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case.
- to ensure the presence of the person in the court.
- Police Officer shall record while making such arrest, his reasons in writing.
- Police to also record reasons for not making the arrest.
- These are conclusions, which one may reach based on facts.
- Magistrates while authorizing detention u/s 167 CrPC, has to be first satisfied that the arrest made is legal and in accordance with law.
- If the arrest affected by the police does not satisfy the requirements of S. 41, Magistrate is duty bound not to authorize detention and release the accused.
- Police is duty bound to furnish facts and reasons and conclusions for arrest.
- Magistrate before authorizing detention will record his own satisfaction in brief.
- Never based on ipse dixit of the police officer i.e. police officer shall furnish to the Magistrate the facts, reasons and materials for any conclusion.
- Magistrate to address the question whether specific reasons for arrest recorded or not.
- Likewise, S. 41A CrPC to avoid unnecessary arrest or threat of arrest.
- In all cases where the arrest of a person is not required u/s 41(1), CrPC, the police officer in terms of the provisions u/s 41A, is required to issue notice directing the accused to appear before him at a specified place and time.
- Law obliges such an accused to appear before the police officer and if the accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that the arrest is necessary.
- At this stage also, the condition precedent for arrest as envisaged u/s 41 has to be complied and shall be subject to the same scrutiny by the Magistrate.

In conclusion

- Police officers not to automatically arrest when a case under Section of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, CrPC;
- All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);
- The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;
- The Magistrate while authorizing detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorize detention;
- The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;
- Notice of appearance in terms of Section 41A of CrPC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;

- Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction;
- Authorizing detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273; Shaikin v. State of U.P., 2012 (76) ACC 159 All. (DB).

*“ Interpretation of a legal provision and its application to a set of facts are two different exercises requiring different approaches. “Interpretation” means action of explaining the meaning of something. For interpreting a statutory provision, court is required to make an insight into the provision and unfold its meaning by means of well-established canons of interpretation, having regard to object, purpose, historicism of law and several other well-known factors. Importantly, interpretation of a legal provision is always independent of the facts of any given case.**

*G. Colman - Cross Examination: A Practical Handbook, CreateSpace Independent Publisher (2017)

CHAPTER-7

BAIL: PRACTICE & PROCEDURE

Definition of Bail

The term bail has not been defined in the Cr.P.C., nevertheless, the word 'Bail' has been used in the Cr.P.C. several times and remains one of the vital concepts of criminal justice system in consonance with the fundamental principles enshrined in Parts III and IV of the Constitution along with the protection of human rights as prescribed under International treaties/ covenants.

Wharton's Lexicon and Stroud's Judicial Dictionary defines bail as "the setting free of the defendant by releasing him from the custody of law and entrusting him to the custody of his sureties who are liable to produce him to appear for his trial at a specific date and time."

According to Halsbury's Laws of England: the effect of granting bail is not to set the defendant (accused) free, but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of the law and he will then be imprisoned.

The literal meaning of the word "bail" is surety Bail, therefore, refers to release from custody, either on personal bond or with sureties. Bail relies on release subject to monetary assurance—either one's own assurance (also called personal bond / recognizance) or through third party sureties.

According to the Hon'ble Supreme Court of India, bail is devised as a technique for effecting a synthesis of two basic concepts of human values, namely the right of the accused person to enjoy his personal freedom and the public interest; subject to which, the release is conditioned on the surety to produce the accused person in court to stand the trial.

Moti Ram & Ors vs State Of M.P on 24 August, 1978

Equivalent citations: 1978 AIR 1594, 1979 SCR (1) 335

Author: Justice V Krishnaiyer

Object of bail not punitive or preventive but to secure appearance of accused at trial:

The object of grant of bail to an accused of an offence is neither punitive nor preventive in nature. The true object behind grant of bail is to secure appearance of accused during trial.

Sanjay Chandra Vs. Central Bureau of Investigation, AIR 2012 SC 830

Bail is the Rule, Jail Exception:

While considering an application for bail either under Section 437 or 439 CrPC, the court should keep in view the principle that grant of bail is the rule and committal to jail an exception. Refusal of bail is a restriction on personal liberty of the individual guaranteed by Article 21 of the Constitution. *Sanjay Chandra Vs. Central Bureau of Investigation, AIR 2012 SC 830.*

LIST OF DOCUMENTS TO BE SEEN AT THE TIME OF HEARING OF BAIL

There is no specific list of documents to be checked at the time of drafting Bail application but one can prepare a checklist before drafting an application of Bail:

1. Bail application on which it is clearly written, 1st bail application, 2nd bail application etc.
2. Supported with an affidavit to this regard.
3. Information or document clearly depicting that accused is in custody (actual).
4. All remand papers as the case may be
5. FIR, GD kayami, Update case diary, arrest memo with all entries ,
6. Medicolegal report if any of injured / victim.
7. Medicolegal report of accused.
8. Post mortem report and panchayatnama as the case may be.
9. Report of APP, PP, SPP or ADGC as the case may be/ARGUMENTS IF ANY
10. If the accused is in judicial custody then compare the warrant entries regarding name, alias @, fathers name, sections, Acts, Thana, address etc with the entries in bail application.

The list is not exhaustive as it depends upon case to case.

Personal appearance/custody of accused-- must for Bail:

Bail application cannot be entertained/heard unless the accused is in the custody of the court. If the accused is already lodged in jail under some order of court, the bail application can be heard and disposed of even without physical appearance/production of the accused before the court.

Even u/s 88 Cr.P.C., bail cannot be granted to a person without his personal appearance before the court.

1. **Sundeep Kumar Bafna Vs. State of Maharashtra, AIR 2014 SC 1745;**
2. **Vaman Narain Vs. State of Rajasthan, 2009 Cr.L.J. 1311 (SC);**
3. **Sunita Devi Vs. State of Bihar, 2005(51) ACC 220 (SC);**
4. **Mukesh Kumar Vs. State of U.P., 2000(40) ACC 306 (All);**
5. **Kamlesh Parihar Vs. State of U.P., 1999 ALJ 1507 (All—D.B.).**

Accused to be permitted to surrender even without report from Police: The practice of some of the subordinate Magistrates not to permit an accused to surrender when they make such request and simply ask the Public Prosecutor to report is not proper. When an accused surrender in court and makes an application stating that he is wanted in the crime, his prayer should be accepted.

Devendra Singh Negi Vs. State of U.P., 1993 A.Cr.R. 184 (All).

Bail during police custody remand:

Relying upon the Hon'ble Constitution Bench decision in the case of ***Shri Gur Baksh Singh Sibbia Vs. State of Punjab, AIR 1980 1632 SC***

It has been held by the Hon'ble Bombay High Court that bail application u/s 439 of the CrPC is maintainable before the Sessions Court even if filed during the period of police remand of the accused granted by Magistrate. Sessions Court can not reject application for bail on that ground. Bail application should be entertained and considered on merits even if there is order of police remand. ***Krushna Guruswami Naidu Vs. State of Maharashtra, 2011 CrLJ 2065 (Bombay).***

Affidavits not to be considered: The affidavits of witnesses or victim should not be considered while deciding bail applications

Jaswant vs State of U.P 1994 ACC 424 (All)

No discretion of court in Bailable offences:

There is no question of discretion of court and the right to claim bail in bailable offences is an absolute and indefeasible right.

Rasik Lal vs Kishore (2009) 2SCC (cri) 338

Relevant Considerations for grant or refusal of bail :

Interpreting the provisions of bail contained u/s 437 & 439 Cr.P.C., the Hon'ble Supreme Court has laid down following considerations for grant or refusal of bail to an accused in a non-bailable offence---

1. Whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
2. Nature of accusation and evidence therefor
3. Gravity of the offence and punishment which the conviction will entail
4. Reasonable possibility of securing presence of the accused at trial and danger of his absconding or fleeing if released on bail
5. Character and behaviour of the accused
6. Means, position and standing of the accused in the Society
7. Likelihood of the offence being repeated
8. Reasonable apprehension of the witnesses being tampered with
9. Danger, of course, of justice being thwarted by grant of bail
10. Balance between the rights of the accused and the larger interest of the Society/State
11. Any other factor relevant and peculiar to the accused.

Gudikanti Narsimhlu vs Public Prosecutor AIR 1978 SC 2447

Sanghian Pandian Rajkumar Vs. CBI, 2014 (86) ACC 671 (SC) (Three-Judge Bench)

Nimmagadda Prasad Vs. CBI, (2013) 7 SCC 466 (para 24)

Y.S. Jagan Mohan Reddy Vs. Central Bureau of Investigation, AIR 2013 SC 1933

Ash Mohammad Vs. Shiv Raj Singh, (2012) 9 SCC 446

Dipak Shubhashchandra Mehta Vs. CBI, AIR 2012 SC 949

Discussions of evidence/merits of the case in bail order : While disposing of bail applications u/s 437/439 Cr.P.C., courts should assign reasons while allowing or refusing an application for bail. But detailed reasons touching the merit of the matter should not be given which may prejudice the accused. What is necessary is that the order should not suffer from non-application of mind. At this stage a detailed examination of evidence and elaborate documentation of the merit of the case is not required to be undertaken.

CBI Vs. V. Vijay Sai Reddy, (2013) 7 SCC 452 1(b). Kanwar Singh Meena Vs. State of Rajasthan, AIR 2013 SC 296. 1. Ranjitsing Brahmajeetsing Sharma Vs. State of Maharashtra, 2005 Cr.L.J.2533 SC

Bail in altered sections:

Where the accused was earlier granted bail for the offences u/s 324, 352, 506 IPC but during investigation the offences were altered by the I.O. to Sec. 304 IPC and during trial the charge against the accused was framed for the offence u/s 302 IPC and the Hon'ble Allahabad High Court allowed the accused to continue on bail on his previous bail bonds furnished for the offences u/s 324, 352, 506 IPC, the Hon'ble Supreme Court has held that the High Court illegally ordered the accused to continue to be on bail for the altered offences u/s 304 or 302 IPC on his previous bail bonds as the accused ought to have applied for fresh bail for the offences under the altered penal sections.

Hamida Vs. Rashid, 2007 CrLJ 3422 (SC)

Bijendra Vs. State of U.P., 2006 (55) ACC 391 (All)

Defence plea at the time of disposal of Bail Application :

Defence plea (like alibi etc.) taken by accused cannot be considered by the court at the time of hearing of the bail application. Plea of defence can be tested by the court at the stage of trial of the case and not at the stage of disposal of bail application.

Naresh Rav Vs. State of U.P., 2005 (53) ACC 148 (All).

Affidavits of P.Ws. & Bail :

In considering bail applications, the Courts should not consider affidavits of prosecution witnesses filed denying the prosecution case.

Jaswant Vs. State of U.P., 1994 ACC 424 (All).

Criminal History of Accused & Bail :

While granting bail to an accused, the court should also take into consideration the criminal history of the accused. Criminal antecedents of an accused though always not determinative of question whether bail is to be granted or not, yet their relevance cannot be totally ignored.

Ash Mohammad Vs. Shiv Raj Singh, (2012) 9 SCC 446

Brij Nandan Jaiswal Vs. Munna Jaiswal, AIR 2009 SC 1021

Surendra Singh Vs. State of U.P., 2008 Cr.L.J. (NOC) 924 (All)

. Anil Kumar Tulsiyani Vs. State of U.P., 2006 (55) ACC 1014 (SC)

Second or Successive Bail Applications:

Second or successive bail applications can be moved only on two grounds noted below---

- (i) On change of facts or circumstances
- (ii) Change in law

Where the issues and grounds taken in the second or successive bail applications were already agitated and rejected by the court, the same cannot be ordinarily allowed to be reagitated. Findings of higher courts or coordinate bench rejecting the earlier bail application must receive serious consideration at the hands of court entertaining a subsequent bail application as the same can be done only in case of change in factual position or in law.

Suheb Vs. State of U.P., 2006 (6) ALJ (NOC) 1362 (All)

Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav, 2005 (51) ACC

Parity in Bail :

It is not universal rule that bail should be granted to co-accused on the ground of parity.

Bail granted to co-accused on the basis of non-speaking order cannot form the basis for granting bail on the ground of parity.

Similarly, if co-accused is granted bail in ignorance or violation of well settled principles of law of bails, it cannot be the basis of parity. Parity cannot be the sole ground for bail. A Judge is not bound to grant bail on the ground of parity.

1. Amarnath Yadav Vs. State of U.P., 2009 (67) ACC 534 (All)

2. Sanjay Vs. State of U.P., 2009 (67) ACC 190 (All)

3. Shahnawaz Vs. State of U.P., 2009 (66) ACC 189 (All)

Cross-Cases & Bail :

When there are cross cases and both the sides have received almost similar injuries and one party has been released on bail the other party has to be released on bail as that is the settled view. The question as to which party was aggressor is a question of fact and that will have to be determined on the basis of evidence that is adduced in these cases. **Jaswant Singh Vs. State of U.P., 1977 (14) ACC 302 (All)**

Mere issuance of production warrant u/s 267 Cr PC not sufficient to entertain bail application unless the accused is in the custody of the court :

Only that court can consider and dispose of the bail application either u/s 437 or u/s 439 Cr PC in whose custody the accused is for the time being and mere issuance of production warrant u/s 267 Cr PC is not sufficient to deem the custody of that court which issued such warrant unless the accused is actually produced in that court in pursuance of such production warrant.

1. Pawan Kumar Pandey Vs. State of UP, 1997 Cr LJ 2686 (All--L B)

2. Pramod Kumar Vs. Ramesh Chandra, 1991 Cr LJ 1063 (All)

Bail in economic offences requires different approach:

Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

While granting bail, the Court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations.

(i) Nimmagadda Prasad Vs. Central Bureau of Investigation, (2013) 7 SCC 466 (para 23, 24 & 25) (ii) Y.S. Jagan Mohan Reddy Vs. Central Bureau of Investigation, AIR 2013 SC 1933

Bail under U.P. Control of Goondas Act, 1970 [U.P. Control of Goondas Rules, 1970]:

As held by Hon'ble Allahabad High Court, the Judicial Magistrate is empowered to grant remand of the accused u/s 167 CrPC to police or judicial custody for the offences under U.P. Control of Goondas Act, 1970. A Judicial Magistrate or the Sessions Judge or Addl. Sessions Judge are also empowered to hear and dispose of bail application of an accused under the 1970 Act as the provisions of bail contained in Chapter XXXIII of the CrPC i.e. Sec. 437 or 439 CrPC are applicable. Since the contravention of Sec. 3 of the Act is punishable u/s 10 of the 1970 Act which provides imprisonment upto three years but not less than six months and as such as per Sec. 2(x) of the CrPC procedure for warrant cases would apply.

Judicial Magistrate has also jurisdiction to take cognizance of the offences under the 1970 Act u/s 190 CrPC and has also jurisdiction to try the cases as warrant case as the penalty provided u/s 10 of the 1970 Act is imprisonment upto three years but not below six months and fine.

Mahipal Vs. State of U.P., 1998 (36) ACC 719 (All)

Bail under section 167 (2) CrPC : when can be granted :

Where charge sheet is not filed within a period of 60 or 90 days and the accused moves application for being released on bail u/s 167(2), Proviso (a) of the CrPC and offers to furnish bail, he can be said to have availed of indefeasible right for being released on bail. If the application of the accused moved u/s 167(2) CrPC is erroneously rejected by the Magistrate and the accused then approaches higher forum for bail and the charge sheet is filed in the meantime, it does not extinguish the accrued right of the accused to be released on bail u/s 167(2) CrPC.

1. Uday Mohanlal Acharya Vs. State of Maharashtra, AIR 2001 SC 1910
2. Dinesh Kumar Jain Vs. State of U.P., 2001 CrLJ 2847 (All)

Merits not to be considered while granting bail u/s 167(2) CrPC : It is well settled that when an application for default bail is filed u/s 167 (2) CrPC, the merits of the matter are not to be gone into.

- (i) Pragyna Singh Thakur Vs. State of Maharashtra, (2011) 10 SCC 445
- (ii) Union of India Vs. Thamisharasi, (1995) 4 SCC 190

60 days relevant for default bail u/s 167(2)(a)(i) CrPC

If minimum sentence is less than 10 years but maximum sentence is not death or life imprisonment: In all cases where minimum sentence is less than 10 years but maximum sentence is not death or life imprisonment, then Section 167(2)(a)(i) CrPC will apply and the accused will be entitled to grant of 'default bail' after 60 days in case charge-sheet is not filed.

- (i) **Rakesh Kumar Paul Vs. State of Assam, AIR 2017 SC 3948 (Three-Judge Bench) and**
- (ii) **Rajeev Chaudhary Vs. State NCT of Delhi, AIR 2001 SC 2369.**

Section 167(2)(a)(ii) CrPC when attracted? :

60/90 days u/s 167(2) begin from the date of order of first remand and not from the date of arrest :

Period of 60 / 90 days u/s 167(2), proviso (a) CrPC begins to run from the date of order of remand and not from the date of arrest.

Pragyna Singh Thakur Vs. State of Maharashtra, (2011) 10 SCC 445

Chaganti Satyanarayana Vs. State of A.P., AIR 1986 SC 2130

Detention for more than prescribed period in case accused is not prepared to give bail

Doubtful question may arise as to whether the magistrate can detain the accused person for further period beyond the prescribed period of 90 or 60 days if the accused is not prepared to and does not furnish bail, this doubt is cleared by explanation number 1 of section 167 sub clause 2 stating that *notwithstanding the expiry of the period specified in paragraph a the accused shall be detained in custody so long as he does not furnish bail.*

Directorate of enforcement vs Deepak Mahajan AIR 1994 SC 1775

Effect of chargesheet after 60 days

Even if no chargesheet was submitted within 60 days but was submitted before the accused applied for bail it would not be open to the accused to claim that he was entitled to bail as of right by invoking section 167 (2)(a) because as soon as the charge sheet was submitted the period of remand pending investigation came to an end and provision of section 167 sub clause 2 sub clause a would cease to apply to such case and in such case bail could be granted and only on merits. **Hero versus state of Uttar Pradesh, 1975 CrLJ 1508 and Shravan versus state of Maharashtra, 1975 Mah LJ 654.**

Sec. 88 & 319 CrPC: Relying upon an earlier decision of Hon'ble Allahabad High Court reported in **Vedi Ram @ Medi Ram Vs. State of U.P., 2003 ALJ 55 (All)**, the Hon'ble Allahabad High Court has held that an accused who has been summoned by court u/s 319 CrPC cannot be granted bail u/s 88 CrPC.

Bail under Prevention of Cow Slaughter Act, 1955 :

Slaughtering of cow in public gauge is a public offence and it offends religious faiths of a section of society and such an act is liable to create communal tension between two communities and would disturb the public tranquility of the area and the harmony between the people of divergent sections of the society would be shattered. Act of cutting cows and calves pertains to public order and the accused has no rights to break law and violate the provisions of the U.P. Prevention of Cow Slaughter Act, 1955 r/w. U.P. Prevention of Cow Slaughter Rules, 1964 and the Prevention of Cruelty to Animals Act, 1960 as the attitude of the accused appeared to create communal tension. Such incidents are not only a law and order problem but detention of the accused under the provisions of National Security Act, 1981 has also been upheld by the Allahabad High Court.

1. Naeem Vs. D.M., Agra, 2003 (47) ACC 185 (All—D.B.)

2. Bhaddu Vs. State of U.P., 2002 (45) ACC 1085 (All—D.B.)

Interpreting the provisions of Sec. 5 & 8 of the U.P. Prevention of Cow Slaughter Act, 1955, it has been held by the Hon'ble Allahabad High Court that there is nothing in the Act prohibiting preparation for cow slaughtering and transportation of bullocks is not an offence punishable under the Act as the Act prohibits slaughter of cows or bullocks and possession of beef.

Babu Vs. State of U.P., 1991 (Suppl.) ACC 110 (All)

Where the accused was found sitting by the side of flesh and bone of slaughtered cow with axe, knife wood and legs of cow, the slaughtering of cow was found proved.

Safiq Vs. State of U.P., 1996 ACC (Sum.) 39 (All)

Difference between cow slaughter Act and Cruelty to animals Act

By declining bail to the accused persons under Cow Slaughter Act, although no offence under this Act is made out and the offences punishable under Animals' Cruelty Act areailable, the personal liberty of the accused protected under Article 21 of the Constitution of India is also unnecessarily curtailed till their release on granting bail by the High Court."

Plea of sanction can be raised only at the time of taking cognizance of the offence and not against the registration of FIR, investigation, arrest, submission of police report u/s 173(2) CrPC or remand of accused u/s 167 CrPCSee---
State of Karnataka Vs. Pastor P. Raju, AIR 2006 SC 2825

Release order issued by Magistrate [Rule 63(a) of G.R. (Criminal)] : When an order for the release of a prisoner, on bail or otherwise, is issued by a magistrate, he shall see that it is entered in a peon book and sent to the Nazir Sadar by the time prescribed by the District Magistrate in this behalf

Release order issued by SJ / ASJ [Rule 63(b) G.R. (Criminal)] : When an order for the release of a prisoner is issued by a court other than a magistrate, it shall be entered in a peon book and may be sent through one of the court peons to the officer incharge of the jail so as to reach the jail ordinarily not later than 4 p.m. in winter and 5 p.m. in summer.

Release order not to be sent to jail through private persons [Rule 63(c) G.R. (Criminal)]: A release order should in no case be made over to private persons for delivery to the jail authorities.

Necessary conditions for grant of bail u/s 37 of the NDPS Act must be fulfilled :

The following twin conditions prescribed u/s 37(1)(b)(ii) of the NDPS Act, 1985 must be fulfilled before grant of bail to an accused of offences under the said Act :

- (i) That there are reasonable grounds for believing that the accused is not guilty.
- (ii) That the accused is not likely to commit any offence while on bail. See : (i) **Union of India Vs. Shiv Shanker Kesari, (2007) 7 SCC 798** (ii) **Superintendent, Narcotics Central Bureau, Chennai Vs. R. Paulsamy, 2001 CrLJ 117 (SC) 27.**
- (B). Bail by ASJ under NDPS Act, 1985 : When the Special Judge exercises power to grant bail, he is bound by Section 37 of the NDPS Act, 1985. He has to take into account the conditions laid down in Clauses (i) and (ii) of Clause (b) of Section 37(1) of the NDPS Act and if he satisfied that those conditions have been fulfilled, he can release a person on bail under this Section. The other conditions laid down in Section 37 will also apply to him when he intends to grant bail in such a case. See....Union of India Vs. Rattan Mallik, (2009) SCC 624. 27

Bail in UP Gangster Act 1986

Section 19 (4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless:

- a. the Public Prosecutor has been given an opportunity to oppose the application for such release, and
- b. where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(5) The limitations on granting of bail specified in sub-section (4) are in addition to the limitations under the Code

Vikram Singh @ Vikky vs State of U.P. on 27 July, 2020

It was held that if main accused has been extended on bail, then co-accused may be extended. In so far as the requirement of Section 19(4) of the U.P. Gangsters Act is concerned, it would be seen that once the Court finds that the applicant against whom the cases which have been mentioned in the gang chart and even otherwise have been brought to the notice on which the applicant has been enlarged on bail, it indicates that the Court concerned while passing the bail orders was conscious of the consideration which are to be noticed while granting or refusing the bail.

At this stage, as the applicant has been enlarged on bail in all the three cases which have been mentioned in the gang chart and the other cases as well and another co-accused has also been enlarged on bail and this fact could not be discredited by the learned A.G.A.

In **PremSagar** on bail keeping in view the facts and circumstances of case.

In Kripa Shanker Pandey @ Kripa Nand Pandey vs State of U. P. On 25.9.2014

It was held that keeping in view the case of **Ranjitsing Brahmajetsing Sharma Vs. State of Maharashtra and another, (2005) 5 SCC 294**, the Hon'ble Apex Court held that law has been stated in the following terms: -

"The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act.

If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant.

Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. **It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial.**

Similarly, the court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in future must be an

offence under the Act and not any other offence. **Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.**

It is, furthermore, trite that for the purpose of considering an application for grant of bail, although detailed reasons are not necessary to be assigned, the order granting bail must demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail.

The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of Section 21 of the Act, the court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction.

The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby."

Reference to law laid down by **the Hon'ble Apex Court in (2013) 8 SCC 368, Dharmendra Kirthal Vs. State of Uttar Pradesh and another**, has also been made wherein the following was held: -

"There can never be any shadow of doubt that sans liberty, the human dignity is likely to be comatosed. The liberty of an individual cannot be allowed to live on the support of a ventilator. Personal liberty has its own glory and is to be put on a pedestal in trial to try offenders, it is controlled by the concept of "rational liberty".

What is stipulated under Section 12 of the U.P. Gangsters Act, 1986 is that the trial in other case is to be kept in abeyance.

The Special Courts have been conferred with the power to try any other offence with which the accused under the U.P. Gangsters Act, 1986 is charged at the same trial. Quite apart from the above, the **U.P. Gangsters Act 1986 under Sections 19(4) and 19(5)** empowers the Special Courts to grant bail to an accused under the U.P. Gangsters Act, 1986 though the provision is rigorous.

The said provisions are akin to the provisions contained in **Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985**. The provision under Section 37 of the NDPS Act, though lays down conditions precedent and they are in addition to what has been stipulated in the Code of Criminal Procedure, yet there is no deprivation of liberty. Thus, there being a provision for grant of bail, though restricted, the contention that the accused is compelled to languish in custody because of detention under the U.P. Gangsters Act, 1986 is, accordingly, negated."

In **ARC-2012-1-1095, Atique Ahmed Vs. State of Uttar Pradesh, the Hon'ble High Court of Allahabad has held as under: -**

" While considering the ambit and scope of Section 37 of the NDPS Act (which is identical to Section 19 of the Act), the Apex Court went on to hold as under in State of Uttaranchal vs. Rajesh Kumar Gupta (2007) (57) ACC 552) in paragraph 23: "Section 37 of the 1985 Act, must be construed in a pragmatic manner. It cannot be construed in such a way so as to negate the right of party to obtain bail which is otherwise a valuable right for all practical purposes."

Thus, to invoke the provisions of Section 19(4) of the Gangsters Act, something more than a mere affidavit is needed, which is not on record.

Counsel for the applicant also argued that the charge sheets was filed with the observation that the voice sample of accused Mahendra Mishra, Dilip Mishra and Keshav

Mishra has not yet been taken. The prosecution does not say that voice sample of Kripa Shanker Pandey has to be taken. Thus, the factum of taking voice sample of other co-accused cannot be considered while considering the bail application of the present accused Kripa Shanker Pandey @ Kripa Nand Pandey.

24. Considering all the facts and circumstances of the case and the submissions advanced by learned counsel for the applicant, learned A.G.A. for the State and learned counsel for the complainant and without expressing any opinion on the merits of the case, I find it to be a fit case for bail.

Let applicant Kripa Shanker Pandey @ Kripa Nand Pandey involved in Case Crime No.237 of 2010 (Special Sessions Trial No. 68 of 2011) under Sections 302, 307, 427, 429, 120B I.P.C., Section 3/5 of Explosive Substance Act, Section 7 of Criminal Law Amendment Act and Section 2/3 (1) of U.P. Gangsters Act and Anti Social Activities (Prevention) Act, 1986, Police Station Kotwali, District Allahabad be released on bail on his executing a personal bond and furnishing two heavy sureties each in the like amount to the satisfaction of the court concerned subject to the following stringent conditions:-

- a. The applicant shall attend the court according to the conditions of the bond executed by him; and
- b. The applicant shall not directly or indirectly make any inducement, threat or promise to any persons acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.
- c. The applicant shall deposit his passport with the trial court within two weeks from his release from prison and if he has no passport, he shall swear to it on affidavit within the same period and shall not leave the country without prior permission of the court concerned

Bail under Prevention of Corruption Act, 1988: Apart from other relevant considerations, some of the considerations for grant or refusal of bail for the offences under the Prevention of Corruption Act, 1947 would be whether or not the ingredients of Sec. 5 of the Act are fulfilled.

These ingredients are---- (i) abuse of position as public servant; (ii) obtaining for himself or for another any valuable thing or pecuniary advantage; (iii) by corrupt or illegal means. See— **R. Balakrishna Pillai Vs. State of Kerala, 2003 (46) ACC 837 (SC)**

Bail u/s 389(3) CrPC by Trial Court on Conviction: Sec. 389(3) CrPC empowers the trial court to grant bail to a convicted accused under the following conditions--- “Sec. 389(3) Cr.P.C.--- Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall—

- (i) Where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or
- (ii) Where the offence of which such person has been convicted is a bailable one, and he is on bail. Order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1), and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

Hearing to Public Prosecutor on bail application u/s 389 CrPC mandatory: Service of copy of appeal and application for bail on public prosecutor and providing him opportunity of hearing is mandatory as required by the first proviso to Section 389 CrPC.

In the event of non observance of the said provision, bail order has to be set aside by the superior court. **See : Atul Tripathi Vs. State of UP, 2015 (88) ACC 525 (SC).**

Deposit of fine a pre-condition for grant of bail u/s 389(3) CrPC by trial court : It is the privilege of the accused to insist for bail even after the order of conviction and sentence u/s 389(3) CrPC if the amount of fine has been paid and quantum of punishment is less than three years especially when there is no other reason to refuse the discretionary relief. **See : Vijaykumar Shantilal Tadvani Vs State of Gujarat, 2008 CrLJ 935 (Gujarat High Court).**

Bail and Parole distinguished: Parole is a form of temporary release of a convict from custody which provides conditional release from custody and changes the mode of undergoing sentence. Parole has nothing to do with the actual merits of the matter i.e. the evidence which has been led against the convicted prisoner but parole is granted in cases of emergency like death, illness of near relative or in cases of natural calamity such as house collapse, fire or flood. Bail and parole operate in different spheres and in different situations. The CrPC does not contain any provision for grant of parole. By administrative instructions, however, rules have been framed in various States regulating the grant of parole. Thus, the action of grant of parole is generally speaking and administrative action. **See: S. Sant Singh Vs. Secretary, Home Department, Government of Maharashtra Mantralaya, 2006 CrLJ 1515 (Bombay...Full Bench)**

No short term bail to attend marriage etc: Where the accused/husband was convicted along with his father for offences u/s 304-B, 498-A of the IPC and u/s 3/4 DP Act and was serving out sentence in jail and meanwhile father/convict was granted bail in appeal by the High Court, the co-accused/husband moved a second application for bail before the High Court. The Hon'ble Allahabad High Court not only rejected the prayer of the co-accused/husband for bail and short term bail but also rejected the prayer to allow him to go from jail to the venue of the marriage in police custody. **See: Upendra Singh Vs. State of UP, 2012 (77) ACC 801 (Allahabad—DB).**

“

The law of bail, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt.

Vaman Narain Ghiya v. State of Rajasthan, (2009) 2 SCC 281

”

CHAPTER-8

APPRECIATION OF EVIDENCE IN CRIMINAL TRIALS

Besides, the basic provisions of law contained in the Evidence Act and various other laws regarding the appreciation of evidence, judicial pronouncements of the Hon'ble Supreme Court and our own Hon'ble High Court have established guiding principles for proper scrutiny and evaluation of evidence in criminal trials.

Different types of evidence

(a) Oral Evidence

Section 60 of the, like he has seen a thing with his own eyes or he has heard a thing with his own ears. Evidence Act says that oral evidence in all cases must be direct. Thus, oral evidence is in the form of statement or deposition of witnesses who have perceived the incident or anything by his own sense organ

(b) Documentary Evidence

That means and includes documents and electronic records.

(c) Tangible things or objects such as – lathis, bamboos, sticks, iron rods, knife, sword, spears, gun pistol, cartridges, explosives, splint of bombs or other explosives, ropes, wires, clothes, hair, soil, ornaments etc.

Oral Evidence

Oral evidence is the deposition of witnesses and there may be witnesses of various kinds, such as, Direct witness/Eye witness, Interested witness, Inimical witness, Injured witness, Chance witness, Habitual witness, Child witness, Deaf & Dumb witness, Tutored witness, Rustic witness/illiterate villager witness, Hostile witness, Expert witness, Accused as a witness, Police personnel as a witness and Approver as a witness etc.

Credibility of witness

- As per **Bhagwan Jagannath Markad v. State of Maharashtra, (2016)10 SCC 537** witness can be put into three categories: -
 - **Wholly reliable, wholly unreliable, partly reliable and partly unreliable.**
- In **Lallu Manjhi v. State of Jharkand, AIR 2004 SC 854**, the Apex Court laid down:

“The Law of Evidence does not require any particular numbers of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely **(i) wholly reliable, (ii) Wholly unreliable and (iii) neither wholly reliable, nor wholly unreliable.** In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon testimony of a single witness”.

Direct Witness/Eye Witness Account:

Following factors are necessary to be considered by the court for appreciating the evidence of an eye-witness.

- (a) Whether the witness was present on the spot?

- (b) Whether the witness had seen the incident himself?
- (c) Credibility and trustworthiness of the witness.
- As per the guidelines of Hon'ble Apex Court in **Doonger Singh and others v. State of Rajasthan (2017) (Paras 12, 13) judgment dated 18.11.17**, it is necessary that the statements of eye witnesses are recorded during investigation itself u/s 164 Cr.P.C. In view of the amendments in S. 164 Cr.P.C. in 2009 w.e.f. 31.12.2009, such statements of witnesses should be got recorded by audio-video electronic means.
- The eye witnesses must be examined by the prosecution as soon as possible.
- Statements of eye witnesses should invariably be recorded u/s 164 Cr.P.C. in accordance with the procedure prescribed thereunder.

Generally following factors are seen in the oral testimony of witnesses: -

- a) Contradictions
- b) Exaggerations, and
- c) Embellishments.

As per **Mukesh v. State for NCT of Delhi, AIR 2017 SC 2161 (3 Judges)** and **Bhagwan Jagannath Markad v. State of Maharashtra (2016) 10 SCC 537** and many other authorities, if there are no material contradictions in the testimony of a witness, his evidence cannot be disbelieved merely on the basis of some normal, natural or minor contradictions, inconsistencies, exaggerations or embellishments etc.

In **Bhagwan J Markad (supra)**, it has been held that minor contradictions in the testimony of prosecution witnesses are bound to be there and **in fact they go to support the truthfulness of witnesses.**

In **Maqsoodan v. State of U.P. (1983) 1 SCC 218 (3 Judges Bench)**, it has been held that minor inconsistencies in the statement of witnesses and FIR regarding the number of blows inflicted and regarding the fact who assaulted whom, would not, by itself, make the testimony of such witnesses unreliable. On the contrary, it would show that the witnesses were not tutored.

It is also very important to note that when witnesses are examined after a considerable lapse of time, it is not unnatural or unexpected to have some minor variations in the statements of such witnesses (**Dharnidhar v. State of U.P., 2010(6) SCJ 667**)

There may be cases when two witnesses make contradictory statements on the same fact. In **Bhagwan Singh v. State of M.P., AIR 2009 SC 768**, the Hon'ble Supreme Court held that when the case of Prosecution is based on the evidence of eye-witnesses, some embellishments in the prosecution case caused by the testimony of any prosecution witness, although not declared hostile, cannot by itself, be a ground to discard the entire prosecution case.

Doctrine of "**falsus in uno, falsus in omnibus**" is not applicable in India. It is merely a rule of caution. The Court has to separate grain from chaff and appraise in each case as to what extent the evidence is acceptable. If separation cannot be done, the evidence has to be rejected as a whole. A witness may be speaking untruth in some respect, the Court has to appraise as to what extent the evidence is worthy of acceptance and merely because in some respects the testimony of a witness is not found to be sufficient for placing reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects. Falsity of particular material witness on a material particular would not ruin it from the beginning to end: -

- **Nasir Ali v. State of U.P., AIR 1957 SC 366**
- **Sucha Singh v. State of Punjab, (2003)7 SCC 643.**
- **Ram Rahis v. State of U.P. (2008) ACC 925 (All)(D.B)**
- **Rajendra Singh v. State of Uttaranchal, (2013)4 SCC 713.**
- **State of Karnataka v. Suvarnamma, (2015) 1 SCC (Cri) 663**

As per the authority of **State of Assam v. Ramen Dowarah, (2016) SCC 19**, immediate conduct of victim is also very important in evaluating the evidence of the witness. “Men may lie but circumstances do not”, is the cardinal principle of evaluation of evidence.

In **Mukesh (2017), Bhagwan Jagannath Marked (2016) and Kripal Singh v. State of Haryana, AIR 2014 SC 286**, the Hon’ble Supreme Court has observed that **if a witness examined in the Court is otherwise found reliable and trustworthy, the fact sought to be proved by that witness need not be further proved by other witnesses though such other witnesses are available but not examined.**

It has been further observed by the Hon’ble Apex Court that **non-examination of material witness is not a mathematical formula to discard the weight of the testimony available on record.**

It is settled law that non-examination of eye-witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of pen. Court can convict an accused on statement of a sole witness if he is found reliable and trustworthy.

In **Dalbir Kaur v. State of Punjab (1976) 4 SCC 158** and **Dharnidhar v. State of U.P., (2010) 7 SCC 759**, the Hon’ble Supreme Court has held that non-examination of an independent eye-witness is inconsequential if the witness was won over or terrorized by the accused.

As per the following authorities the Hon’ble Supreme Court has held that in a Criminal Trial **it is the quality of evidence and not the quantity of evidence which matters. Section 134 of the Evidence Act does not require any particular number of witnesses to prove any fact.**

- **Syed Ibrahim v. State of A.P., AIR 2006 2908**
- **Raj Narain Singh v. State of U.P., 2009 (67) ACC 680 (SC)**
- **Avtar Singh v. State of Haryana, AIR 2013 SC 286**
- **Veer Singh v. State of U.P., (2014) 2 SCC 455**

And the same view has been taken in recent case such as, **Nand Kumar v. State of Chhattisgarh, (2015) 1 SCC 776** and **State of U.P. v. Satveer, (2015) 9 SCC 44**

Plurality of witnesses in a criminal trial is not the legislative intent. **If the testimony of sole witness is found reliable on the touchstone of credibility, accused can be convicted on the basis of such sole testimony.**

Interested witness:

Interested witness may be a family member, relative or a friend of the victim of the offence. In a criminal trial, the testimony of a witness cannot be discarded mainly on the ground that the witness is a family member or relative of the victim.

In **Bhagwan Jagannath Markad v. State of Maharashtra, (2016) 10 SCC 537** and **Dhari and another v. State of U.P., AIR 2013 SC 308** etc. the Hon’ble Apex Court has held that **the testimony of a witness cannot be discarded merely because the witness is an interested one** being relative, friend or family member of the victim. However, in such cases, **the Court has to analyze and scrutinize the evidence of such a witness more carefully. And after careful analysis of evidence, if the testimony of such a witness is otherwise found credible and trustworthy, the accused can be convicted on the basis of the testimony of such a witness related to the victim.**

The same view had been taken in, **Amit v. State of U.P., AIR 2012 SC 1433**, **Dharnidhar v. State of U.P., (2010)6 SCJ 662**, **Namdeo v. State of Maharashtra, 2007(58) ACC 414 (SC)** and **Sucha Singh (2003) (supra).**

Inimical Witness:

Inimical witness is one who has some enmity or grudge with the accused. The Hon'ble Supreme Court in **Dilawar Singh v. State of Haryana (2015) 1 SCC 737 and Dhari v. State of U.P, AIR 2013 SC 308**, has laid down that the **evidence of a witness cannot be discarded merely on the ground that the witness has some enmity with the accused and if on proper scrutiny, the testimony of such a witness is otherwise found reliable and trustworthy, the accused can be convicted on the basis of such testimony.** The Hon'ble Apex Court has further observed as a matter of guiding principle that the possibility of falsely involving some persons in the crime or exaggerating the role of some of the accused by such witnesses should always be kept in mind and ascertained on the facts of each case. The same view had been taken in **Anil Rai v. State of Bihar, (2001) 7 SCC 318** and **Dharamveer v. State of U.P, AIR 2010 SC 1378**.

Injured Witness:

It is established law that the testimony of an **injured witness is more reliable because his presence on the place of occurrence stands established and it is proved that he suffered injuries in the course of the incident.**

In **Mukesh (2017), State of Haryana v. Krishnan, AIR 2017 SC 3125, Bhagwan Jagannath Markad (2016)** and others, it has been laid down that the testimony of an injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies. The reason for attaching such reliability for evidence of an injured witness is that his presence on the scene stands established and it is proved that in the said incident he got injured.

In **Sadhu Saran Singh v. State of U.P., (2016) 4 SCC 357**, the Hon'ble Supreme Court held that when the injured witness has been kidnapped and threatened by the accused persons and in these circumstances, the witness could not be produced for examination by the Prosecution despite best efforts, in such a case the non-examination of the injured witness was not fatal to the prosecution case and the conviction of the accused persons on the basis of eye witness account was proper.

In **Bhagwan Jagannath Markad (supra) and Maqsoodan v. state of U.P. (1983) 1 SCC 218 (three-judge Bench)**, the Hon'ble Apex Court held that presence of the injured witness at the time and place of the occurrence cannot be doubted as they had received injuries during the course of the incident and they should normally be not disbelieved.

Chance Witness:

There is no such rule of law that a chance witness cannot be believed.

The Hon'ble Supreme Court in **Kallu v. State of Haryana, AIR 2012 SC 3212, Ramesh v. State of U.P. 2010 (68) ACC 219 (SC), Sarvesh Narain Shukla v. Daroga Singh, AIR 2008 SC 320** and Hon'ble Allahabad High Court through Division Bench in **Fateh Singh v. State of U.P. 2003(46) ACC 862** have laid down that the testimony of a chance witness cannot be discarded merely on the ground of his being a chance witness. What is required, is to make close scrutiny of the probability and reason for a chance witness being present on the spot. The testimony of such a chance witness also requires close scrutiny. And if on the touchstone of such a close scrutiny, the chance witness is otherwise found reliable and trustworthy, his testimony cannot be rejected merely on the ground that he is a chance witness. The evidence of a chance witness requires very cautious and close scrutiny for being reliable.

Habitual Witness:

Where the evidence of a Stock witness/Panch Witness to the recovery of weapons of offence was found truthful and fully corroborated, his evidence cannot be rejected merely on the ground that the said witness had given evidence in some other cases also. **(Nana Keshav Lagad v. State of Maharashtra, AIR 2013 SC 3510)**

In **Mahesh v. State of Maharashtra, (2009) 3 SCC (Criminal) 543**, it has been held that simply because the witnesses had appeared as panch witnesses in other cases also, it cannot be concluded that they are habitual punch witnesses and had blindly signed the punchnama.

Child Witness:

Section 118 of the Indian Evidence Act says that a child witness is competent to testify.

A child of tender age can be allowed to testify if it has intellectual capacity to understand questions and give rational answers to such questions: -

- **K. Venkateswarlu v. State of A.P. AIR 2012 SC 2955**
- **State of U.P. v. Krishna Master, AIR 2010 SC 3071**
- **Panchhi v. State of U.P. 1998(37) ACC 528 (three judge Bench)**

Trial Judge may resort to any examination of a child witness to test his capacity and intelligence as well as his understanding of the obligation of an oath. If on a careful scrutiny, the testimony of a child witness is found truthful, there can be no obstacle in the way of accepting the same and recording conviction of the accused on the basis of evidence of such child witness.

In **Gul Singh v. State of MP, 2015(88) ACC 358 (SC)**, the Hon'ble Apex Court has held that testimony of a child witness cannot be rejected unless found unreliable and tutored.

In **Shivasharanappa v. State of Karnataka, 2013 CrLJ 2658 (SC)** it has been held that **conviction on the basis of testimony of a child witness is permissible if evidence of such child witness is credible, truthful and corroborated. Corroboration is not must. It is a rule of prudence.**

Oath to a child witness is administered under Sec. 4 of the Oaths Act, 1969.

Proviso to **Section 4(1) of Oaths Act** says that **if the child witness does not understand the nature of an oath** or affirmation, thus in such a case the **absence of oath shall not render the evidence of such child witness inadmissible**, nor will it affect the obligation of such witness to state the truth.

Section 7 of the Oaths Act, 1969 provides that **omission to take oath or any irregularity in the administration of oath will not invalidate any proceeding or render inadmissible the evidence of any witness** nor such omission or irregularity in oath will affect the obligation of a witness to state the truth.

In **Paras Ram v. State of H.P., 2001(1) JIC 282(SC)**, the Hon'ble Supreme Court had laid down that there is **no legal bar against relying upon the testimony of a child witness to whom oath could not be administered due to her incapacity to understand the meaning of oath.**

Deaf and Dumb Witness:

Section 119 of Indian Evidence Act provides that a deaf and dumb person is a competent witness provided he can make his evidence intelligible, by writing or by signs

and such evidence will be deemed to be oral evidence under Section 3 of the Evidence Act.

In **State of Rajasthan v. Darshan Singh @ Darshan Lal**, AIR 2012 SC 1973 and **Ram Deo Chamar v. State of U.P.**, 2016 (94) ACC (All) Paras 20, 21, it has been held that when a deaf and dumb person is examined in court, as a witness, **the court has to exercise due caution and take care to ascertain before he is examined that he posses the requisite amount of intelligence and that he understands the nature of an oath.** On being satisfied on this, the witness may be administered oath by appropriate means and that also with the assistance of an interpreter.

In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. The law requires that there must be a record of signs and not the interpretation of signs.

In **Darshan Singh case (supra)** it has been held that if **interpreter** is provided, he should be a person of the same surrounding but **should not have any interest in the case and he should also be administered oath.** However, in case a person can read and write, it is most desirable to adopt that method as being more satisfactory than any sign language.

Tutored Witness

In **Maqsoodan v state of U.P.**, (1983) 1 SCC 218 (three-judge Bench), it has been observed by the Hon'ble Apex Court that **if there are minor inconsistencies in the statements of witnesses and FIR with regard to number of blows inflicted and failure to state who injured whom, would by itself not make the testimony of the witnesses unreliable.** On the contrary, this shows that the witnesses were not tutored and they gave no parrot like stereotyped evidence.

Rustic Witness/ Illiterate Villager witness

In **State of Punjab v. Hokam Singh**, (2005) 7 SCC 408, **Dimple Gupta (Minor) v. Rajiv Gupta**, AIR 2008 SC 239, **State of U.P. v. Chhotylal**, AIR 2011 SC 697 and many other cases, it has been held that it is impossible for a rustic lady or an illiterate villager to state with precision the chain of events as such witness do not have sense of accuracy of time etc. **Expecting hyper technical calculations regarding dates and time of events from illiterate or rustic villager witnesses is an insult to justice-oriented judicial system and detached from the realities of life.**

In the case of rustic lady eye witness, the Court should keep in mind her rural background and the scenario in which the incident had happened and should not appreciate her evidence from rational angle and discredit her otherwise truthful version on technical grounds.

In **State of U.P. v. Krishna Master**, AIR 2010 SC 3071, it has been held by the Hon'ble Supreme court that:

"Where a rustic eye witness of murder/honour killing (child of tender age) was subjected to cross-examination for days together to confuse him and there were certain contradictions etc. in his evidence, in that case his evidence cannot be rejected because such rustic witness cannot be expected to state precisely the exact distance, direction from which he had witnessed the incident. He is also not expected to precisely describe the whole incident which happened in few minutes."

It has also been held that where a rustic witness was subjected grueling cross-examination for many days, inconsistencies are bound to occur in his evidence and they should not be blown out of proportion.

Hostile Witness:

The evidence of a hostile witness cannot be rejected outrightly. Both parties are entitled to rely on such part of his evidence which assists their case. To this effect the law is settled vide following authorities:

- **K. Anbazhagan v. Superintendent of Police (2004) 3 SCC 767**
- **Radha Mohan Singh v. State of U.P., AIR 2006 SC 951**
- **Sarvesh Narain Shukla v. Daroga Singh AIR 2008 SC 320**
- **Prithi v. State of Haryana (2010) 8 SCC 536**
- **Shyam Lal Ghosh v. State of W.B., AIR 2012 SC 3539**

And the same view has been reiterated in recent authorities, such as **Veer Singh v. State of U.P., (2014) 2 SCC 455, Vinod Kumar v. State of Punjab (2015) 3 SCC 220 and Pooja Pal v. Union of India (2016) 3 SCC 135**

The same view has also been taken by the Hon'ble Division Bench authority of Allahabad High Court in **Chhidda v. State of U.P. 2005(53) ACC 405**

Per **Bable v. State of Chhattisgarh, AIR 2012 SC2621**, if informant has not proved FIR and he has turned hostile, then it cannot be said that the FIR would lose its entire relevancy. It is settled law that FIR is not a substantive piece of evidence, but certainly it is a relevant circumstance of the evidence produced by the investigating agency.

A Division Bench authority of Hon'ble Allahabad High Court in **Karan Singh v. State of U.P.** issued directions to judicial officers to initiate process for cancellation of bail of such accused who threaten the PWs to turn hostile. In this regard Hon'ble High Court has issued C.L.No. 6551/2007 dated April 21, 2007 for compliance.

If the prosecution witness supporting defense is neither declared hostile nor cross examined by prosecution, accused can rely on such evidence (**Javed Masood v. State of Rajasthan, 2010 Cr.L.J. 2020 SC**)

Police Personnel as a witness

As observed in **Promod Kumar v. State of Delhi, AIR 2013 SC 3344**, the testimony of a Police personnel should be treated in the same manner as the testimony of any other witness. There is no principle of law that without corroboration by independent witnesses, the testimony of police personnel cannot be relied on. The presumption that a person acts honestly applies as much in favour of a police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good reasons. As a rule it cannot be stated that police officer can or cannot be sole eye witness in criminal case. Statement of Police Officer can be relied upon and even form basis of conviction when it is reliable, trustworthy and preferably corroborated by other evidence or record.

Electronic Evidence

Per Information Technology Act 2000 (as amended in 2008), "document" includes "electronic records" also.

Per **State of U.P. v. Ajay Kumar Sharma, 2016 (92) ACC 981 (SC)** "compact Disc" is a document which is admissible in evidence as per section 294(1) Cr.PC without endorsement of admission or denial by the parties.

Per **Mukesh v. State of NCT Delhi & others, AIR 2017 SC 2161 (3 Judges Bench)**, CCTV footage is admissible in evidence u/s 65B of the Evidence Act.

- In **Vikram Singh v. State of Punjab, (2017)8 SCC 518 (3 Judges Bench)**, where original tape-recorded conversation of random calls was handed over to the police, it has been held that since the original tape-record was primary evidence, therefore certificate u/s 65B Evidence Act was not required for its admissibility. Such certificate u/s 65B is required only for secondary evidence and not for the original tape-recorded conversation which is a primary evidence.
- Three Judges Bench in **Anvar P V v. P.K. Basheer, AIR 2015 SC 180**, overruling **State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru, 2005 SCC (Cri) 1715** (known as Parliament attack case), observed that in the absence of certificate u/s 65-B of the Evidence Act, a secondary evidence of electronic records like CD, VCD, Chip or Pen-drive etc. is not admissible in evidence. However, if the original recorder/hard drive attached to CCTV is led in evidence, the same can be received even without the certificate, as it will itself, be a primary evidence. In **Kishan Tripathi v. The State (2016)** it was held that Original Hard Disk containing CCTV Footage is a primary evidence u/s 62, Evidence Act.

End Notes

- **Question on a particular fact not put to witness in cross-examination makes that fact final**

Per **Mahavir Singh v. State of Haryana (2014)6 SCC 716 (Para 16)** it is a settled legal position that in case the question is not put to the witness in cross-examination who could furnish explanation on a particular issue, the correctness or legality of that fact or issue could not be raised.

- **Closure of evidence by Public Prosecutor**

In **Bablu Kumar v. State of Bihar, (2015)8 SCC 787**, it has been laid down that it is the duty of the Court to see that witnesses, cited by the Prosecution have been examined. If the Court is of the opinion that material witnesses have not been examined, it should not allow the prosecution to close the evidence. There can be no doubt that the prosecution may not examine all the material witnesses, but that does not necessarily mean that the prosecution can choose not to examine any witness and convey to the court that it does not intend to cite the witnesses; Court must apply its judicial mind on every occasion. Non-application of mind by the trial court has to potentiality to lead to the paralysis of the conception of fair trial.

Per **Joseph M Puttussery v. T.S. John, AIR 2011 SC 906 & Laxmi Raj Shetty v. State of Tamil Nadu, AIR 1988 SC 1274**, News Paper reports to be treated as hearsay evidence and cannot be relied upon.

- **Witness not named in FIR or Charge-sheet**

It is not the requirement of law that names of all witnesses should be mentioned in FIR or in statements recorded by the I.O. u/s 161 Cr.P.C. Such witnesses can also be examined by Prosecution with the permission of the Court.

Non-mentioning of the name of any witness in FIR would not justify rejection of evidence of the eye-witness:

- **Sri Bhagwan v. State of Rajasthan, (2001)6 SCC 296.**
- **Bhagwan Singh v. State of Madhya Pradesh, 2002(44) ACC 1112 (SC)**
- **Chittar Lal v. State of Rajasthan (2003)6 SCC 397.**

- **Delayed FIR**

If the cause of delay in lodging FIR is not attributable to any effort to concoct a version and the delay is satisfactorily explained by the prosecution, such delay would not adversely affect the prosecution case:

- **Ravi Kumar v. State of Punjab 2005(2) SCJ 505**
- **Ashok Kumar Chowdhary v. State of Bihar (2008)**
- **Mukesh v. State of NCT (Delhi), AIR 2017 SC 2161 (3 Judges)**

Per **Anil Rai v. State of Bihar, (2001)7 SCC 318 & State of Punjab v. Hakam Singh (2005)**, delay in sending copy of FIR to the Magistrate u/s 157 Cr.P.C. is not material where the FIR is shown to have been lodged promptly and investigation had started on that basis. Delay is not material when the prosecution has given cogent and reasonable explanation for it.

- **Incised wound by blunt object:**

The Hon'ble Supreme Court while quoting "Medical Jurisprudence & Toxicology" has clarified in **Dashrath Singh v. State of U.P. (2004)7 SCC 408** that incised injury on occipital region or skull is possible by lathi or stick. Sometimes on wounds, produced on tense structures covering bones, by blunt weapons or by a fall, skin splits and they may look like incised wounds. Such tense structure may be scalp, eyebrows, iliac crest or perineum etc.

“

The confession does not indeed come within the definition of "evidence" contained in S. 3. Evidence Act. It is not required to be given on oath, nor in the presence of the accused and it cannot be tested by cross-examination. It is obviously evidence of a very weak type. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities. Such a confession cannot be made the foundation of a conviction and can only be used in "support of other evidence".

Kashmira Singh v. State of M.P., AIR 1952 SC 159.

”

CHAPTER-9

HOW TO ADDUCE EVIDENCE IN CRIMINAL CASES?

In a criminal case adducing and appreciation of evidence is one of the first and foremost tests to consider the credibility and reliability of the prosecution version both oral and documentary.

The correctness of findings of facts and the quality of judgment depend upon whether or not the trial Judge or Magistrate or the appellate Judge is familiar with the laws applicable to different sorts of evidence adduced by the parties.

As the evidence is gathered from the set of facts and circumstances which are relevant to the fact in issue, the meticulous appreciation of facts is also necessary for the Prosecutors, who have to present their case in best form to assist the court to reach to a justifiable end.

Kinds of Evidence: Evidence of following kinds are produced in criminal cases:

- (i) Oral Evidence (i.e. statements of witnesses)
- (ii) Documentary Evidence (i.e. documents)
- (iii) Electronic Records (contents or voice in computers, CD, mobile, tape recorder, e-mail and other electronic devices)
- (iv) Tangible Objects (like sticks, lathis, bamboos, iron rods, swords, spears, knives, pistols, guns, cartridges, metals, explosives, splinters of bombs and other explosive devices, bones, hairs, etc.)

Kinds of witnesses: The witnesses which are generally examined before the Courts in criminal trials and whose testimony has to be appreciated by the Courts are of following categories:

1. Independent Witness
2. Direct (Ocular) Witness
3. Interested Witness: (a) Family Member as Witness (b) Relatives as Witness (c) Friendly Witness
4. Inimical Witness
5. Hostile Witness
6. Injured Witness
7. Chance Witness
8. Child Witness
9. Deaf and Dumb Witness
10. Tutored Witness
11. Habitual Witness
12. Hearsay Witness
13. Planted Witness
14. Police Personnel as Witness (a) Investigating Officer (b) Chick FIR Registering Constable (c) Witness to Arrest & Recovery etc.
15. Expert Witness (a) Doctor (Medical Expert) (b) Hand Writing Expert (c) Thumb & Finger Print Expert (d) Typewriter Expert (e) Voice Expert (f) Chemical Examiner (g) Ballistic Expert (h) Any Other Expert
16. Secondary Witness
17. Approver as Witness
18. Accused as Witness

Kinds of witnesses (credibility wise): As regards the reliability of witnesses, they can be categorized as under:

- (i) Wholly Reliable
- (ii) Wholly Unreliable
- (iii) Partly Reliable & Partly Unreliable

Lallu Manjhi Vs. State of Jharkhand, AIR 2003 SC 854

Amongst the various rules of evidence that have developed over the course of time, the Rule of Best Evidence is one of the foundation stones on which our criminal justice system rests.

Failure to lead best possible evidence in criminal trials

While a duty is cast upon the courts to arrive at the truth by all means possible, a duty is also cast upon the parties to come to court with clean hands, i.e. to make a complete disclosure without suppression of any material facts/evidence.

In proving the guilt of an accused, the investigating agencies are duty bound to collect the best possible evidence and the public prosecutor is bound to present the best possible evidence to prove an alleged fact or circumstance leading to the commission of the offence.

Rule of Best Evidence in cases of circumstantial evidence

It is a settled principle of law that a conviction can be based on circumstantial evidence. However, in such cases, every circumstance needs to be proved through reliable and cogent evidence by the prosecution which would form a chain so complete as to exclude every hypothesis except the guilt of the accused. However, it is an equally settled principle of law that while dealing with cases of circumstantial evidence, **the best evidence must be adduced** which the nature of the case requires to be presented.

Mode of taking and Recording Evidence

Section 272 to 283 of CrPC read with rules under Chapter XII of General Rules and Circular Order Volume I, explains the Mode of taking and recording Evidence in criminal cases. The following are the modes of recording evidence:

Section 273– It is mandatory to record all the evidence only in the presence of the accused when his personal attendance has been dispensed, the evidence must be recorded in the presence of a pleader.

Section 274– Magistrate shall record a memorandum of the substance of evidence in the court language and must be signed by the Magistrate.

Section 275(1)– In all the warrant cases, the evidence of each witness shall be in writing by Magistrate or under his direction if the Magistrate is unable to do so due to some physical or other incapacities, under his direction and superintendence, by the officer of the court who is appointed by the Magistrate on his behalf. The evidence under this subsection may also be recorded by audio-video electronic means.

Section 275(3)– This section permits the Magistrate to record evidence in question and answer form.

Section 276– In Session Court, the recording should be done in a narrative form. The presiding officer at his discretion can take down any part of the evidence in question and answer format which has to be signed by him

Section 278– When the evidence of a witness is completed, it should be read over to the accused or his pleader. This shouldn't be done at the end of the day when all the witnesses have been examined. The evidence if needed can be corrected by the accused.

Section 280– The presiding judge or magistrate is empowered to record the remarks.

Sequence of Examination of Witnesses - Examination-in-chief, Cross-examination.

Section 137 of the Indian Evidence Act, 1872 ('IEA') states that the examination of a witness shall be done by the party who calls him (prosecution) and it shall be called examination-in-chief. The cross-examination of the witness is done by the adverse party (defence). The re-examination is done subsequent to cross-examination by the prosecution.

Section 138 of the IEA, 1872 lays down the order of examination of the witnesses. It says that the witness should be first examined in chief and then cross-examined. The examination in chief is done by the party who calls the witness and cross-examination is done by the adverse party. If the party who called the witness so desires, can re-examine the witness with the permission of the Court.

The examination-in-chief and cross-examination should be connected to the relevant facts of the case. However, the cross-examination does not need to be restricted to the facts to which the witness has testified in examination-in-chief. The re-examination shall be related to the explanation of the matters referred to in the cross-examination. If any new matter has arisen in the re-examination, the defence may further cross-examine the witness upon that matter.

Procedure of Adducing Evidence in a Session Trial Presentation of Evidence by the Prosecution

Under Section 230 CrPC a date is to be fixed by the court for prosecution evidence. When the date is so fixed, the Judge will proceed to take all the evidence that may be produced by the prosecution in his support. On an application of the prosecution, the Judge will issue a process for compelling the attendance of witnesses or to produce any document or any other thing. The Judge has the discretion to permit cross-examination of any witness to be deferred until the other witness or witnesses have been examined or recall any witness for further cross-examination.

Presentation of Evidence by the Defence

As per S. 233 CrPC when the accused is not convicted under Section 232 he shall be called upon to produce evidence he may have in his support. If the accused desires he can give evidence in his defence in a written form and the Judge shall file it with the record. If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.

Procedure of Adducing Evidence Instituted on Police Report in Warrant Trial

Steps in Presentation of Evidence

- i) Section 242(1) - Fixing date for the examination of witnesses
- ii) Section 242(2) - Examination of Witnesses - On the application of the prosecution, court has the authority to issue summons to any witnesses and direct them to attend or produce any document or thing relevant to the case. The cross-examination by the defence is allowed by the Magistrate before some other witness has been examined.

- iii) Section 242(3)-Record of the Evidence- On the date fixed, the testimonies of witnesses of prosecution and any evidence provided to prove the accused had committed the offence by the prosecution is recorded by the Magistrate. The Magistrate may permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination by the defence.
- iv) Section 243 - Evidence of the Defence

The defence shall have an opportunity to present witnesses to defend the accused. This may include an alibi or individuals that can point out that the accused was present elsewhere from where the offence was committed. The witnesses presented by the defence can be cross-examined by the prosecution and their testimonies challenged. The purpose of defence witness is to create a reasonable doubt to point out that the accused may not have been the exact individual who committed the offence. However, the prosecution can challenge the testimony of said witnesses and isolate the accused to prove beyond a reasonable doubt that the offence was committed by him. After the prosecution is finished with the examination of the witness, the accused may enter his defence in a written statement or can be produced orally. After the accused has entered his defence, an application may be put to the Magistrate so that summons may be issued to perform cross-examination of any witness presented by the prosecution. An application can be made by the defence to the Magistrate to compel the attendance of a witness for the purpose of examination or cross-examination, or for the production of any relevant documents or other things. The Magistrate shall issue such directions unless he feels the application has been put for the purpose of delay or vexation or defeats the ends of justice and refuse the application on those grounds. The grounds of refusal of the application by defence shall be recorded by the Magistrate in writing. The reasonable expenses incurred by the witness in attending the Court for the purpose of the trial must be deposited in Court.

Court Witnesses

As per S 311, the Court can at any stage of any inquiry, trial or other proceedings, summon and examine any person as a court witness, if his evidence appears to the court that it is essential for the just decision of the case.

“ *The accused can be cross-examined if he is called as a witness who has made statements conveying his personal knowledge by reference to the contents of the document or if he has given his statements in court otherwise than by reference to the contents of the documents.*
State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808. ”

CHAPTER-10

ART OF CROSS EXAMINATION IN CRIMINAL CASES

If there is a skill that every lawyer should learn, it is undoubtedly the art of cross-examination. It is much more than asking a set of questions to witnesses, it is an art form that requires years of practice to master and perfect. This article aims to simplify the complexity of cross-examination and provide some guidelines for effective cross-examination.

What is cross-examination?

An examination is simply the process of asking relevant questions relating to the fact in issue to a witness. Examination in chief, Cross-examination, and Re-examination are the three ways to examine a witness. The Indian Evidence Act, prescribes examination of witnesses in civil and criminal cases. In civil cases, the plaintiff has the right to begin (O.XVIII, R.3, CPC), whereas the prosecutor or complainant begins the matter in a criminal case. The examination of a witness by the party calling him is chief-examination, and examination by the other party is cross-examination (S. 137 IEA.)

Importance of cross examination:

According to *Lord Herschell*: the importance of cross-examination is-

- To penetrate the inmost recesses of the human mind and find the source of men's action.
- To reveal their true motives.
- To tear the mask from the seemingly fair exterior and exhibit the real nature which lies behind.
- These are the duties of advocate and he must discharge them fearlessly and faithfully.

According to *Phipson*; the objects are to:

- Impeach the accuracy
- The credibility
- The general value of the evidence given in chief.
- To sift the facts already stated by the witness.
- To detect and expose discrepancies.
- To weaken, qualify or destroy the case of the opponent and to establish the party's own case by means of his opponent's witness.

Important points relating to cross-examination:

1. The opposite party is entitled to a fair opportunity to cross-examine.
2. The right of Cross-examination is available only to the adverse party. However, the party calling a witness can cross-examine that witness if he turns hostile S 154 IEA. A co-defendant is liable to cross-examination only when his interest is adverse to that of the defendant.
3. Conducting cross-examination without chief examination is not permissible S 145 IEA
4. If any evidence produced by police on the interrogation of a witness is prejudicial to the accused, cross-examination without examination in chief is permissible.
5. Non-appearance of the counsel on the date fixed doesn't prevent the party from recalling the witness for cross-examination.

6. Failure to present a witness for cross-examination after examination in chief will deprive the credibility of his evidence.
7. The court has the power to put questions to a witness if he is confused during cross-examination.
8. Cross-examination is conducted *viva voce*.
9. A fact is non-disputed after cross-examination if the opposite party fails to challenge any statement of fact made by a witness during the examination in chief.
10. If the adverse party waives the right to cross-examine, they cannot make any grievances about it.

Purpose and need to cross-examine

Cross-examination is the most effective tool in law to elicit the truth. Cross-examination is necessary to give credibility to the testimony made by a witness. Evidence given by a witness is admissible only if the opposite part tests the truthfulness by cross-examination.

Aim and subject-matter of cross-examination

Cross-examination aims to discredit the accuracy, credibility, and value of the evidence stated by the witness during a chief examination. It also enables the cross-examining party to run through the material facts given by the witness to discover and reveal any inconsistencies, or to reveal any concealed information and facts which will strengthen the case.

The aim of cross-examination differs for each type of witness, and they are as follows:

- Aim for cross-examining a fact witness (not an expert)
- Extracting favourable facts and information
- To dispute the validity and accuracy of the testimony.
- Challenging the credibility of the witness
- Using the witness to:
 - Strengthen the claim made by one of your witnesses
 - Impeaching the credibility of the opposite party's witness
 - Introduce your narrative to the court
- Aim for cross-examining an expert witness. In addition to the above aims, it may also have the following objectives:
 - To reduce the scope and need of the expert witness.
 - To pinpoint the area of his testimony that exceeds his competency.
 - To identify the examined and unexamined documents.
 - Questioning the credibility of the opinion on the grounds of:
 - a) Insufficient data
 - b) Unscientific procedure
 - c) Arbitrary assumption
- Changing the opinion to reduce its effect
- To establish the credibility of your expert.

Long years of practice are required to master the art of cross-examination, so it is not possible to enact a set of rules to govern it. However, the Evidence Act lays down a set of guidelines for cross-examination. They are as follows:

- Cross-examination must pertain to the relevant facts. The opposite party has the freedom to not restrict the questions to those introduced in the chief examination. (S.138)
- Cross-examining the witnesses who produce documents is not permissible. S 139 IEA
- Cross-examining a witness relating to previous statements made in writing or reduced into writing and on relevant issues is permissible. S145 IEA
- The cross-examining party can put any questions to the witness to:
 - Check his credibility.
 - Understand who he is and his role in life
 - Reduce his credit by damaging his character. Section 146 IEA
 - The witness is not excused from answering any relevant questions put to him Section 147 IEA
- Irrelevant questions are permissible if the allegation seriously affects the credibility of the witness.

The following are considered to be improper questions:

- Questions relating to remote matters, which does not affect the credibility of the witness
- Those allegations against the character of a witness, which has no relevance to the evidence given by him.
- During cross-examination, the party should avoid all indecent questions.
- If a witness turns hostile, the party calling him may cross-examine him

Preparation for cross-examination

Preparation is crucial for a successful cross-examination. One must prepare for both fact witnesses and expert witnesses.

Preparation for fact witnesses

The prosecution may call any witness from the list of witnesses presented. Preparation should start early and continue until the commencement of the trial. The first step is to collect the statements of the witnesses. After it is collected, the party who cross-examines should thoroughly check it to understand the case of the opposite party. The cross-examiner may discredit the witness with the inconsistencies in their statements.

Preparation for Expert witnesses

Preparation is a very crucial step before cross-examining an expert witness. They are masters of their fields. In every cross-examination of an expert, the lawyer must be well aware of the concerned areas of science. The vocabulary of the expert is a must know, or else they may fool you with scientific jargon. The cross-examiner should try to figure out the limitations of their field, presence of any bias, previous statements inconsistent with current opinion.

Preparation for Police witnesses

In criminal trials police witness are of great importance, the main categories of police witnesses are arresting officers, recovery officers, writer of F.I.R. etc. and Investigating Officers. It is very important for advocates that they should prepare themselves meticulously so that they can ably cross-examine the police witnesses.

Make a vivid study of all police papers viz. F.I.R., Tehrir, G.D reports, quaymi muqadma, recovery memo, arrest memo, C.D.s and relevant papers filed by investigation officers during investigation.

Anticipate the answers of police witnesses and prepare a plan according to answers.

Grill the witnesses on the issues of ravangi from concerned police station, assisting police officials, time of recovery or arrest, site plan, mode and manner of recovery, sealing of incriminating articles, presence/ absence of public witnesses, place of recording the statement under 161 CrPC, promptness and delay in recording of statement under section 164, application of several other laws and penal sections, inference drawn or conclusion of police report, questioning about the legal process of recording the statements submission of bonds, issuance of notices. Example; under section 41-A, etc.

Make sure you have a cross-examination plan

Cross-examination is one of the most reliable methods to extract the truth from the witnesses. However, it can act as a double-edged sword if not wielded correctly by harming the cross-examiner without producing the desired effect. It is a skill acquired with practice. Lawyers should refrain from a severe cross-examination unless there is a strong belief in breaking down a witness.

The chief examination determines the direction of the cross-examination. Therefore, the usual procedure is to take each relevant point and cross-examine the witness on it. By doing this, the opposite can identify the discrepancies in the chief examination and develop a line of defence.

Due to its unpredictable nature, it is necessary to have a proper plan before cross-examination. There is no hard and fast rule to plan for a cross-examination.

Given below is a basic framework of a cross-examination plan.

- The cross-examiner should make a list of the assertions and statements required from the witness. If necessary, try to force an admission.
- Separate the necessary points and create a list of facts and opinions that you plan to challenge. Eliminate everything unnecessary.
- Make the expert recognize the author of the book or passage that you wish to use for disproving him, then point out the contradictions. In this way, challenge the opinion of the expert.
- List out all the inconsistencies. After careful consideration, ascertain the important ones and use them against the witness.
- Given below is a basic plan to structure a cross-examination.
- Don't write all the questions that you wish to ask. Examine the witness in the form of a conversation. However, if you plan to impeach the witness by contradiction with a previous statement, a predetermined question can trap the witness and help to establish the inconsistency.
- Start with the examination with easy questions, as you further examine the witness and ask the more difficult ones.
- During the examination of an expert, create a situation where the expert must produce the required answers. For example, an expert is more likely to agree with the cross-examining party if he uses reliable materials to contradict the expert.
- Leave the witnesses guessing for your intention. Try scattering the connected points throughout the examination and connect them in the arguments.
- Structure the questions to get a favourable response. Realize that the cross-examination is not immune to failure, and frame some backup questions if things don't go according to plan.
- Always finish the cross-examination by making a strong and undeniable point.

Keep it short and simple

The cross-examiner should try to control the witness during the examination. Always reduce the complex questions into simple ones. Simple cross-examinations are easy to understand and dramatic. The whole point of a cross-examination is to obtain the truth from the witness. Lengthy questions may make comprehension difficult. A simple method is to check if you have to breathe while putting a question. If you have to, it's too long.

Avoid open-ended questions

If the answer to the question is not yes or no, then it is an open-ended question. The general advice given by lawyers is to avoid open-ended questions. The problem with an open-ended question is that the lawyer is asking a question to which he doesn't know the answer. By asking open-ended questions, the lawyer is giving control to the witness. At times an experienced lawyer may also use open-ended questions.

Example: After a series of questions relating to the credibility of a document, a lawyer asks, "where is the attestation of the document mentioned?" Although an open-ended question, the witness is compelled to make the answer to the point.

Know when to stop

If evidence given during chief examination is clear and conclusive, the opposite party need not cross. That would only strengthen the evidence. Also, there is no need to cross-examine the witness whose evidence he admits. A careless cross-examination may lead to the admission of previously inadmissible evidence.

Use only leading questions

A question that suggests the answers are called leading questions. Questions suggesting a subject is not a leading question. Leading questions are only allowed in cross-examination because its object is to elucidate the truth. The general rule is to compel the witness to say yes or no after every question.

Example: "Is true to say that you were present at the house of X during the murder?" to this question, the witness either answers yes or no.

The ability to use a leading question enables the cross-examiner to control the witness. The witness has to give specific answers.

Destroying the witness's credibility through cross-examination

Destroying the credibility of a witness is necessary to strengthen your case and to weaken the adverse party's case. The cross-examiner can choose the following methods to discredit the witness:

By Observation

- The cross-examiner can prove the inconsistencies and can elicit necessary information by making the witness's answer questions containing who, what, where, when, and how.
- Using the surrounding conditions against the witness.
- Identifying whether the case involves any hearsay evidence.
- Proving the incompetence of a witness.

By confusing him

- If a long time has elapsed, the cross-examiner can discredit the witness by challenging his memory.

- Confusing with other circumstances.
- Through reviewing documents and reconstruction from other sources.
- One of the easiest ways to discredit a witness is by establishing bias.

By changing the expression

- By rephrasing the words of the witness, the cross-examiner can reduce the impact caused by it.
- Another method to discredit the witness is by proving that the witness has exaggerated any part of the testimony.

Conduct during cross-examination

Maintaining a calm and composed mind is always advantageous during a cross-examination. Due to the unpredictable nature of cross-examination, a lawyer must always be on his feet. Try asking the questions politely but firmly. Maintain good eye contact. Always avoid a fight with a witness. If a witness incites you, stick to the backup questions. Listen to the witness carefully and always look for any inconsistencies in their statements.

Proper attitude of the court in respect of cross examination

Section 143 IEA is simple and plain, a court should not interfere with cross examination leading the witness of the opposite side, though putting into a mouth of the witness the very words of the defence leaves an unfavourable impression.

Generally, no interruption be allowed under any circumstances, so long as the cross examination is being fairly conducted.

Though it is not right that a Judge should interfere still it is highly desirable that the Judge should exercise some control over cross examination assuming inordinate length.

Limits of good sense and decency in cross examination

- The right to cross examination ought not to be turned into an engine of oppression.
- It should be in dignified and in a noble manner as is required by a learned professional.
- Witnesses not to be subjected to gross insults affecting the sanctity of their private life or some long forgotten, conduct of little use.
- Cross examination not to become the mouth piece of his client's revenge.

Conclusion

We can see that the area cross-examination covers is very vast. The guidelines in this write-up are not exhaustive but merely try to outline the elements of a good cross-examination. Constant training and practice is the only way to gain mastery over the art of cross-examination.

CHAPTER-11

IMPORTANT DOCUMENTS & THEIR MODE OF PROOF IN CRIMINAL CASES.

The term evidence has come from the Latin word "evident", which means "to show clearly" or to prove. The evidence contains everything that is used to reveal the truth or facts. In law, the person on whom the burden of proof lies has to produce the evidence before the court of law. It is also important that the evidence which is produced before the court should be true.

Types of Evidence

The types of evidence are as follows:

Direct evidence- It refers to the evidence directly about the real point in the issue. It is the declaration of the observer as to key certainty to be demonstrated. Example - The proof of an individual who says that he saw the commission of the demonstration that comprises of affirmed wrongdoing. The original document is also included in the indirect evidence. Direct evidence is generally clear and convincing. It is simply the hypothetical verification when the truth of the matter is demonstrated by a direct declaration or facts. Direct evidence also means that the person has heard, seen, perceived, form an opinion and after that revealed the facts.

Circumstantial evidence- *“Proof does not mean hard mathematical formula since it is impossible”*. It was told by **Justice Fletcher Moulton** in regard to circumstantial event. He also said that these proofs are strong, but sometimes it leaves a gap through which the accused escapes.

Documentary evidence refers to that evidence which is in Tangible, physical form. It is different from other kinds of evidence in many ways. Other kinds of evidence include oral evidence, circumstantial evidence, hearsay evidence, etc. Generally, the credibility of the documentary evidence is comparatively higher than other types of evidence.

According to the Indian Evidence Act, 1872, concerning documentary evidence, the act requires that generally the original should be produced because it is considered that copy of the document may contain omission or mistakes of a deliberate or accidental nature.

Documentary evidence is defined in the act as all documents produced for the inspection of the court. The purpose of producing documents is to rely upon the truth of the statement contained therein. This involves when a document is produced in court, analysis of three questions is taken into consideration:

- Is the document genuine?
- What are its contents?
- Are the statements in the documents true?

Explicit provisions regarding documentary evidence are contained in chapter V, Section 61-90 of the Evidence Act, 1872. These provisions provide for the detailed guidelines and procedure of how documentary evidence is to be admitted in a court of law. It also provides for the evidentiary value for such kind of documents.

Proof of content of documents (Section 61)

Section 61 of the act provides that the contents of documents may be proved either by primary or secondary evidence.

Section 3 defines documentary evidence- “Documentary evidence means all documents produced for the inspection of the court”. Documents are of two kinds: Public and private. Section 74 gives a list of public documents. Rest all other documents are regarded as private documents. The production of documents in courts is regulated by the Civil Procedure Code and the Criminal Procedure Code.

The contents of a document must be proved either by the production of the document, which is called primary evidence, or by copies or oral accounts of the contents, which is called secondary. However, it was held by the Hon'ble Supreme court that where there is documentary evidence, the oral evidence must not be given much weight.

When a document is not required to be registered, it is admissible, even though unregistered. An ex-parte affidavit without allowing the other party to test the veracity of its contents by cross-examination, cannot be proof of its contents.

Primary Evidence: Section 62

Section 62 provides for the provision of Primary Evidence. Primary evidence means the documents itself produced for the inspection of the court. Ingredients for section 62 are as follows:

- (i) Primary evidence means the document itself produced for the inspection of the court.
- (ii) Where a document is executed in several parts, each part is primary evidence.
- (iii) Where a document is executed in counterpart, each counterpart is primary evidence against the party executing it.
- (iv) Where several documents are made by a uniform process, such as painting, lithography, or photograph, each one is primary evidence of the contents of the rest.
- (v) Where several documents are made by one uniform process, but they are copies of the common original, they are not primary evidence of the contents of the original.

This section defines the meaning of the primary evidence, which means the documents itself is produced for inspection by the court. Where a document is executed in several parts, each part is the primary evidence of the document. Where a document is executed in counterparts, each counterpart is primary evidence.

Two wills in identical language were prepared by the process of typing in which the second copy was obtained by carbon impression. Both were duly executed and attested. Both were held to be original and not a copy of the other. The fact that the testator inserted a remark on one of the “true copy” would not alter their character.

Section 276 of the succession act 1925 requires that an application for probate or letters of administration should be made with the "will" annexed. Since this does not necessarily mean "original will", a copy certified by the sub-registrar was allowed to be annexed

Secondary evidence: Section 63

Section 63 provides for Secondary evidence means and includes:

1. Certified copies.

2. Copies made from the original by a mechanical process and copies compared with such copies.
3. Copies made from or compared with the original.
4. Counterparts, of documents as against the party who did not execute them.
5. Oral accounts of the contents of a document by a person who has seen it

Proof of documents by primary evidence: Section 64

Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Ingredients:

- (i) Documents must be proved by primary evidence.
- (ii) Secondary evidence can be given under the circumstances described under section 65.

A written document can only be proved by the instrument itself where the contents of any document in question, either as a fact directly in issue or the sub-alternative principal fact the document is proper evidence of its contents. But where a written instrument or document of any description is not a fact in issue and is merely used as evidence to prove some fact, independent proof is required.

Section 65 mentions cases in which secondary evidence relating to documents may be given. It provides certain emergencies in which secondary evidence concerning a document may be preferred. For example, when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved or when the original is of such a nature as not easily moveable etc.

Special Provision as to evidence relating to electronic record and admissibility: Section 65-A & 65-B

Section 65-A provides that the contents of electronic records may be proved in accordance with the provision of section 65-B. It may be noted that section 65-A & 65-B are new insertions to the original act and are inserted by an amendment in the year 2000. Earlier it was becoming a difficult task to prove the electronic evidence in courts as no explicit provision provided an authenticity to the electronic records and with the increasing use of electronic mediums and with the emergence of the digital era, it became imperative on Indian courts to make electronic records admissible to ensure justice in its truest sense.

According to section 65-B, any information contained in an electronic record which is printed on paper, stored, recorded, or copied in optical or magnetic media produced by a computer shall be deemed to be also a document provided condition mentioned in the section is satisfied.

The conditions shall be as follows:

1. Computer output containing the information was produced by a computer that was regularly used to store or process such information by a person having lawful control over the use of a computer.
2. Such information was regularly fed in such a computer during the ordinary course of activities.
3. The computer should be operating properly during the period for which the information is sought. Even if the computer was not operating during such a period, then the defect was not as such to affect the electronic record or the accuracy of its contents.

4. The information contained in the electronic record reproduced or is derived from such information fed into the computer in the ordinary course of the said activity.

A certificate is required by virtue of section 65-B if the statement is to be given, then following is to be duly regarded:

1. Identifying the electronic record containing the statement and describing how it was produced.
2. Giving such particulars of any device involved in the production of that electronic record as may be appropriate for showing that the electronic record was produced by a computer.
3. Dealing with any of the matters to which the conditions as provided above.

Proof of signature and handwriting of person alleged to have signed or written document produced: Section 67

If the document is alleged to be signed or to have been written wholly or in part by any person, the signature or writing or so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. Section 67A provides for proof as to digital signature

A statement is a written document made and signed by a witness, telling police what they know about a crime. Evidentiary is something constituting evidence or having the quality of evidence and something that relates to the evidence in a particular case.

Some Documents and their Evidentiary Value in Criminal Trials

Statement of witness u/s 161 CrPC not a substantive piece of evidence: The statement of a witness made during investigation u/s 161 CrPC is not a substantive piece of evidence but can be used primarily for the following limited purposes: (i) to contradict such witness by the accused u/s 145, Evidence Act. (ii) to contradict such witness also by the prosecution but with the leave of court. (iii) to re-examine the witness, if necessary. See: **V.K. Mishra Vs. The State of Uttarakhand, (2015) 9 SCC 588 (Three-Judge Bench). 32(A-2).**

No conviction merely on statement of witness u/s 164 CrPC: When a witness resiles from his earlier statement recorded by a Judicial Magistrate u/s 164 CrPC, then his previous statement u/s 164 CrPC may not be of any relevance nor it can be considered as substantive evidence to base a conviction solely thereupon. See: (i). **Somasundaram Vs. State, (2020) 7 SCC 722** (ii). **State of Karnataka Vs. P. Ravikumar, (2018) 9 SCC 614.**

Statement of witnesses' u/s 164 CrPC to be recorded by audio-video electronic means: It is necessary that the statements of eyewitnesses are got recorded during the investigation itself u/s 164 of the CrPC. In view of the amendments in Section 164 CrPC in 2009 w.e.f. 31.12.2009, such statement of witnesses should be got recorded by audio-video electronic means. The eye-witnesses must be examined by the prosecution as soon as possible. Statements of eye-witnesses should invariably be recorded u/s 164 CrPC as per the procedure prescribed. See: **Judgment dated 28.11.2017 of the Hon'ble Supreme Court in Criminal Appeal Nos. 2045-2046 of 2017, Doongar Singh & Others Vs. State of Rajasthan (paras 12 & 13).**

Section 164(1) CrPC as amended w.e.f. 31.12.2009 : A new Proviso substituted to sub-section (1) of Section 164 CrPC w.e.f. 31.12.2009 reads thus : "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 81 advocate of the person 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. "

Evidentiary value of statement recorded by the police in the course of an investigation under section 162 Cr.P.C.:

Every statement recorded by a police officer during the investigation is neither given on oath nor is tested by cross-examination. According to the law of evidence, the facts stated therein are not considered substantive evidence. But suppose the person making the statement is called a witness at the time of trial. In that case, according to the normal rules of evidence, his former statements could be used for corroborating his testimony in court or for showing how his former statement was inconsistent with his deposition in court with a view to discrediting him.

Section 162 of the Cr.P.C. prohibits the use of the statements made to the police during the course of the investigation for corroboration. It is based on the assumption that the police cannot be trusted for recording the statements correctly and that the statements cannot be relied upon by the prosecution for the corroboration of their witnesses as the statements recorded might be of self-serving nature. There is not a total ban on the use of the statements made to police officers.

The defence is not deprived of an opportunity to discover what a particular witness said at the earliest opportunity. In **Khatri vs. State of Bihar (1983)**, the Court has observed that the object of section 162 Cr.P.C is to protect the accused both against overzealous police officers and untruthful witnesses.

In the case of **State of U.P. V. M.K. Anthony 1985**, it has been ruled by the Hon'ble Supreme Court that S.162 does not provide that evidence of a witness in the court becomes inadmissible if it is established that the statement of the witness recorded during the investigation was signed by him at the instance of the police officer. Thus, the bar created by S.162 Cr.P.C. in respect of the use of any statement recorded by the police during the course of investigation is applicable only where such statement is sought to be used "at any inquiry or trial in respect of any offence under investigation at the time when such statement was made.

If any such statement is sought to be used in any proceeding other than an inquiry or trial or even at an inquiry or trial but in respect of an offence other than that which was under investigation at the time when such statement was made, the bar of s.162 would not be attracted. Section 162 of Cr.P.C is enacted for the protection of the accused. The bar created by S.162 has no application in a civil proceeding or in a proceeding under Art.32 or 226 of the constitution. It also has no application under s.452 of the code for disposal of property.

It is immaterial whether the statement recorded under S.161 Cr.P.C. amounted to a confession or admission. The statements falling under S.32(1) and S.27 of the Evidence Act are exceptions to this Rule. A dying declaration recorded by a police officer during the course of investigation becomes relevant under S.32 of the Evidence Act in view of the exemption provided by s.162(2).

Any part of such statement which has been reduced to writing may in certain limited circumstances be used to contradict the witness who made it. The limitations are:

- Only the statement of a prosecution witness can be used;
- Only if it has been reduced to writing;
- Any part of the statement recorded can be used; such part must be duly proved;
- It must be a contradiction of the evidence of the witness in Courts;
- It can be used only after the attention of the witness has been drawn to it or to those parts of it which it is intended to use for the purpose of contradiction.

The restrictions on the use of previous statements of witnesses imposed by Section 162 of the Code are confined in their scope to the use by the parties to the proceedings of such statement. However, the Court while examining a person as a Court witness under Section 311 of the Code or asking any question of any witness under Section 165 of the Evidence Act, may make use of the previous statement of such a witness and the restrictions put by Section 162 of the Code on the use of previous statements are not applicable in such a case.

Evidentiary value of statements made during the period of investigation but not during the course of the investigation:

The restrictions imposed on the use of statements before police officer applicable only to such statements as are made to the police officer during the course of the investigation. The words 'in the course of' imply that the statement must be made as a step in a pending investigation. Any other statement, though made during the time investigations were going on, is not hit by the prohibitory rule of Section 162 of the Code of Criminal Procedure. Therefore, such a statement can be used for corroborating or contradicting purposes according to the normal rules of evidence contained in Sections 157 and 145 of the Evidence Act.

In **Baleshwar Rai v. State of Bihar (1962)**, it has been held that it was admissible as an admission as to the motive of the accused under Section 21 of the Evidence Act, when an anonymous letter was written by the accused to the police officer complaining about the act of a Chowkidar, who was ultimately murdered by the accused.

Evidentiary value of Confession:

Confession is not defined in the Act. Confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime. A confession may occur in many forms. When it is made to the court itself, then it will be called judicial confession, and when it is made to anybody outside the court, in that case, it will be called extra-judicial confession. It may even consist of conversation to oneself, which may be produced in evidence if overheard by another.

In **Sahoo v. the State of U.P. (1966)** the accused who was charged with the murder of his daughter-in-law with whom he was always quarrelling was seen on the day of the murder going out of the home, saying words to the effect:

“I have finished her and with her the daily quarrels.” The statement was held to be a confession relevant in evidence, for it is not necessary for the relevancy of a confession that it should be communicated to some other person.

Section 164 of Cr.P.C. empowers any Metropolitan or Judicial Magistrate whether or not he has jurisdiction in the case to record any confession or statement of a person made in the course of investigation by the police, or (when the investigation has been concluded) at any time afterwards but before the commencement of the inquiry or trial. It applies only to the statements recorded in the investigation under Ch. 12 and is limited to the period before the inquiry or trial.

The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

A confession to the police officer is the confession made by the accused while in the custody of a police officer and never relevant and can never be proved under Section 25 and 26 of IEA. Now, as for the judicial confession and confession made by the

accused to some magistrate to whom the police have sent him for the purpose during the investigation, they are admissible only when they are made voluntarily.

If the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds, which would appear to him reasonable for supporting that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him, it will not be relevant and it cannot be proved against the person making the statement as per section 24 of the Act.

A confessional statement made by the accused before a magistrate is a piece of good evidence and the accused be convicted based on it but a confession made to a police officer is not admissible evidence in the Court of law.

Evidentiary Value of FIR:

First Information Report Commonly known as F.I.R is the first and foremost important step to set the criminal law in motion. Though the term F.I.R is nowhere mentioned in the code of criminal procedure but the information given under Section 154 of Cr.P.C. is popularly known as F.I.R.

Provision of section 154 makes possible that any person aware of the commission of any cognizable offence may give information to the police and may, thereby set the criminal law in motion. Such information is to be given to the officer-in-charge of the police station having jurisdiction to investigate the offence. The information so received shall be recorded in such form and manner as underprovided in Section 154. This section is intended to ensure the making of an accurate record of the information given to the police.

The evidentiary value of FIR is far greater than that of any other statement recorded by the police during the course of the investigation. It is a settled principle of law that a FIR is not a substantive piece of evidence, that is to say, it is not evidence of the facts which it mentions. However, its importance in conveying the earliest information regarding the occurrence cannot be doubted.

In the case of *Hasib vs. State of Bihar (1972)*, the Hon'ble Apex Court has held that though the FIR is not substantive evidence, it can be used to corroborate the informant under S.157 of the Indian Evidence Act, 1872, or to contradict him under S.145 of the said Act, if the Informant is called as a witness at the time of trial.

Evidentiary value of dying declaration:

Sham Shankar Kankaria vs. State of Maharashtra (2006) is a case where the basis of conviction of the accused is the dying declaration. The Hon'ble Apex court in this case held that The situation in which a person is on the deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in the law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded, it will result in the miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence.

Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in

its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination.

The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, it can undoubtedly base its conviction without further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

The dying declaration must be made by the deceased only. In the case of **Such and Pal vs. Phani Pal (2004)**, the Hon'ble Supreme Court held that the declaration made by the deceased could not be called a dying declaration because it was not voluntary and she did not give answers, it was her husband who was answering.

Dying declaration when made u/s 161 CrPC & its appreciation: Statement u/s 161 CrPC of victim of Section 302 IPC—Victim lodged FIR and got his statement recorded u/s 161 CrPC. before his death. The victim and witness recognized the accused at night. The accused was the grandson of deceased. DD was corroborated by an ocular witness, investigating officer and constable. Statements of victim u/s 161 CrPC was found worthy to be relied on as DD. **See: Gulab Singh Vs. The State of U.P., 2003(47) ACC 161 (All)(DB)**

Evidentiary value of successive dying declarations: Where there are multiple dying declarations, the duty of the court is that each dying declaration should be considered independently on its own merits. One cannot be rejected because of contents of other in cases where there is more than one dying declarations; it is the duty of the court to consider each one of them in its correct perspective and satisfy itself that which one of them reflects the true state of affairs. **See: (i) Mukesh Vs. State for NCT of Delhi & Others, AIR 2017 SC 2161 (Three- Judge Bench)**

Evidentiary value of articles seized:

The police also conduct search and seizures. The search and seizures should not be unreasonable. They may be conducted by police with or without a warrant. In case a search is conducted on a warrant issued by a Magistrate it must invariably, contain the following details:

- The information as to the statement of facts showing probable cause that a crime has been committed.
- A specification of a place or places to be searched.
- A reasonable time limit within which it may be conducted.

The police can also conduct a search without a warrant when it is incidental to be a lawful arrest or where the search object is a mobile vehicle that can quickly be removed out of police jurisdiction or when the accused has consented to it. The burden of proving the consent, however, lies upon the prosecution.

The legal provisions relating to search and seizures are so framed to maintain a balance between the security of persons on the one hand and the protection to police in discharging its duty properly on the other. Thus, during the investigation, the police are empowered to make a search, order production of documents, seize any suspicious property, call witnesses, require them to attend court, and arrest persons suspected of having committed a crime, without a warrant. After the investigation, a police report is prepared upon which proceedings are instituted before a Magistrate. The law requires that every investigation should be completed without undue delay.

As soon as any property is seized, the Investigating Officer should hand over the property along with a copy of the seizure memo to the Officer-in-charge of the Malkhana who will make an entry in the Malkhana Sub-Module or Seized Property Register.

Record of seized property shall be maintained in the Malkhana Sub-Module of CRIMES or in the prescribed form in all the CBI Branches.

Whenever a court permits inspection of documents kept in the Malkhana, the Law Officer-in-charge of Malkhana or the SP of the Branch should make an Officer responsible for supervising such inspection. Such designated Officer shall be responsible for ensuring the safety of all the documents.

All properties seized during an investigation under the provisions of the Cr.P.C. should invariably be forwarded to the Court in order to obtain orders under Section 457 Cr.P.C. for their custody during the pendency of the case. CBI should retain no case property relevant to the trial after the trial of the case has commenced unless it has been so by the Court of competent jurisdiction.

A complete file of photocopies of seizure memos should be maintained for the purpose of checking the Seized Property Register. Properties relating to cases recommended for suitable action may be disposed of after giving information to the Department concerned as mentioned in the chapter pertaining to the Preliminary Enquiry.

Chargesheet

Evidentiary value of charge-sheet u/s 173(2) CrPC: A charge sheet submitted by an investigating officer u/s 173(2) CrPC is a public document within the meaning of Sec. 35 of the Evidence Act but it does not imply that all that is stated in the charge sheet as having been proved. All that can be said is that it is proved that the police had laid a charge sheet in which some allegations have been made against the accused. **See-- Standard Chartered Bank Vs. Andhra Bank Financial Services Ltd., (2006) 6 SCC 94 (Three-Judge Bench)**

Only those things in the site plan are admissible in evidence which are based on personal knowledge of I.O. as to what he saw and observed. **See: State of UP Vs. Lakhan Singh, 2014 (86) ACC 82 (All)(DB).**

Test Identification Memo

TIP not substantive evidence: TIP does not constitute substantive evidence. Court can accept evidence of identification of the accused without insisting on corroboration. **See: 1. Santosh Devidas Behade Vs. The state of Maharashtra, 2009 (4) Supreme 380 2. Mahabir Vs. State of Delhi, AIR 2008 SC 2343**

Delayed TIP with 100% precision held proper: Where in a case of rioting and firing at the police personnel causing the death of senior police official and injuries to others, TIP was held after 55 days of the incident, but five out of the seven eyewitnesses had identified the accused persons with 100% precision, the Hon'ble Supreme Court held that the delay in conducting the TIP was meaningless and the TIP was held proper. **See: State of UP Vs Wasif Haider and others, (2019) 2 SCC 303**

Ballistic experts' opinion & its appreciation:

Where the ballistic expert had given the opinion that the empty cartridges recovered from the spot of occurrence matched with the injury, it has been held that it was a valuable piece of evidence and could not be brushed aside. **See: Leela Ram Vs. The state of Haryana, (1999) 9 SCC 525.**

Ballistic experts opinion & ocular testimony when contrary : Where the eyewitnesses of the murder had stated that the injuries from the firing of the pistol were on the leg of the deceased but the post mortem report indicated the injury on part slightly higher than the thigh and there was nothing on record to impeach the testimony of the

eyewitnesses, it has been held that in the absence of ballistic experts opinion and contradictions regarding the position of injuries, it would not be sufficient to discard the trustworthy testimony of the eyewitnesses. **See: Ajay Singh Vs. The state of Bihar, (2000) 9 SCC 730.**

PMR is a public document, its certified copy is admissible: Since the PMR, FIR & other such documents or public documents therefore their certified copies would be admissible in evidence u/s 63 of the Evidence Act. **See: Vimlesh Kumari Vs. Rajendra Kumar, 2010 (4) ALJ (NOC) 422(All)**

Evidentiary value? As per Sec. 45, Evidence Act, a doctor is a medical expert. It is well settled that medical evidence is only evidence of opinion and it is not conclusive, and when oral evidence is found to be inconsistent with medical opinion, the question of relying upon one or the other would depend upon the facts and circumstances of each case. **See: Mahmood Vs. The State of U.P., AIR 2008 515.**

Courts should give due regard to the expert opinion u/s 45 of the Evidence Act but not bound by it: The courts normally would look at expert evidence with a greater sense of acceptability but the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory and unsustainable. The purpose of an expert opinion is primarily to assist the court in arriving at a final conclusion, but such a report is not a conclusive one. The court is expected to analyse the report, read it in conjunction with the other evidence on record and form its final opinion as to whether such report is worthy of reliance or not. Serious doubts arise about the cause of death stated in the post-mortem reports in this case. **See: Tomaso Bruno & Another Vs. State of Uttar Pradesh, (2015) 7 SCC 178 (Three-Judge Bench)**

No formal proof of certain documents

Under section 294 of the Code, where any document is filed before the Court, the specifics of each document must be included in a list and the prosecution, the accused or the pleaders as per the case, are called upon to admit or deny the veracity of such documents.

The list of documents shall be in such a format which is prescribed by the State Government.

Where the sanctity of any document is not disputed, then it will be considered as a piece of evidence in a trial or other proceeding under the provisions of this Code, without proof of the signature of the person to whom it claims to be signed, however, the Court may, in its discretion, require such signature to be proved.

Sowam Kisku and Ors. vs The State of Bihar (Now Jharkhand) on 5 January, 2006
Equivalent citations: 2006 CrLJ 2526

In this background, when we look at the provisions of Section 294 Cr. P.C., it could be seen that if any document is to be filed before the Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, shall be called upon to admit or deny the genuineness of each such document and that the list of documents shall be in such form as may be prescribed by the State Government. The prosecution, not having taken recourse to Section 294 and the postmortem certificate having not fallen within the ambit of Section 293, cannot examine the compounder for marking the post mortem certificate to establish the cause of death of the deceased.

Evidence of the formal character of an affidavit

Section 296 CrPC mentions that if any evidence given by the person is of a formal nature, the affidavit has to be used for the same and will be subject to all such exceptions be read in evidence in any inquiry, trial or other proceeding under this Code.

Moreover, the court, if it thinks fit, or on the application of the prosecution or the accused, can summon and interrogate the person based on the facts of the affidavits.

The object of this section is to accelerate the disposal of cases.

In the case of **Shankaria vs. the State of Rajasthan**, Equivalent citations: 1978 AIR 1248, 1978 SCC (3) 435

It was held that if the witness has taken the specimen fingerprints of the accused filed an affidavit, then his non-examination is immaterial because the evidence is formal in nature and is admissible in a court of law.

Conclusion

Evidence is an imperative part of every case, whether it is a criminal case or a civil suit, as it validates a fact. The facts can be used in evidence for deciding as well as proving the disputed facts. Evidence attaches weight to the facts quoted as evidence. Thus, various types of evidence can be used for proving and disproving facts. Moreover, evidence helps in curbing down the time dedicated to a particular case. Thus, it can be concluded that the evidence is for judicial behaviour like the reasoning for logic

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It can't be gainsaid that the right of a victim under the amended CrPC are substantive, enforceable, and are another facet of human life. The victim's right, therefore, cannot be termed or construed respectively like brutumfulmen.

Jagjeet Singh and others v. Ashish Mishra alias Monu and another, AIR 2022 SC 1918: AIR Online 2022 SC 552

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CHAPTER-12

USE OF SCIENTIFIC EVIDENCE: BALLISTIC

Firearms Wounds, Nature, Range and Direction of Fire

General observations- The popular conception of firearms is arm or weapons which are discharged by the fire exploding gun powder.

A gun is a firearms or weapon, from which balls or other projectiles are discharged, usually by means of gunpowder.

There is a lot of difference between wounds inflicted by gunshot and wounds caused by other instruments. In the former case, tissue is actually destroyed; in the latter case, tissues may only be cut.

Governing Act

The Arms Act, 1959 is an Act of Parliament of India which **regulates matters** relating to **acquisition, possession, manufacturing, sale, transportation, import and export, licencing of arms and ammunition**. It also empowers government officials to exercise powers concerning the matter. Like every other substantive law, it lays down the **penalties and punishments** associated with the violation of rules related to this act.

“**Ammunition**” means ammunition for any firearm, and includes—

1. **Rockets, bombs, grenades, shells** [and other missiles],
2. Articles designed for **torpedo service and submarine** mining,
3. Other articles containing, or designed or adapted to contain, **explosive, fulminating or fissionable material or noxious liquid, gas or other such thing, whether capable of use with firearms** or not,
4. **Charges for firearms** and accessories for such charges,
5. **Fuses and friction** tubes,
6. **Parts of, and machinery for manufacturing, ammunition,** and
7. Such ingredients of ammunition as the Central Government may, by notification in the Official Gazette, specify in this behalf;

“**Arms**” means articles of any description designed or adapted as weapons for offences, or defence,

and **includes firearms,**

sharp-edged and other deadly weapons,

and parts of, and machinery for manufacturing arms,

“**firearms**” means arms of any description designed or adapted **to discharge a projectile or projectiles of any kind by the action of any explosive** or other forms of energy, and includes, —

1. Artillery, hand-grenades, riot-pistols or weapons of any kind designed or adapted for the discharge of any noxious liquid, gas or other such things,
2. Accessories for any such firearm designed or adapted to diminish the noise or flash caused by the firing thereof,
3. Parts of, and machinery for manufacturing, firearms, and
4. Carriages, platforms and appliances for mounting, transporting and serving artillery;

“**prohibited arms**” means—

1. Firearms so designed or adapted that, if pressure is applied to the **trigger, missiles continue to be discharged until pressure is removed from the trigger** or the magazine containing the missiles is empty, or

2. Weapons of any description designed or adapted **for the discharge of any noxious liquid, gas or other such thing, and includes artillery**, anti-aircraft and anti-tank firearms and **such other arms as the Central Government may, by notification in the Official Gazette**, specify to be prohibited arms;

Firearm of a particular variety

When the offender uses a firearm of a particular variety toward killing his victim and escapes unidentified and unrecognized, the role of the crime investigator is very important so should investigate on following points
the nature and character of a wound or wounds;

- The nature of the firearm,
- The type of bullet or bullets used;
- The nature and make of the cartridge.

For a solution of these and allied points, a crime investigator has so often to take expert opinions from those who may have specialized themselves in firearms in general and their components in particular.

Firearms- General- Firearms are of many forms and descriptions. Such arms are being improved every day for as their usage, purpose or effect is concerned. New types of arms and new patterns of barrels, bullets and cartridges are being constantly evolved and invented.

Shotguns- The barrels of shotguns have smoothbores. The inner side of the barrel is not rifled.

Shotguns are generally double- barreled, the two barrels' side by side. Sometimes the two barrels are placed one over the other which give the gun the designation of 'Over and under' gun

"Automatic shotguns" -Such "automatic" shotguns are called "autoloaders" in America, and they are of types generally known as the Remington and Winchester. In Europe, they are termed "browning". In common parlance, they are called "pump guns"

Sporting rifles- The calibers of guns /rifles of this description are from .22 to .600. Their action assumes numerous forms. A large majority of sporting rifles are made with bolt actions and magazines, as in military rifles.

Meaning of Caliber

(Internal diameter of the gun barrel bore regardless of how or where the bore is measured and whether or not the finished bore matches that specification. It is measured in inches or in millimeters. For example, a ".45 caliber" firearm has a barrel diameter of roughly 0.45 inches (11 mm). Barrel diameters can also be expressed using metric dimensions. For example, a "9 mm pistol" has a barrel diameter of about 9 millimeters.)

Self loader” or “semi-automatic” –There is a class of ‘self-loader or ‘semi –automatic’ weapon. The trigger has to be pressed again for every shot that self-loaders fire. The appearance of a self-loading pistol is very much different from that of a revolver. Numerous are the makes and forms of self-loading pistols.

Revolvers- A revolver is, in fact, a repeating pistol, as it were. The cylindrical magazine rotates immediately in the rear of the barrel. This circumstance accounts for the name 'revolver'. Five or six cartridges are held in the 'cylinder'. Each cartridge is in a separate chamber. Each chamber can be aligned in turn with the bore. When a shot is fired, the hammer is cocked. The cocking of the hammer has the effect of rotating the cylinder. Thus, the next cartridge can be fired. Without reloading, five or six shots can be fired in quick succession. In the 'single action' revolver, the hammer must be coked by hand after each shot.

Arms Wounds, Nature, Range and Direction of Fire

In the investigation of cases in which firearms have been used number of important points of medico-legal and technical nature may arise in connection with the injuries sustained by the victim. One such point is the nature of the firearm wounds and the type of firearm that caused it.

In general, the wound produced by the firearm is dependent on the size of the missile and the speed with which the missile strikes the body.

Wounds of the entrance- The size and velocity of the bullet are the two most important factor in the production of the wound.

As the slug strikes the skin, it is not only moving forward at a relatively high velocity, but it is also rotating rapidly as the result of the spin or twist imparted to it by the rifling or lands and grooves in the barrel.

What as the distance from which the shot was fired? - This is one of most important point which often crops up before a criminal Courts in a case in which the firearm is said to have been used during the course of occurrence.

Ballistic and medical experts are frequently examined in a case on this being important question. The experts give approximate answers about the distance by considering the appearance of powder grains on the skin and how they may have penetrated the clothing.

it is well known that different kinds of smokeless powder will vary widely in the distance to which they will project unburnt powder grain when used in the same cartridge.

It is thus not safe to give an opinion about the distance from which the shot was fired by noting down the powder burnt and unburnt powder on the surface.

Range of shot- the distance from which a shot has been fired is calculated from the presence or absence of scorching, singeing, blackening and tattooing. The determination of range is one of the important matters on which the opinion of a Ballistics experts is quite often sought.

It was held that no hard and fast rule can be laid down for estimation of distance from the presence of unburnt or partially burnt grains. **Horilal v. State of U.P. (2007) 2 SCC (Cri.) 581**

Scorching- Scorching is also known as burning or charring. Scorching is the discoloration resulting from burning by the flame or ho gases that issue from a firearm.

The presence of scorching is a clear indication that the firearms has been discharged from a close range.

In Nath Singh v. State of U.P, 1980 SCC (Cri) 968, it was observed that charring is an indication that these fatal shots were fired at the deceased from a very close range.

Singeing of hairs. - Around the wound up to a short distance the hairs due to flame are burned and signed. The distance approx may be in between 2 to 6 inches.

Blackening –Blackening is also known as smudging. Blackening generally consists, wholly or largely, of smoke produced by the combustion of the powder.

In Vineet Kumar Chauhan vs. the State of U.P on 14 December, 2007, the Hon'ble Supreme Court has held that -

It cannot be laid down as a general proposition that in every case where a firearm is allegedly used by an accused person, the prosecution must lead the evidence of a Ballistic Expert to prove the charge, irrespective of the quality of the direct evidence available on record. **It needs little emphasis that where direct evidence is of such an unimpeachable character, and the nature of injuries, disclosed by post-mortem notes is consistent with the direct evidence, the examination of Ballistic Expert may not be regarded as essential.**

However, where direct evidence is not available or that there is some doubt as to whether the injuries could or could not have been caused by a particular weapon, examination of an expert would be desirable to cure an apparent inconsistency or for the purpose of corroboration of oral evidence.

Gurcharan Singh vs State of Punjab on 10 August, 1962

Equivalent citations: 1963 AIR 340, 1963 SCR (1) 236

When the evidence of ballistic expert essential

It is possible to imagine cases where the direct evidence is of such an unimpeachable character and the nature of the injuries disclosed by post mortem notes is so clearly consistent with the direct evidence that the examination of a **ballistic** expert may not be regarded as essential. Where the direct evidence is not satisfactory or disinterested or where the injuries are alleged to have been caused with a gun and they prima facie appear to have been inflicted by a rifle, undoubtedly the apparent inconsistency can be cured or the oral evidence can be corroborated by leading the evidence of a **ballistic** expert. In what cases the examination of a **ballistic** expert is essential for the proof of the prosecution case, must naturally depend upon the circumstances of each case.

A single gunshot can cause multiple fire arm injuries: A single shot fired from a double-barreled gun can cause multiple injuries. See: Om Pal Singh Vs State of UP, AIR 2011 SC 1562.

Opinion of the ballistic expert

In the case of **S.S. Ajmer Singh v. State of Punjab**, it was held that if there is no ground for not to believe the opinion of a ballistic expert, then the opinion of ballistic expert is reliable.

Police officer when can be treated as a ballistic expert

In case of Brij Pal v. State (1996) 2 SCC 676: 1996 SCC (Cri) 392: 1996 Cr LJ 1677. it was held that police personnel must be treated as ballistic expert if he is having a

certificate of technical competency and armour technical course and also having long experience of inspection, examination, and testing of fire arms and ammunition.

Double barrel gun

Absence of expert opinion. –Even in the absence of any evidence of an armourer or an expert of that type, evidence of a Police Officer who is trained in handling guns can be accepted. The Hon’ble Apex Court, therefore, confirm the conviction and order of sentence passed against him. **Jarnail Singh v. State of Punjab, AIR 1999 SC. 321**

Recovery of the incriminating article under s 27 evidence Act

The exact information given by the accused while in custody, which led to the recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and prosecution that information is given should be recorded and proved, and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events.

The extent of information admitted should be consistent with understandability. The mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given. **See: Bodh Raj Vs. State of J & K, AIR 2002 SC 3164 (para 18).**

Mere recovery of incriminating article u/s 27 of the Evidence Act on pointing out of the accused without establishing its connection with the crime or the ownership etc. not relevant and not reliable. **Digamber Vaishnav Vs. The state of Chhattisgarh, AIR 2019 SC 1367**

“*Fingerprint evidence has long been the best-known form of forensic evidence, but there are also voiceprints, shoeprints, tire marks, bite marks, tool marks, ballistic examinations, handwriting analysis, hair and fiber matching, and many more, including less well-known ones such as the analysis of bloodspatter patterns.*”

*G. Colman - Cross Examination: A Practical Handbook, CreateSpace Independent Publisher (2017)

CHAPTER-13

MEDICO LEGAL EVIDENCE

Introduction

Medico-Legal Evidence is also the form of documentary evidence prepared by the expert and collected by the I.O. or in case of a complaint by the complainant or victim. As you know that this the era of science and technology. Due to the progress of the technology, the equipment in respect of medico-legal Evidence has been developed day by day. The scientific evidence is more reliable than other shreds of evidence; hence the importance of Medico legal undoubtedly enhances. Even though the concept of medico-legal is very vast but in this write-up, we will concentrate on injuries.

Types of Injury

In a simple term, we can say Injury may be simple or grievous in nature. Based on medico-legal, it can be divided as below-

- **Bruise or Contusion**

This is a simple kind of Injury that has been caused by a blunt object. It can occur buy fall down. It has swelling and pain in that part of the body where Injury caused. It has called Gumra or Nilgoo Nishan. Such kind of Injury exist inside the skin means the skin has not been rip up. This type of Injury has changed its colour after three days. The formula of VIBGYOR has applicable in this format RVIBGYO.

- **Abrasion**

In this Injury, the upper layer of the skin has removed. It may be caused by the fall down in a rough place, through biting by nails or teeth. There is very little bleeding in such kind of Injury. It may cause immediately crusting of the Brown colour over the Injury.

- **Wound**

A wound is defined as the forcible solution of continuity of any of the soft tissues of the body, including the skin, mucous membrane or cornea. It may be below kinds-

1. Incised wound.
2. Punctured wound.
3. Lacerated wound.
4. Firearm wound.

Nature of the Injuries-

As you know, Injury may be simple or grievous in nature, but in respect of appreciation of medico-legal injuries, it may be bifurcated as follows-

- Accidental Injuries.
- Suicidal Injuries.
- Homicidal Injuries.

CHAPTER-14

ADDUCING SCIENTIFIC EVIDENCE & ITS MODE OF PROOF

Section 3 of the Evidence Act describes the word 'Evidence' as the statement made before court and document, including an electronic record, which is produced before the court for inspection. Chapter III, IV and V of the evidence act deals with proof and proof of oral and documentary Evidence, respectively. Any fact except the content of the document can be proved by oral evidence, and it must be direct. On the other hand, content of the document can be proved by the document itself, i.e. primary Evidence or, in the absence of it, by secondary Evidence. During the course of the trial, a fact is said to be proved if the court, after considering the matter before it either believe in the existence of that fact or considers its existence on the benchmark of a common prudent man.

Scientific Evidence plays a vital role in proving a fact where there is a lack of cogent and direct oral and documentary evidence. It lends corroboration to a fact that is though proved by another evidence but needs some assurance to enable the court to come to a definite conclusion. Scientific Evidence is taken resorted to in most criminal cases but it also very useful in civil cases too.

Scientific Evidence is based on the following scientific tests -

- (i) D.N.A. (Deoxyribose Nucleic Acid)
- (ii) R.N.A. (Ribo Nucleic Acid)
- (iii) Lie-Detector Test
- (iv) Polygraph Test
- (v) Brain-Mapping Test (P300)
- (vi) Narco Analysis Test (Also known as Truth Serum Test)
- (vii) Voice Analysis Test
- (viii) Finger Print Test
- (ix) Handwriting Test

D.N.A. and R.N.A. test

D.N.A. and R.N.A. are blueprint of human zenom which carry vital information with it which fix the identity and exclusiveness of accused. We are witnessing the growing trend of use of ultra modern technology by accused in committing crime. Some times there are blank cases where no witness is available to prove the involvement of accused in that case though the committal of crime has been proved. In such situation the role of D.N.A. and R.N.A. analysis becomes more relevant.

Explaining the meaning and role of 'D.N.A.' in judicial trial Honourable Supreme Court in Dharam **Deo Yadav Vs State of UP, (2014) 5 SCC 509**, held that-

'D.N.A.' stands for deoxyribonucleic acid, which is the biological blueprint of every life. D.N.A. is made up of a double-stranded structure consisting of deoxyribose sugar and phosphate backbone, cross-lined with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines. The most important role of the D.N.A. profile is in identification, such as an individual and his blood relations such as mother, father, brother, and so on. Successful identification of skeleton remains can also be performed by D.N.A. profiling. D.N.A. usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones etc.

Further in **Anil @ Anthony Arikswamy Joseph Vs. The state of Maharashtra, (2014) 4 S.C.C. 69** Hon'ble Apex Court explained the source, from where D.N.A. can be obtained and held that,

D.N.A. is a molecule that encodes the genetic information in all living organisms. D.N.A. genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, the D.N.A. profile has also shown a tremendous impact on forensic investigation. Generally, when the D.N.A. profile of a sample found at the scene of crime matches with the D.N.A. profile of the suspect, it can generally be concluded that both the samples have the same biological origin. D.N.A. profile is valid and reliable, but the variance in a particular result depends on the quality control and quality procedure in the laboratory.

There must not be any confusion as to 'D.N.A.' sampling and 'D.N.A.' profiling. D.N.A. sample is obtained from the person of accused/victim by an authorised medical person on his being arrested for the purpose of comparison with D.N.A. of material found on the person of victim/accused or on the place of occurrence. If both D.N.A. found to be the same, it becomes a major and important chain to connect the accused with the crime. While D.N.A. profiling which is being used these days to create a database of D.N.A. of suspected criminal in order to make law enforcing agency to find out real accused on the basis of matching of D.N.A. Supreme court in **Selvi Vs. The state of Karnataka, (2010) 7 SCC 263** distinguished D.N.A. sampling and D.N.A. profiling in the following word,

D.N.A. profiling technique has been expressly included among various forms of medical examination in the amended Explanation to Sec. 53 CrPC. D.N.A. Profile is different from the D.N.A. sample, which can be obtained from bodily substances. A DNA profile is a record created on the basis of D.N.A. samples made available to forensic experts. Creating and maintaining D.N.A. profiles of offenders and suspects are useful practices since newly obtained D.N.A. samples can be readily matched with existing profiles already in law enforcement agencies' possession. Matching of D.N.A. samples is emerging as a vital tool for linking suspects to specific criminal acts.

Importance of DNA Test in Criminal Cases

Criminal courts are obliged to decide the case on the basis of evidence adduced by parties. In criminal cases prosecution has to prove its case on the touchstone of beyond reasonable doubt. One cannot be ignorant of the fact that offences against children and women, apart from offences of other nature are increasing day by day in recent time. And it has been increased many fold in recent period in comparison to a decade ago. This fact culminates in docket explosion before court. In order to reach to a definite conclusion as to culpability of accused and also to do complete justice courts in india are relying more and more on scientific evidence particularly on DNA analysis.

Hon'ble Supreme court in **Santosh Kumar Singh Vs. State through C.B.I., (2010) 9 SCC 747** discussed the evidentiary value of D.N.A. report and held that,

'In the case of rape with murder, it has been held by the Hon'ble Supreme Court that the D.N.A. report must be accepted as scientifically accurate & an exact science. Interpreting the provisions of Sec 53 & 53-A CrPC, it has also been held that the court cannot substitute its own opinion for that of an expert, specially in the case of a complex subject like D.N.A. profiling.

D.N.A. and R.N.A. test is vital Evidence for deciding question related to paternity of a child, identifying the accused of offence like rape, murder, identifying the body of victim/deceased. Section 53 A of Cr.P.C. has made it obligatory for authorized medical practitioner to conduct an examination of a person who is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford Evidence as to the commission of such offence, on request of the police officer concerned. During the

course of the medical examination of such accused medical practitioner has to mention the material taken from the person of the accused for D.N.A. profiling. Likewise, Sec. 164 A of Cr.P.C. cast a duty on investigating officer to get medical examination of a victim of rape done by competent medical practitioners, and medical practitioners are bound to mention in its report the description of material taken from the person of the woman for D.N.A. profiling. Report given by such medical practitioner will be part of the report under section 173 of CrPC.

For the purpose of section 53A and 54 -

- a. "examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and fingernail clippings by the use of modern and scientific techniques including D.N.A. profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

Admissibility and Evidentiary value of D.N.A. report

D.N.A. report is scientific Evidence that is based on scientific procedure and methodology; thus, it has greater evidentiary value and can be trusted by the court, if the factual matrix of case is proved. But for making it reliable and trustworthy, it is also important to maintain utmost care and caution in collecting D.N.A. sample and also to follow the scientific process and procedure, prescribed for this purpose.

The Hon'ble Supreme Court of India in **Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra, 2005 CrLJ 2533 (S.C.)** discussed the pre-conditions for the admissibility of the scientific Evidence (u/s. 45 of the Evidence Act) and made the following test to be applied before it can be relied upon:

- (i) Whether the principle or technique has been or can be reliably tested?
- (ii) Whether it has been subject to peer review or publication?
- (iii) It is known for the potential rate of error?
- (iv) Whether there are recognized standards that control the procedure of
- (v) implementation of the technique?
- (vi) Whether it is generally accepted by the Community?
- (vii) Whether the technique has been introduced or conducted independently of the litigation?

After being satisfied with the above test court can rely and place trust in any scientific evidence. These tests are applicable to all sort of scientific Evidence.

Importance of DNA Test in Civil Cases

In **Gautam Kundu v. State of West Bengal, (1993)3 SCC 418**, where the division bench of apex court, held as follows: -

"(1) that courts in India cannot order blood test as matter of course; (3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Evidence Act..... (5) No one can be compelled to give sample of blood for analysis."

In **Sharda v. Dharampal, (2003)4 SCC 493**, The Hon'ble Full Bench of Supreme Court taking note of the law propounded in Gautam Kundu considered the power of a matrimonial court to order such test and clarified that Goutam Kundu is not an authority for the proposition that under no circumstances the Court can direct that blood tests be conducted. It, having regard to the future of the child, has, of course, sounded a note of caution as regard mechanical passing of such order. The Court after hefty discussion summed up three significant conclusions.

1. *A matrimonial court has the power to order a person to undergo medical test.*
2. *Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.*

3. *However, the Court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the Court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him.*

In Selvi v. State of Karnataka, (2010)7 SCC 263, while testing the validity of DNA tests on the anvil of Article 20(3) of the Constitution of India, made following observation:

*“The matching of DNA samples in emerging as a vital tool for linking suspects to specific criminal acts. It may also be recalled that as per the majority decision in **Kathi Kalu Oghad, AIR 1961 SC 1808**, the use of material samples such as fingerprints for the purpose of comparison and identification does not amount to a testimonial act for the purpose of Article 20(3). Hence, the taking and retention of DNA samples which are in the nature of physical evidence does not face constitutional hurdles in the Indian context.”*

In Shri Rohit Shekhar v. Shri Narayan Dutt Tiwari an Anr. MANU/DE/3701/2010: 2011(121) DRJ 563, in which the court has gone a step further. In peculiar facts of this case, the petitioner, who was born during a subsisting marriage of her mother, asked for DNA test on the respondent, claiming the latter to be his biological father. The Court has ordered DNA test on the respondent a third party to marriage, primarily recognizing, from various international covenants, the right of a child to know of his biological antecedents.

Often courts come across question as to the paternity of the child in the course of the trial, be it civil or criminal in nature. In such cases D.N.A. test becomes a vital source to clear ambiguity and suspicion on the issue of paternity or legitimacy of the child. The Hon'ble Supreme Court in **Bhabani Prasad Jena Vs. Orissa State Commission for women, (2010) 8 SCC 633**, has laid down the following guidelines for the purpose of blood test and D.N.A. test:

- (i) That courts in India cannot order blood test as a matter of course;
- (ii) Wherever applications are made with such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
- (iii) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising u/s 112 of the Evidence Act.
- (iv) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
- (v) No one can be compelled to give a sample of blood for analysis.

Narco-analysis technique, polygraph and the Brain Electrical Activation -

Narco Analysis, Polygraph & BEAP technique is used to extract information from the accused after administering him psychopathic substance-controlled circumstances and under medical supervision in order to decide the direction of the investigation. Section 53, 53A and 54 of CrPC speaks of medical examination of accused, but it is not extended to the extent to permit investigating officer to go for Narco Analysis, Polygraph & BEAP test of accused. But the court has the power to permit the investigating officer to conduct these tests in certain circumstances.

In Selvi Vs. State of Karnataka, (2010) 7 SCC 263, a judgment of juristic importance, Hon'ble Supreme court after having discussed various aspect of personal liberty of accused and witness subjected to polygraphy test during and after investigation, in the context of constitutional and evidentiary parameter held that,

In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice, provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as Evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with Section 27 of the Evidence Act, 1872.

The hon'ble court further reproduced the 'Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused' issued by The National Human Rights Commission published in 2000 and held that, these guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the 'Narcoanalysis technique' and the 'Brain Electrical Activation Profile' test. The text of these guidelines has been reproduced below:

- (i) No Lie Detector Tests should be administered except on the basis of the consent of the accused. An option should be given to the accused whether he wishes to avail such a test.
- (ii) If the accused volunteers for a Lie Detector Test, he should be given access to a lawyer, and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.
- (iii) The consent should be recorded before a Judicial Magistrate.
- (iv) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.
- (v) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a 'confessional statement to the Magistrate but will have the status of a statement made to the police.
- (vi) The Magistrate shall consider all factors relating to the detention, including the length of detention and the nature of the interrogation.
- (vii) The actual recording of the Lie Detector Test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.
- (viii) A full medical and factual narration of the manner of the information received must be taken on record.

The principle of Selvi's case has been reiterated in the case of **Mr. Justice K. S. Puttaswamy V/s Union of India reported in 2017 (10) S.C.C. page 1.** and in a recent decision of W.P. No.11759/2020 **Toofan Singh V/s State of Tamilnadu reported in 2020 S.C.C. online SC 82.**

Voice Analysis Test:

Voice analysis test is relevant where accused is not identifiable by his physical character or there is lack of evidence of physical character or appearance of accused and accused can only be traceable on the proof of his voice. Where there is telephonic conversation between accused and some other person which has some connection with offence, or where someone has heard the voice of accused uttered during commitment of an offence and there is no source of light to identify the accused, the only way to identify the accused is to have his voice analysed after taking his voice sample. The voice sample is analysed or measured on the basis of time, frequency and intensity of the speech-sound waves. A voiceprint is a visual recording of voice. Voiceprint identification

requires (1) a recording of the questioned voice, (2) a recording of known origin for comparison, and (3) a sound spectrograph machine adapted for 'voiceprint' studies. The purpose of taking a voice sample which is non-testimonial physical Evidence, is to compare it with tape-recorded conversation. It is a physical characteristic of the accused. It is identificatory Evidence.

In *Ritesh Sinha Vs. The State of U.P., A.I.R. 2013 SC 1132* Hon'ble Court has laid down that taking a voice sample of an accused as a sample for comparing and identifying it with a tape-recorded or telephonic conversation is not violative of the fundamental rights of the accused guaranteed by Art. 20(3) of the Constitution.

Relying on the dictum passed in *Kathoo Kaalu vs State of Maharashtra, A.I.R. 1961 SC 1808* and *R. M. Malkani vs State of Maharashtra 1973 AIR 157, 1973 S.C.R. (2) 417*, the Hon'ble Court further held that, voice sample is physical non-testimonial Evidence. It does not communicate to the investigator any information based on the personal knowledge of the accused, which can incriminate him. Voice sample cannot be held to be conceptually different from physical non-testimonial Evidence like blood, semen, sputum, hair etc. Taking of voice sample does not involve any testimonial responses.

The Hon'ble Supreme Court in *Nilesh paradkar vs. the State of Maharashtra (2011) 4 SCC 143*, where the voice test identification was conducted by playing cassette in the presence of panchas, police officers and prosecution witnesses. The Court rejected the voice identification evidence because precautions similar to the precautions which are normally taken in visual identification of suspects by witnesses were not taken. But court did not reject the evidence on the ground that voice identification parade is not contemplated under Section 54 A of the Code.

Interpreting Sections 65-A & 65-B of the Evidence Act, it has been held by the Hon'ble Supreme Court in *Sanjaysinh Ramrao Chavan Vs. Dattatray Gulabrao Phalke & Others, (2015) 3 SCC 123* that where the voice recorded was inaudible and the voice recorder was not subjected to analysis, the translated version of the voice cannot be relied on upon without producing the source and there is no authenticity for translation. Source and its authenticity are the two key factors for electronic evidence.

Tape recorded conversation & its admissibility in Evidence (S. 7, Evidence Act)

During the investigation, investigating agency sometimes intercepts the conversation of the accused or suspected person which throw some light on the crime and involvement of the accused in that crime. Such tape-recorded conversation plays a vital role by helping the trial court in coming to a definite conclusion as to culpability of accused.

Hon'ble Supreme Court, in a catena of judgment discussed the admissibility and evidentiary value of tape-recorded conversation. In *R.M. Malkani vs. State of Maharashtra, A.I.R. 1973 SC 157* apex court held that,

Tape recorded conversation is admissible in Evidence provided that the conversation is relevant to the matters in issue, that there is the identification of the voice and that the accuracy of the conversation is proved by eliminating the possibility of erasing the tape record. A contemporaneous tape record of a relevant conversation is a relevant fact and is admissible u/s. 7 of the Evidence Act. It is also comparable to a photograph of a relevant incident. A tape-recorded statement is admissible in Evidence subject to the following conditions:

1. The voice of the speaker must be identified by the maker of the record or other persons recognizing his voice. Where the maker is unable to identify the voice, a strict proof will be required to determine whether or not it was the voice of the alleged speaker.

2. The accuracy of the tape-recorded statement must be proved by the maker of the record by satisfactory Evidence: direct or circumstantial.
3. Possibility of tampering with, or erasure of any part of, the tape-recorded statement must be totally excluded.
4. The tape-recorded statement must be relevant.
5. The recorded cassette must be sealed and must be kept in safe or official custody.
6. The voice of the particular speaker must be clearly audible and must not be lost or distorted by other sounds or disturbances.

This proposition of law was also followed in **State (N.C.T. of Delhi) vs. Navjot Sandhu alias Afsan Guru, 2005 S.C.C. (Cri) 1715**. Later on in **Anvar P.V. Vs. P.K. Basheer, (2014) 10 SCC 473, A.I.R. 2015 SC 180** the Hon'ble apex court observed that in the absence of certificate u/s 65-B of the Evidence Act, a secondary evidence of electronic records like CD, VCD, chip etc. is not admissible in Evidence.

Further in **Shafhi Mohammad Vs. State of H. P., (2018) 2 SCC 801** the Hon'ble Supreme court held that the requirement of a certificate u/s 65-B (4) of the Evidence Act is not always necessary. A piece of evidence / material object should not be kept out of court's consideration on the ground that the certificate u/s 65-B (4) of the Evidence Act is not available because the ultimate object of a criminal prosecution is to arrive at the truth.

Specimen signatures, handwriting and fingerprint

Section 311-A of Cr.P.C. specifically authorises Magistrate to direct any person including accused to give specimen signatures or handwriting for the purposes of any investigation or proceeding under this Code, subject to satisfaction of magistrate as to sufficiency of cause for such order. Provided that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.

Section 3 and 4 of the Identification of prisoners Act relates to measurement by police officer itself, of a convicted person and a person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of 1 year or upwards respectively. While section 5 of the Act relates to any person, the taking of whose measurements or photographs might be expedient for the purposes of any investigation or proceeding under the code of Criminal Procedure. The power measurement under section 5 vests in a Magistrate and not in any police officer. Section 2 of the Act defines that "measurements include finger-impressions and foot-print impressions"

Similarly, section 73 of Evidence act authorise the court to direct any person present in court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person, if there is any dispute with regard to such signature writing or seal. This power is exercisable by civil and criminal court both during any proceeding before court.

Thus it is clear that signature, writing and finger print of any person including accused can be obtained under different provision of different act, which can be used as Evidence in course of trail. Honourable courts has on many occasion dealt with the question of admissibility and evidentiary value of opinion of expert given on such signature, writing and finger print.

*Hon'ble Supreme Court in the case of **Murari Lal v. State of M.P. [1980] 1 SCC 704** on the issue of need of corroboration of opinion of expert held that, on the facts of a particular case, a court may require corroboration of a varying degree. There can be no hard and fast rule, but nothing will justify the rejection of the opinion of an expert*

supported by unchallenged reasons on the sole ground that it is not corroborated. The approach of a court while dealing with the opinion of a handwriting expert should be to proceed cautiously, probe the reasons for the opinion, consider all other relevant Evidence and decide finally to accept or reject it.

In the case of **State of Maharashtra v. Sukhdeo Singh 1992 AIR 2100**, the Hon'ble Apex Court opined that before a Court can act on the opinion evidence of a handwriting expert two things must be proved beyond any manner of doubt, namely, (i) the genuineness of the specimen/admitted handwriting of the concerned accused and (ii) the handwriting expert is a competent, reliable and dependable witness whose Evidence inspires confidence.

Where the crime article, before its seizure, was handled by many persons, non-examination of the finger print expert in such a case would not have any adverse effect on prosecution case as held in **Keshavlal Vs. State of M.P., (2002) 3 SCC 254**.

In **Musheer Khan Vs. State of M.P., 2010 (70) ACC 150 (S.C.)** it was held by the Hon'ble Supreme court that, Evidence of fingerprint expert u/s 45 of the Evidence Act is not substantive evidence. It can be used to corroborate some items of substantive on record.

In **S.P.S. Rathore vs. C.B.I. (2017) 5 SCC 817** the Hon'ble supreme court held that, it is thus clear that uncorroborated Evidence of a hand writing expert is an extremely weak type of Evidence, and the same should not be relied upon either for the conviction or for acquittal. The courts, should, therefore, be wary to give too much weight to the Evidence of handwriting expert. It can rarely, if ever, take the place of substantive evidence. Before acting on such evidence, it is usual to see if it is corroborated either by clear, direct evidence or by circumstantial evidence.

Where the fingerprint and palm impression was taken under section 3,4,5 of Identification of prisoners' act and it was challenged on the ground that there was no rule framed under section 8 of the act, Hon'ble Supreme court in **Sonvir v. The State of N.C.T. of Delhi (2018) 8 S.C.C. 24** discarded such plea and held that,

'Non-framing of any rules under section 8 by the State Government does not prohibit the exercise of powers given under section 3 and 4 of the Act. Exercise of power under section 3 and 4 is hedged by conditions as prescribed, but in a case where no rules have been framed, the authorities as empowered under section 3 and 4 are not denuded of their powers to act under section 3 and 4.'

In **Mohd. Aman v State of Rajasthan (1997) 10 S.C.C. 44, Rohit Dhingra and Ors., v. State, 2012 (2) JCC 820, Para 13, Ashish Jain v Makrand Singh 2019 S.C.C. Online SC 37**, Hon'ble Supreme Court held that in order to make Evidence as to finger print credible, reliable and trustworthy and above any suspicion it is eminently desirable that they were taken before or under order of a Magistrate.

Where defamation made by publication through electronic device the Hon'ble Supreme court in **Google India Private Limited Vs. Visaka Industries, (2020) 4 SCC 162** held that intermediary like Google and accused both liable for defamation done in electronic form.

Above discussion shows that though in the course of trial, court primarily rely on oral and documentary evidence rendered by parties under different provision of procedural law and marshal those evidences as per law of evidence to reach to definite conclusion. But sometimes court find itself unable to draw a definite conclusion from the evidences before it or there is lack of sufficient evidence of such level of probative value which can prove a fact with certainty. In such situation scientific evidence becomes relevant and significant as it lend assurance and support to the court to come to a definite conclusion.

CHAPTER-15

PLEA BARGAINING

Introduction

Plea bargaining is a concept based upon negotiation processes in the criminal justice system wherein an accused or offender voluntarily confess his guilt in exchange for reducing charges, leniency in punishment, or elimination of certain facts. In other words, a plea bargain is an agreement or a settlement reached in criminal cases. The parties to the settlement in a case instituted on a police report are Investigating officer, prosecutor, victim and offender, whereas, in any other case, the accused and victims are the parties to such settlement.

The objective behind the concept is to expedite the disposal of the cases and to get a victim of the crime compensated adequately on the one hand while on the other hand, it gives opportunity to offenders for seeking lesser sentence and further to avoid the long, tortuous and expensive process of undergoing trial. Plea bargaining has been considered an effective tool of the justice administration system in the speedy and effective disposal of pending cases worldwide.

There are three types of plea bargaining that is, (i) Charge Bargaining, (ii) Sentence Bargaining, and (iii) Fact Bargaining. However, in India, only sentence bargaining has been made applicable in law. In India, the concept of plea bargaining was introduced in CrPC by including Chapter XXI-A w.e.f. 5th July 2006 on the recommendation of Malimath Committee report. However, this mode of recourse is limited to a specific category of offences. For instance, the offences that affect the country's socio-economic condition and offences committed against women or children (below 14 years of age) have been kept out of the purview of plea bargaining.

Legal Provisions: Chapter XXI-A [Section(s) 265A to 265L] of Criminal Procedure Code, 1973.

Applicability of the Provisions of Plea Bargaining: Criminal procedure Code, 1973 provides limited applicability of the plea-bargaining doctrine. It provides that the recourse to plea bargaining is applicable only when the punishment prescribed under the law for the time being in force is up to seven (7) years. **[S. 265A, CrPC]** The offences which are out of the purview of plea bargaining are as follows:

- an offence for which the prescribed punishment is death; or
- an offence for which the prescribed punishment is imprisonment for life; or
- an offence for which the prescribed punishment is imprisonment for a term exceeding seven years; or
- an offence which has been committed against a woman, or a child below the age of fourteen years; or
- a crime that affects the socio-economic condition of the country as notified by the Central Government.

The socio-economic offences notified by the Central Government under the following laws for the time being in force are- (i) Dowry Prohibition Act, 1961. (ii) The Commission of Sati Prevention Act, 1987. (iii) The Indecent Representation of Women (Prohibition) Act, 1986 (iv) The Immoral Traffic (Prevention) Act, 1956. (v) The Protection of Women from Domestic Violence Act, 2005 (vi) The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992. (vii) Provisions of Fruit Products Order, 1955 (issued under the Essential Services Commodities Act, 1955). (viii) Provisions of Meat Food Products

Orders, 1973) (issued under the Essential Commodities Act, 1955). (ix) Offences with respect to animals that find a place in Schedule I and Part II of the Schedule II as well as offences related to altering of Page 3 boundaries of protected areas under the Wildlife (Protection) Act, 1972. (x) The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. (xi) Offences mentioned in the Protection of Civil Rights Act, 1955. (xii) Offences listed in sections 23 to 28 of the Juvenile Justice (Care and Protection of Children) Act, 2000. (xiii) The Army Act, 1950. (xiv) The Air Force Act, 1950. (xv) The Navy Act, 1957. (xvi) Offences specified in sections 59 to 81 of the Delhi Metro Railway (Operation and Maintenance) Act, 2002. (xvii) The Explosives Act, 1884. (xviii) Offences specified in sections 11 to 18 of the Cable Television Networks (Regulation) Act, 1995. (xix) The Cinematograph Act, 1952.

Who Can File the Application for Plea Bargaining?

In general, any accused person above 18 years of age against whom a charge-sheet is filed or process is issued in case of complaints other than on police report or the trial is commenced or pending can apply to plea bargaining [S.265B, CrPC]. However, the same is subject to some exceptions, which are as follows:

- The offence against the accused must not carry the prescribed punishment of imprisonment of more than seven (7) years.
- The offence must not have been committed against a woman or a child below 14 years.
- An accused who committed an offence affecting the country's socio-economic condition cannot take the benefit of the provisions of plea bargaining.
- An accused who had earlier convicted for the same offence shall not apply for plea bargaining also,
- An accused who is covered under Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 cannot apply for plea bargaining under CrPC [S.265L, CrPC].

Stage of Application:

The stage of applying to plea bargaining in cases instituted on police report starts with the filing of charge-sheet (report under Section 173, CrPC) by the police in the Court, and in other cases, it starts with the issuance of process by the Court under Section 204, CrPC. [S. 265A, CrPC]

Stepwise Procedure of Plea Bargaining:

Step-1: An accused who wishes to plead guilty may move an application to the concerned Court where the offence is pending for trial with the following details [S. 265B, CrPC]: brief description of the case; an affidavit of the accused declared that he is presenting the application-

1. voluntarily;
2. after understanding the nature and extent of punishment provided under the law for the offence; and
3. he has not previously been convicted by a Court for the same offence

Step-2: After receiving the application mentioned above, the Court shall issue notice for an appearance on the date fixed, to- public prosecutor, victim, and accused in cases instituted on the police report; or the complainant and accused (in any other cases). [S. 265B, CrPC]

Step-3: On the appearance of the public prosecutor or complainant (as the case may be) and accused on the date fixed for by the Court, the Court shall examine the accused in camera in the absence of the other party to satisfy itself that the accused has filed the application voluntarily [S. 265B, CrPC]. Following would be the consequences of aforesaid examination of the accused:

1. Rejection of Application, if the Courts find that the application has been filed involuntarily by the accused; or the accused has been previously convicted by a Court for the same offence; or the accused covers under any of the non-applicability provision of plea bargaining. In such cases, the Court shall proceed further in accordance with the law.

2. If the Courts satisfied on the voluntariness of the accused in filing the application, and other pre-conditions of plea-bargaining, the Court shall provide time to the Public Prosecutor/ the complainant and the accused to work out a mutually satisfactory disposition of the case.

Step-4: Guidelines for mutually satisfactory disposition [S. 265C, CrPC]. The Court shall issue notice for participation in the meeting to work out a satisfactory disposition of the case to-

1. the Public Prosecutor, IO, the accused and the victim of the case where the case is instituted on a police report; and
2. the accused and the victim of the case where the case is instituted otherwise than on police report.

The Court has to ensure that the entire process is completed voluntarily by the parties participating in the meeting. It is pertinent to note that the victim or the accused of the case may participate with their pleader as the case may be.

Step-5: Mutually satisfactory disposition report [S. 265D, CrPC].

- If mutually satisfactory disposition did not work out, the Court shall reject the application and proceed further in accordance with the law.
- If a mutually satisfactory disposition of the case is worked out, the Court shall prepare a report of such disposition that the Court and all the participating persons shall sign and proceed to dispose of the case as provided under Section 265E, CrPC.

Step-6: Disposal of the case [S. 265E, CrPC]. The Court shall dispose of the case in the following manner:

- the Court shall award the compensation to the victim in accordance with the disposition; and
- hear the parties on the quantum of the punishment, releasing of the accused on probation of good conduct or after admonition under section 360 or for dealing with the accused under the provisions of the Probation of Offenders Act, 1958 (20 of 1958) or any other law for the time being in force;
- after hearing the parties, the Court shall-
 1. release or provide the benefit to the accused, if finds that section 360 or the provisions of the Probation of Offenders Act, 1958 (20 of 1958) or any other law for the time being in force are attracted;
 2. in case the laws stated above does not apply in the case of the accused, the Court may sentence the accused to half of the minimum punishment as provided under the law for the offence committed by the accused, and in case where no such minimum punishment is provided, the Court may sentence the accused to one-fourth of the punishment provided or extendable for such offence.

The Court shall deliver its judgment in the open court, and the Court's presiding officer shall sign the same.

Consequence(s) of Successful Disposal of Case through Plea Bargaining:

The accused shall be entitled to set off the period of detention he underwent against the imprisonment sentence under Section 265-I read with Section 428 of the CrPC.

- The judgment delivered by the Court shall be final, and no appeal shall lie in any Court against such judgment except the special leave petition under article 136 and writ petition under articles 226 and 227 of the Constitution.
- The statements or the facts stated by the accused in the application for plea bargaining shall not be used for any other purpose except for deciding the said application.
- Victims get adequate compensation and saved themselves from long-drawn and expensive judicial process. It can be seen as speedy justice and end of indecision.
- Accused get lesser punishment or release on probation or admonition. End of uncertainty as there is no appeal against the judgment passed in favour accused, and also, he gets complete protection against the admission he made in the application of plea bargaining. It can also be seen as saving from facing long-drawn, tedious and expensive judicial process.
- Justice administration system is able to deliver speedy and effective justice to the people.

Role of Advocates in Plea Bargaining Process

Advocates are professionally duty-bound to ensure the best interest of their clients as per law. An advocate plays a unique role in the plea-bargaining process, making the accused understand his case. An advocate who is well versed with legal knowledge can give sound advice to the accused after comprehending whole issues related to the case of the accused, such as the rule of evidence, possible defences, probability of conviction based on the available evidence, and sentencing options. It is genuinely believed that the advocate mostly has more significant influence over the decision of their clients. Thus, the advocate must ensure that before the filing of an application for plea bargaining, his client (if the client is accused of committing an offence) should plead guilty voluntarily and only after fully appreciating the facts and legal consequences which may follow.

There are various factors that might influence the decision of the accused to plead guilty such as financial conditions, socio-economic conditions, ability to secure bail, the strength of evidence, age of the accuse, probability of conviction, the chance of loss of employment, family life, dependants, and reputation in society. The decision of whether to waive his right of taking the case to trial or to plead guilty is the most important in any criminal case. Plea bargaining depends upon three essential elements: waiver of rights, voluntary waiver, and the factual basis of the case. Therefore, it is the advocate's responsibility to make every reasonable effort to protect the accused from an ill-informed choice and persuade him to decide plea bargaining if that is in his best interest. However, it is to be kept in mind that the advocate gives professional advice to the accused, but the ultimate decision should remain with the accused.

Similarly, the advocate of the victims or complainants should also vouch for their client's best interest. An advocate should persuade the victim to get the matter settled through plea bargaining and must not object unnecessary, especially when the victim is being compensated adequately and further he or she is saved from the mental pain and harassment of long, tedious and expensive process of trial. One has to keep in mind that

whether the advocate is privately engaged or from the legal aid panel or the advocate is rendering his service pro-bono, the aim must be to protect their client's best interest.

However, it is pertinent to note that even if the concerned parties reached a settlement disposition, the parties to the said settlement have no right or authority to force the Court to accept the settlement. The Court accepts the plea-bargaining settlement only on his satisfaction as provided in the law.

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Plea Bargaining in the matter involving economic crimes, food offences and other cases should not be applied.

Balram Kumawat v. Union of India (2003) 7 SCC 628

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CHAPTER-16

COMPENSATORY JURISPRUDENCE IN CRIMINAL JUSTICE SYSTEM IN INDIA

I. Introduction

India is governed by rule of law which cannot be maintained if equal importance is not given to both the parties – prosecution and defense in the administration of criminal justice system. State is considered to be the *loco parentis* ever since it came into existence as an important legal entity. It is duty of state under criminal justice system to protect the citizens from harm either to their person or properties as he himself is deprived of power to take law into his hands and unfortunately in this process attention is always shifted from victim to offender as the criminal justice system in its present form is heavily loaded with the provisions in favor of accused.

The role of victim of a crime in the criminal justice system had long been restricted to that of a witness for prosecution even though he/she is the person who has suffered physical, mental, emotional or economic harm due to the commission of the crime. Since the main object of legal process is to promote and maintain public confidence in the administration of justice, an urgent need was felt for giving a well-defined status to the victim of crime under the criminal law. Consequently, victim of a crime gradually came to occupy a central place in our criminal justice system over the last two decades. The rehabilitation or compensation of victims of crime is as important an issue as the punishment of the offender in the present criminal justice discourse.

The issue of restitution or rehabilitation of victims of crimes became a central issue in advance western countries during 1970's and most of the western countries such as United Kingdom, USA, and Canada as well as Australia & New Zealand enacted laws for victim compensation in the decades of 1970's and 1980's. The United Nations also passed a declaration with regard to victim's position and protection. The U.N. Declaration of Basic Principle for Victims of Crimes and Abuse of Power, 1985 which defines 'victims' as persons who, individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.

Section 2 (wa) of the Code of Criminal Procedure, 1973 (Amendment Act 41 of 2010) defines victim as 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. Consequently, we now have many provisions such as sections 250, 357, 357A and 358 in the Code of Criminal Procedure, 1973 which deal with the issue of compensation to victims. Section 357A of CrPC which was introduced in 2009 provides a comprehensive victim compensation scheme and different states in India have adopted a separate scheme allocating a reasonable amount towards the compensation of victims of crimes.

II. Changing Role of Victim in Indian Criminal Justice System

The Indian criminal justice system which is based on adversarial system of jurisprudence has largely been concentrated on the fair trial rights of accused person, leading to a neglected role of victim in the system. The Supreme Court in a historic judgment delivered in April, 2022 provides a greater participation for victims in the criminal justice process which is certainly a cause of celebration for the victims' rights movement in India (*Jagjeet Singh v. Ashish Mishra alias Monu and another*, AIR 2022 SC 1918: AIR Online 2022 SC 552).

The Supreme Court has certainly broken the long drawn and solidified ice on the role of victim in criminal trials in India when it held that a victim of crime is to be heard at all stages of a trial. This judgment is remarkable in many ways as the courts in India have never made such a fervent plea for victim justice. While cancelling the bail of accused Ashish Mishra in Lakhimpur Kheri Case, the court made sharp remarks legitimizing the claims of victim to participate in the criminal justice system. The court observed that international legal regime and trends as well as the recommendations of law commissions were in favour of granting greater participation to victims of crime in criminal trials.

It is noticeable that this judgment has far reaching implications for the jurisprudence of victimology in India. The court observed that our criminal justice system conflates the presence of the state with the presence of the victim. Such conflation is attributable to the traditional understanding of the criminal process where a trial is a contest between the state and the accused only. If this situation is placed in the terminology of famous sociologist and criminologist Nils Christie, who considers a conflict to be a property, then the state claims ownership over the same. The conflict as property must be restored to its rightful owner – the victim.

One has to accept the undeniable fact that victim of a crime has a central role in the trial process. The victim is, indeed, a de facto sufferer of a crime but unfortunately had no participation in the adjudicatory process and is often made to sit outside the court as a mute spectator. However, with the recognition that the ethos of criminal justice dispensation is to prevent and punish crime. The jurisprudence with respect to the rights of victims especially the right to be heard and to participate in criminal proceeding gradually began to positively evolve.

On the domestic front, recent amendments to the CrPC have recognized a victim's rights in the Indian criminal justice system. It was recommended that the victim should be armed with right to be represented by an advocate of his or her choice, if he or she is not in a position to afford the same, an advocate should be provided at the expense of the state. The right of the victim under the amended CrPC are substantive, enforceable and are another facet of human rights. The victim's right, therefore cannot be termed or construed restrictively like a brutum fulmen. These rights are totally independent, incomparable and are not accessory or auxiliary to those of the state under CrPC.

In fact, the presence of state in the proceedings, therefore does not tantamount to according a hearing to a victim of the crime. A victim cannot be asked to wait the commencement of trial for asserting her right to participate in the proceedings. He has a legally vested right to be heard at every step post the occurrence of an offence. Such a victim has unbridled participatory rights from the stage of investigation till the culmination of the proceedings in an appeal or revision.

In another recent judgement delivered in *Jaswinder Singh (Dead) through Legal Representative v. Navjot Singh Sidhu*, AIR 2022 SC 2441, the Supreme Court has held that an important aspect to be kept in mind is that any undue sympathy to impose inadequate sentence would do more harm to justice system and undermine the public confidence in the efficacy of law. The society cannot long endure under serious threats and if the courts do not protect the injured, the injured would then resort to private vengeance and, therefore, it is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed.

It has, thus, been observed that the punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated. (*Raviji v. Surajbhan Singh*, (2014) 7 SCC 323: (AIR 2014 SC 2840)). The sentencing philosophy for an offence has a social goal

that the sentence has to be based on the principle that the accused must realize that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric.

But the main question is the extent of this participation particularly in a system like ours where victim is represented through public prosecutor. In our criminal justice system, the public prosecutor occupies a position of great importance. Given the fact that crimes are treated as a wrong against the society as a whole, his role in the administration of justice is crucial because he is not only a representative of the aggrieved person but of the state at large (*Rekha Murarka v. State of West Bengal and another*, (2020) 2 SCC 474).

III. Constitutional Inspiration

The principles of victimology have, indeed, foundations in Indian Constitutional Jurisprudence. The provision on Fundamental Rights (Part III) and Directive Principles of State Policy (Part IV) form the bulwark for a new social order in which social and economic justice would blossom in the national life of the country (Article 38). Article 41 mandates, inter alia, that the State shall make effective provisions for “securing the right to public assistance in cases of disablement and in to other cases of undeserved want”. (*Maya Devi’s case (AIR 2011 SC (Supp) 417:2011 AIR SCW 24)*)

The juristic basis underlying the requirement that courts and indeed all such authorities exercise the power to determine the rights and obligations of individuals must give reasons in support of their orders has been examined in a long line of decisions rendered by this Court. In *Hindustan Times Ltd. v. Union of India*, (1998) 2 SCC 242: (AIR 1998 SC 688: 1998 AIR SCW 352) the need to give reasons has been held to arise out of the need to minimize chances of arbitrariness and induce clarity.

In fact, the recording of reasons in support of the order passed by the High Court has been held to inspire public confidence in administration of justice. In *Union of India v. Jail Prakash Singh* (2007) 10 SCC 712, reasons were held to be live-links between the mind of the decision-maker and the controversy in question as also the decision or conclusion arrived at. Moreover, in *Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity*, (2010) 3 SCC 732, reasons were held to be the heartbeat of every conclusion.

While the award or refusal of compensation in a particular case may be within the court’s discretion, there exists a mandatory duty on the court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion.

IV. Compensation to Victim

Victimology must find fulfillment said the Court, not through barbarity but by compulsory recoupment by the wrongdoer of the damage inflicted not by giving more pain to the offender but by lessening the loss of the forlorn. (*Hari Singh (Hari Kishan) v. Sukhbir Singh and other*, (1988) 4 SCC 551) *Balraj v. State of U.P.*, (1994) 4 SCC 29 : (AIR 1995 SC 1935); *Dilip S. Bhanukar v. Kotak Mahindra Co. Ltd. & another*, (2007) 6 SCC 593.

The primacy purpose of such restitution was not to compensate the victim, but to protect the offender from violent retaliation by the victim or the community. As the State gradually established a monopoly over the institution of punishment, and a division between civil and criminal law emerged, the victim’s right to compensation was incorporated into civil law. This conventional position has in recent times undergone a

notable sea change as society's world over have increasingly felt that victims of the crimes were being neglected by the legislatures and the courts alike. Legislations have, therefore, been introduced in many countries including Canada, Australia, England, New Zealand, and Northern Ireland and in certain States in the USA providing for restitution/reparation by Courts administering criminal justice. England was perhaps the first country to adopt a separate statutory scheme for victim compensation by the State under the Criminal Injuries Compensation Scheme, 1964.

When compensation is not fully available from the offender or other sources, the states should endeavor to provide financial compensation to the victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes. The family, in particular, dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization. Compensation shall be provided for any economically assessable damage resulting from violations of human rights or international humanitarian law, such as:

1. Physical or mental harm, including pain, suffering and emotional distress;
2. Lost opportunities including education;
3. Material damages and loss of earnings, including loss of earning potential;
4. Harm to reputation or dignity
5. Costs required for legal or expert assistance, medicines and medical services.”

V. Compensation to Victim & Capacity of Accused

It is also beyond dispute that the occasion to consider the question that the award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay constitutes an important aspect of any order under Section 357 Cr.P.C. and would involve a certain enquiry albeit summary unless of course the facts in the course of the trial are so clear that the court considers it unnecessary to do so.

VI. The Victim Compensation Scheme: S. 357-A Cr.P.C.

1. Every State government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.
2. Wherever 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-section (1).
3. If the trial Court, at the conclusion of the trial, is satisfied that the compensation awarded under Section. 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-section (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 for immediate first aid facility or medical benefits to be made available free of cost on the certificate of the police officer

not below 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.

S. 357 B- Compensation to be in addition to fine under Section 326-A or section 376-D of Indian Penal Code.

The compensation payable by the State Government under section 357-A shall be in addition to the payment of fine to the victim under Section 326-A or section 376-D of the Indian Penal Code (45 of 1860).

VII. Section 357-C- Cr.P.C. Treatments of Victims

All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under Section 326-A, 376, 376-A, 376-B, 376-C, 376-D or section 376-E of the Indian Penal Code (45 of 1860) and shall immediately inform the police of such incident

The Hon'ble Supreme Court in *Ankush Shivaji Gaikwad v. State of Maharashtra*, AIR 2013 SC 2454 observed that the power conferred on court is coupled with duty as the courts are bound to consider issue of award of compensation in every case. It ought to record reasons for awarding or refusing compensation. The court can hold enquiry as to capacity of accused to pay compensation.

The Hon'ble Court further observed that "...Sub-section (1) of Section 357 provides power to award compensation to victims of the offence out of the sentence of fine imposed on accused. It is an important provision but courts have seldom invoked it, perhaps due to ignorance of the subject of it. It empowers the court to award compensation to victims while passing judgment of conviction.

It may be noted that this power of courts to award compensation is ancillary to other sentences but it is in addition thereto. This power was intended to do something to re-assure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to the crime. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way.

The long line of judicial pronouncements of this court recognized in no uncertain terms a paradigm shift in the approach towards victims of crime who were held entitled to reparation, restitution or compensation for loss or injury suffered by them. This shift from retribution to restitution began in the mid 1960s and gained momentum in the decades that followed. Interestingly the clock appears to have come full circle by the law makers and courts going back in a great measure to what was in ancient times common place. [Harvard Law Review (1984)]. The primacy purpose of such restitution was not to compensate the victim, but to protect the offender from violent retaliation by the victim or the community. As the State gradually established a monopoly over the institution of punishment, and a division between civil and criminal law emerged, the victim's right to compensation was incorporated into civil law (*Balraj v. State of U.P.*, (1994) 4 SCC 29 : (AIR 1995 SC 1935); *Dilip S. Bhanukar v. Kotak Mahindra Co. Ltd. & another*, (2007) 6 SCC 593

In *State of Punjab v. Saurabh Bakshi* (2015) 5 SCC 182, His Lordships Deepak Misra and Prafulla C. Pant, JJ. observed that justice is "the crowning glory", "the sovereign mistress" and "queen of virtue" as Cicero had said. Such a crime blights not only the lives of the victims but of many others around them. It ultimately shatters the faith of the public in judicial system.

It is the duty of every right-thinking citizen to show veneration to law so that an orderly, civilized and peaceful society emerges. It has to be borne in mind that law is averse to any kind of chaos. It is totally intolerant of anarchy. If anyone defies law, he has to face the wrath of law, depending on the concept of proportionality that the law recognizes. Purpose of criminal law is to protect the collective interest and save every individual that forms a constituent of the collective from unwarranted hazards.

It is the duty of the Court to award just sentence to a convict against whom charge is proved. While every mitigating or aggravating circumstance may be given due weight, mechanical reduction of sentence to the period already undergone cannot be appreciated. Sentence has to be fair not only to the accused but also to the victim and the society. It is also the duty of the court to duly consider the aspect of rehabilitating the victim. ***Suresh v State of Haryana, (2015) 2 SCC 227 : (2015) 2 SCC (Cri) 45***

The Hon'ble Supreme Court observed that punishment to the accused is one aspect, determination of just compensation to the victim is the other. Just compensation to the victim has to be fixed having regard to the medical and other expenses, pain and suffering, loss of earning and other relevant factors. While under S. 357, financial capacity of the accused has to be kept in mind, under S. 357A compensation should be invoked out of State funds to meet out the requirements of just compensation (***Manohar Singh v. State of Rajasthan & Others 2015 (89) ACC 266 (S.C.)***).

VIII. Kerala Compensation Scheme to be followed

Hon'ble Supreme Court took judicial notice of the following facts in ***Suresh & another (supra)***:

- i. That 25 out of 29 states have notified victim compensation schemes,
- ii. That although five year had expired since enactment of S. 357 A Cr.PC, the award of compensation has not become a rule,
- iii. That interim compensation is not being awarded by courts, and
- iv. That upper limit of compensation fixed by same states is arbitrarily low and is not in keeping with the object of legislation.

The Court, therefore, gave directions that there is need to consider upward revision in the scale for compensation and pending such consideration to adopt the scale notified by the State of Kerala in its scheme, unless the scale awarded by any other state or U.T. is higher. The court further directed that a copy of this judgment be forwarded to National Judicial Academy so that all judicial officers in the country can be imported requisite training so make section 357-A and 357 Cr.P.C operative and meaningful. The Scheme adopted by the State of Kerala is applicable to all the states and the said scheme provides for compensation up to Rs. 5 lakhs in the case of death.

IX. VICTIM COMPENSATION SCHEME IN THE STATE OF UTTAR PRADESH

The Governor in co-ordination with the Central Government framed the Uttar Pradesh Victim Compensation Scheme, 2014. This scheme states that 'Victim' means a person who himself has suffered loss or injury as a result of the crime and requires rehabilitation, and includes his dependent family members. (***See: 2 (d) of the Uttar Pradesh Victim Compensation Scheme, 2014***)

IX. 1. Eligibility for Compensation

The position of the victims of crime was vulnerable in Indian criminal procedure as he/she could be awarded compensation only out of the fine imposed by the court after recording conviction. *(See Section 357 of the Code of Criminal Procedure, 1973)* But the State has brought revolutionary changes in law taking appropriate care of victim and his dependents through the Victim Compensation Scheme. *See: Criminal Law (Amendment) Act, 2009 and Section 357-A of the Code of Criminal Procedure Code, 1973)* The Victim Compensation Scheme of U.P. states that a victim shall be eligible for the grant of compensation if:

- a) the offender is not traced or identified, but the victim is identified and where no trial takes place, such victim may also apply for grant of compensation; *(See sub-section (4) of Section 357-A of Cr.P.C. 1973)*
- b) the victim/claimant reports the crime to the officer-in-charge of the police station within 48 hours of the occurrence or any senior police officer or Executive Magistrate or Judicial Magistrate of the area provided that the District Legal Services Authority, if satisfied for the reasons to be recorded in writing, may condone the delay in reporting;
- c) The victim/claimant cooperates with the police and the prosecution during the investigation and trial of the case. *(See: 4(a), (b) & (c) of the U.P. Victim Compensation Scheme, 2014)*

IX. 2. Procedure for Grant of Compensation

1. Whenever a recommendation is made by the Court or an application is made by any victim or his dependent to the District Legal Services Authority, the District Legal Services Authority shall examine the case and verify the contents of the claim with regard to the loss or injury caused to the victim and arising out of the reported criminal activity and may call for any other relevant information necessary in order to determine genuineness of the claim. After verifying the claim the District Legal Services Authority shall, after due enquiry, award compensation within two months from the date or receipt of the recommendation of the court of the receipt of application. *(See: sub-section (4) of Section 357-A of Cr.P.C., 1973)*
2. Compensation under this Scheme shall be paid subject to the condition that if the trial court, while passing judgment at later date, orders the accused persons to pay any amount by way of compensation, the victim/claimant shall remit an amount ordered equal to the amount of compensation or the amount ordered to be paid whichever is less. *(See: sub-section (3) of Section 357 of Cr.P.C., 1973)* An undertaking to this effect shall be given by the victim/claimant before the distribution of the compensation amount.
3. The District Legal Services Authority shall decide the quantum of compensation to be awarded to the victim or his dependents on the basis of loss caused to the victim, medical expenses to be incurred on treatment, minimum sustenance amount required for rehabilitation including such incidental charges as funeral expenses etc. The compensation may vary from case to case depending on the facts of each case.
4. Keeping in view the particular vulnerabilities and special needs of the affected person in certain cases, the District Legal Services Authority or the State Legal Services Authority, as the case may be, will have the power to provide additional assistance of Rs. 25,000/-subject to maximum of Rs. 1,00,000/-, in the cases where:
 - a. Affected person is a minor girl requiring specialized treatment and care:

- b. Person is mentally challenged requiring specialized care;
 - c. Any other case as may be deemed fit by the Legal Services Authority concerned.
5. The quantum of compensation to be awarded to the victim of dependents shall not exceed the maximum limit as per Schedule-1.
6. The amount of compensation decided under the Scheme shall be disbursed to the victim or his dependents from the fund. The interim or any financial assistance shall be remitted to the bank account of the applicant preferably within a week. In cases where the person affected is a minor, the amount shall be remitted to the bank account of his parent or guardian after an Authority concerned is satisfied about the proper utilization of the amount of compensation.
7. Compensation received by the victim from the State in relation to the issue in question, namely, insurance, ex-gratia and/or payment received under any other head in State run Scheme, shall be considered as part of the compensation amount and this Scheme and if the due compensation amount exceeds the payments received by the victim from collateral sources mentioned above, the balance amount shall be paid out of the fund.
8. The cases covered under the Motor Vehicle Act, 1988 wherein compensation is to be awarded by the Motor Accident Claims Tribunals shall not be covered under this Scheme.
9. The District Legal Services Authority, to alleviate the suffering of the victim may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer-in-charge of the police station or the Magistrate of the area concerned. The district Legal Service Authority may order for any other interim relief as it may deem fit. *(See 5(1) to (9) of the Uttar Pradesh Victim Compensation Scheme, 2014)*

IX. 3. Applicable Principles

It is made clear in the scheme that while determining the compensation and rehabilitation services to be provided on the basis of the restorative needs of the affected person, the Authority shall be guided by the following factors:

- i. type and severity of the bodily injury suffered by the affected person and expenditure incurred or likely to be incurred on victim's medical treatment and psychological counseling,
- ii. age and financial condition of the affected person so as to determine the need for his education or professional or vocational trauma or humiliation faced,
- iii. non-pecuniary loss entailing suffering, mental or emotional trauma or humiliation faced,
- iv. expenses incurred in connection with provision of any alternate accommodation in cases where the affected person resides in a place other than where the offence was committed and the FIR has been recorded or criminal trial initiated. *(See: 6(a) to (d) of the Uttar Pradesh Victim Compensation Scheme, 2014)*

IX. 4. Order to be on Record

To ensure clarity of position of the authority and avoid confusion, it is also provided that a copy of the order of compensation passed under the Scheme shall be mandatorily placed on record of the trial court to enable the court to pass order of compensation. *(See: Section 357(3) of Cr.P.C., 1073 and 7 of the U.P. Victim Compensation Scheme, 2014)*

IX. 5. Limitation

It is an important principle of Common Law that delay defeats equity and a victim who does not act promptly is bound to suffer financial loss as law tends to help only those who are vigilant. No claim made by the victim or his dependents under sub-section (4) of section 357-A of the Act shall be entertained after a period of six months of the crime, provided that the District Legal Services Authority, if satisfied for the reasons to be recorded in writing, may condone the delay in filing any claim. *(See: Section 357-A (4) of Cr.P.C., 1973 and 8 of the Uttar Pradesh Victim Compensation Scheme, 2014)*

IX. 6. Right of Appeal by Victim

To ensure fairness, transparency and proper supervision over the district level authority, it is provided that any victim aggrieved by the denial of compensation by the District Legal Services Authority may file an appeal before the State Legal Services Authority within a period of ninety days, provided that the State Legal Services Authority, if satisfied for the reasons to be recorded in writing, may condone the delay in filing the appeal. *(See: 8 of the U.P. Victim Compensation Scheme, 2014)*

The Schedule given in the Uttar Pradesh Victim Compensation Scheme, 2014 makes a systematic arrangement dealing with particulars of injury to the victims and maximum financial limit of compensation which is as under:

Schedule 1*

S.No.	Particulars of loss or injury	Maximum limit
1.	Rape	Rs. 2,00,000/
2.	Loss or injury causing severe mental agony to the victim of the crime	Rs. 1,00,000/
3.	Victim of corrosive substance i.e. acid attack etc.	Rs. 3,00,000/
4.	Death (Non-earning member)	Rs. 1,50,000/
5.	Death (Earning member)	Rs. 2,00,000/
6.	Victim of Human Trafficking	Rs. 2,00,000/

*Source: Uttar Pradesh Victim Compensation Scheme, 2014.

In view of the enactment of Protection of the Children from Sexual Offences Act, 2012, it was necessary to bring a separate but additional schedule relating to the quantum of compensation to victims of sexual assault. Consequently, on 10th July, 2015, certain additions were made in the U.P. Victim Compensation Scheme, 2014 so as to address the grievances of the victims of sexual assault in the State and provide compensation to them. Offences under Section 4, 6, 7, 9, 11 and 14 of the Protection of the Children from Sexual Offences Act, 2012**

1.	Penetrating Sexual assault (Section 4)	Rs. 2,00,000
2.	Aggravated penetrative Sexual assault (Section 6)	Rs. 2,00,000/
3.	Sexual assault (Section 7)	Rs. 1,00,000
4.	Aggravated Sexual assault (Section 9)	Rs. 1,50,000
5.	Sexual harassment (Section 11)	Rs 1,00,000
6.	Using Child for Pornographic porpoise (Section 14)	Rs 1,00,000

** Source: Some Notification No. 1986/VIP 9 2015 31 (90) 2010 dated July 10, 2015 Uttar Pradesh ShasanGrih (Police) Anubhag-9.

X. Conclusions

In fact, the object behind the sentencing is to promote a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community. Rehabilitation of victims, therefore, is as important as punishing the accused and it was neglected position of victim which finally led to the emergence of compensatory jurisprudence in our country.

It is now well settled that when compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to the victims or their family. Compensation shall be provided for any economically assessable damage resulting from violations of human rights or international humanitarian law. There exists a mandatory duty on the court to apply its mind to the question of compensation in every criminal case. The court ought to record reasons for awarding or refusing compensation in a given case.

The development of law regarding compensation to victim as a part and parcel of the Code of Criminal Procedure in India is not only remarkable but a welcome change as well. Recently introduced Victim Compensation Scheme of 2014 is a beautiful sign of modern State being loco parentis of its citizens. Moreover, the contours of victim compensation have not only been defined by the Apex Court but have also been sufficiently broadened by indicating towards Kerala Compensation Scheme as the role model and the Court aspired its expansion in near future by the States.

It is appreciable to note that 26 out of 29 states in India framed 'Victim Compensation Scheme' and the rest are in the process of framing the same under the directions of the Supreme Court of India but unfortunately most of the States have not followed the upper limit of compensation amount as set out in 'Kerala Compensation Scheme'. Let us hope that in near future not only Kerala model will be followed by all the states but a better model with a 'higher upper limit of compensation' will come into being providing a better position to hapless victims or his family members in our criminal justice system.

Queries Regarding Compensation to Victim and Victim Compensation and Scheme

Q. Can compensation be awarded by Court to a victim of a crime prior to enforcement of Criminal Law (Amendment) Act, 2013 (w.r.e.f. 03.02.2015)

Yes. It can be awarded in view of the judgments of Hon'ble Supreme Court reported in (2015) 5 SCC 182, (2015) 5 SCC 197 & (2015) 2 SCC 227: (2015) 2 SCC (Cri.) 45

*The date of actual occurrence, in State of Madhya Pradesh v. Mehtab (2015) 5 SCC 197, was 22-11-1997 and the judgment and order passed by the High Court of Madhya Pradesh at Gwalior was on 6-11-2012 (long before the Criminal Law (Amendment) Act, 2013 come into force-w.r.e.f 3-2-2013) Hon'ble Supreme Court of India held: "if is the duty of Court to award just sentence to a convict against whom charge is proved. Mechanical reduction of sentence has to be fair not only to the accused but also to the victim and society. No cogent reason has been assigned for imposing only 10 days sentence when an innocent life has been lost. The High Court was not justified in reducing the sentence of imprisonment to 10 days without awarding any compensation to the heirs of the deceased. The order of the High Court can be upheld only with the modification that the **accused will pay compensation of Rs. 2 lakhs to the heirs of the deceased within six months.** In default, he will undergo RI for six months. The*

compensation of Rs. 2 lakhs is being fixed having regard to the limited financial resources of the accused but the said compensation may not be adequate for the heirs of the deceased. In the interest of justice, interim compensation of Rs. 3 lacs is also awarded under Section 357-A, Cr.PC payable out of the funds available to be made available by State of M.P. In case the accused does not pay the compensation awarded, the state of M.P. will pay the entire amount of compensation of Rs. 5 lakhs. (paras 7 to 11)

Thus, it is crystal clear that compensation may be awarded by court for an offence committed even in 1997 as the date of award falls in 2015 when the victim compensation Scheme is operative.

Prior to the above judgment, Hon'ble Supreme Court in **Suresh and another v. State of Haryana reported in (2015) 2 SCC 227: (2015) 2 SCC (Cri.) 45**, held that section 357 A has been incorporated in Cr.P.C. vide Act 5 of 2009 and the amendment duly come into force in view of Notification dated 31-12-2009. The object and purpose of section 357-A Cr.PC is to enable the court to direct the state to pay compensation to the victim where the compensation under section 357 Cr PC is not adequate or where the cases ended in acquittal or discharge and the victim is required to be rehabilitated.

The facts of the above case would show that the date of occurrence was 18-12-2000 and the criminal revision no. 1477 was of 2004 for compensation which was dismissed by the High Court. Hon'ble Supreme Court considered the award of compensation to the family members of the deceased in 2015. This makes it amply clear that compensation to victim may be considered u/s 357-A. at any stage. by the court so long as the matter is pending even through the offence might have occurred in 1987, 1999 or 2004.

Q. Can interim compensation be awarded under section 357-A of Cr.P.C.?

Yes. It can be awarded rather it must be awarded. Hon'ble Supreme Court, in **Suresh & another v. State of Haryana reported in (2015) 2 SCC (Cri) 45**, held that "it is the duty of the Courts, on taking cognizance of a criminal offence, to ascertain whether there is tangible material to show commission of crime, whether the victim is identifiable and whether the victim of crime needs immediate financial relief. On being satisfied on an application or on its own motion, the court ought to direct grant of interim compensation. subject to final compensation being determined later. Such duty continues at every stage of a criminal case where compensation ought to be given and has not been given irrespective of the application by the victim. At the stage of final hearing it is obligatory on the part of the court to advert to the provision and record a finding whether a case for grant of compensation has been made out and, if so, who is entitled to compensation and how much. Award of such compensation can be interim. Gravity of offence and need of victim are some of the guiding factors to be kept in mind, apart from such other factors as may be found relevant in the facts and circumstances of an individual case.

So in view of the above law, it would not be possible for a Magistrate to award interim compensation in pre cognizance stage. It may be considered only at the time of taking cognizance.

Q. Does the use of the word Court in Section 357-A Cr.P.C., include Revisional or Appellate court as well?

*In the absence of specific use of the words Revisional/Appellate Courts in Section 357-A, it cannot be said with certainty that these courts are also covered under Section 357-A Cr.P.C. Yet the judgment of Hon'ble Supreme Court in **Manohar Singh v. State of Rajasthan reported in 2015 (89) ACC 266** brings certain amount of clarity by pre-supposing the inclusion of these courts within the ambit of Section 357-A Cr.P.C. Hon'ble Supreme Court observed as under:*

We find that the Court of Sessions and the High Court have not fully focused on the need to compensate the victim which cannot be taken to be integral to sentencing and order of sentence in criminal case needs due application of mind. The court has to give attention not only to the nature of crime, prescribed sentence, mitigation and aggravating circumstances to strike just balance in needs of society and fairness to the accused, but also to keep in mind the need to give justice to victim of crime. In spite of legislative changes and decisions of this court, this aspect at times escapes attention. Rehabilitating victim is as important as punishing the accused Victim's plight cannot be ignored even when a crime goes unpunished for want of adequate evidence.

Just compensation to the victim has to be fixed having regard to the medical and other expenses, pain and suffering, loss of earning and other relevant factors. While punishment to the accused is one aspect, determination of just compensation to the victim is the other. Compensation is payable under Sections 357 and 357-4. While under section 357, financial capacity of the accused has to be kept in mind, section 357-4 under which compensation comes out of State funds, has to be invoked to make up the requirement of just compensation.

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22. 2015 (89) ACC 266 (SC).

CHAPTER-17

TRIAL OF CASES UNDER NDPS ACT: PRACTICE AND PROCEDURE

1. Genesis

The genesis of drug control laws in India can be traced back to the **Opium Act of 1857**. This was followed by the **Opium Act of 1878 and the Dangerous Drugs Act of 1930**. These laws were designed to regulate and monitor the use of some specific drugs in limited contexts; they were not based on any well-defined principles and did not contain any overarching provisions to grapple with the problem of drug abuse in a holistic manner.

In order to bring India's narcotics control law at par with international standards and to effectuate the goals of these treaties, the **Narcotic Drugs and Psychotropic Substances Act, 1985** was enacted by the Government of India. The Act is widely regarded as a prohibitionist law which seeks to grapple with 2 kinds of offences: trafficking of prohibited substances i.e. cultivation, manufacture, distribution and sale, as well as their consumption.

Common or street names:

- White China, Smack, Big H, Black Tar, Chiva, Skag, Junk, Brown Sugar, Skunk, White Horse, and Thunder

What is heroin?

- Pure heroin (diacetylmorphine) is a white powder with a bitter taste abused for its euphoric effects. Heroin, a highly addictive drug, is derived from the morphine alkaloid found in opium poppy plant (*Papaver somniferum*) and is roughly 2 to 3 times more potent than morphine. It is usually injected, smoked or snorted up the nose.
- Most illicit heroin is sold as a white or brownish powder and is usually "cut" with other drugs or with substances such as sugar, starch, powdered milk, or quinine. It can also be cut with strychnine or other poisons. This is the form that is injected. Potent opioids such as fentanyl and carfentanyl have been found cut into heroin accessed on the streets, and can be deadly to the unsuspecting user.
- Another form known as "black tar" may be sticky, like roofing tar, or hard, like coal. Its color may vary from dark brown to black. This form is usually smoked or snorted. Because abusers do not know the actual strength of the drug or its true contents, they are at often risk of overdose or death.
- **Coca** is any of the four cultivated plants in the family Erythroxylaceae, native to western South America. The plant is grown as a cash crop in Argentine Northwest, Bolivia, Colombia, Ecuador, and Peru, even in areas where its cultivation is unlawful. There are some reports that the plant is being cultivated in the south of Mexico as an alternative to smuggling its recreational product cocaine.
- **Cocaine** - Coca is known throughout the world for its psychoactive alkaloid, cocaine. The alkaloid content of coca leaves is relatively low, between 0.25% and 0.77%. The native people use it as a stimulant. Coca-Cola used coca leaf extract in its products from 1885 and until about 1903. Extraction of cocaine from coca

requires several solvents and a chemical process is known as an acid-base extraction, which can fairly easily extract the alkaloids from the plant.

2. The Narcotic Drugs and Psychotropic Substances Act, 1985

What is Narcotic Drugs: (S. 2 of sub Cl. XIV)

Narcotic Drugs means Coca leaf, cannabis (hemp), opium poppy straw and includes all manufactured drugs.

Arjun Singh V. State of Haryana, 2005 Cri.L.J. 253 (P&H)

It has been held by different Hon'ble High Courts, that bhang does not fall under the definition of cannabis as defined under Section 2(iii) of the Act. Thus, its possession does not constitute an offence punishable under the Act.

PSYCHOTROPIC SUBSTANCES. (S. 2 of sub Cl. XXIII)

Any substance means natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substance specified in the Schedule.

According to S. 3 Central Government may omit or add any other substance.

S. 2 [(viiia) "commercial quantity", in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette;

S2. xxiiiia) "small quantity", in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette;]

3. There is **notification** specifying **small quantity and commercial quantity** vide SO 1055(E) dated 19th October 2001 published in gazette of India.

Table 1: **Common drugs in NDPS Act.**

Drugs	Small Quantity	Punishment	Commercial Quantity	Punishment	Intermediate (In between smaller & commercial quantity)
Heroin	5g	Maximum of 1 year rigorous imprisonment or a fine up to Rs 10,000 or Both	250g	Rigorous imprisonment from 10 years (min) to 20 years (max) and a fine from Rs 1 lakh to 2 lakhs.	Rigorous imprisonment that may extend to 10 years & fine that may extend to Rs 1 lakh.
Opium	25g	As above	2.5kg	As above	As above
Morphine	5g	As above	250g	As above	As above
Ganja (cannabis)	1kg	As above	20kg	As above	As above
Charas (cannabis resin)	100g	As above	1kg	As above	As above
Coca leaf	100g	As above	2kg	As above	As above

Cocaine	2g	As above	100g	As above	As above
Amphet-Amine	2g	As above	50g	As above	As above
LSD	2mg	As above	100mg	As above	As above
Codeine	10 g		1 kg		
Poppy straw	1kg		50kg		
Diazepam	20g		500g		
Methaqualone	20g		500g		

4. Section 8 Prohibition of certain operations. —No person shall—

- (a) cultivate or gather any portion of coca plant; or
 (b) Cultivate the opium poppy or any cannabis plant; or
 (c) Produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance, except for medical or scientific purposes by way of licence, permit or authorisation Provisio regarding cultivation etc for Ganja.

Provided further that nothing in this section shall apply to the export of poppy straw for decorative purposes.

5. Offences and Penalties

Offences	Penalty	Sections of the Act
Cultivation of opium, cannabis or coca plants without license	Rigorous imprisonment-up to 10 years + fine up to Rs.1 lakh	Opium - 18(c) Cannabis - 20 Coca-16
Embezzlement of opium by licensed farmer	Rigorous imprisonment -10 to 20 years + fine Rs. 1 to 2 lakhs (regardless of the quantity)	19
Production, manufacture, possession, sale, purchase, transport, import inter-state, export inter-state or use of narcotic drugs and psychotropic substances	Small quantity - Rigorous imprisonment up to 6 months or fine up to Rs. 10,000 or both. More than small quantity but less than commercial quantity - Rigorous imprisonment. up to 10 years + fine up to Rs. 1 Lakhs. Commercial quantity - Rigorous imprisonment 10 to 20 years + fine Rs. 1 to 2 Lakhs	Prepared opium-17 Opium – 18 Cannabis - 20 Manufactured drugs or their preparations-21 Psychotropic substances -22
Import, export or transhipment of narcotic drugs and psychotropic substances	Same as above	23
External dealings in NDPS-i.e. engaging in or controlling trade whereby drugs are obtained from outside India and supplied to a person outside India	Rigorous imprisonment 10 to 20 years + fine of Rs. 1 to 2 lakhs (Regardless of the quantity)	24
Knowingly allowing one's premises to be used for committing an offence	Same as for the offence	25

Violations pertaining to controlled substances (precursors)	Rigorous imprisonment up to 10 years + fine Rs. 1 to 2 lakhs	25A
Financing traffic and harboring offenders	Rigorous imprisonment 10 to 20 years + fine Rs. 1 to 2 lakhs	27A
Attempts, abetment and criminal conspiracy	Same as for the offence	Attempts-28 Abetment and criminal conspiracy - 29
Preparation to commit an offence	Half the punishment for the offence	30
Repeat offence	One and half times the punishment for the offence. Death penalty in some cases.	31 Death - 31A
Consumption of drugs	Cocaine, morphine, heroin - Rigorous imprisonment up to 1 year or fine up to Rs. 20,000 or both. Other drugs- Imprisonment up to 6 months or fine up to Rs. 10,000 or both. Addicts volunteering for treatment enjoy immunity from prosecution	27 Immunity - 64A
Punishment for violations not elsewhere specified	Imprisonment up to six months or fine or both	32

- ***The Narcotic Drugs and Psychotropic Substances Act, 1985 views drug offences very seriously and prescribes stiff penalties.***

The Act follows a graded system of punishment with the punishment varying with the quantum of punishment being dependent upon whether the offence pertains to small, commercial and intermediate quantities of narcotic drugs and psychotropic substances.

- *For offences involving commercial quantities of drugs, a minimum penalty of ten years rigorous imprisonment is prescribed, which may extend to twenty years. Repeat offences attract one and half times the penalty and in a few cases even the death penalty.*

6. Points of Consideration;

Alongside these stringent provisions, the Act has procedural safeguards as follows:

Personal search: Any person being searched has a **right to be searched before a Gazetted Officer or a Magistrate (Section 50)**. The officer searching the person has to explain to the person that he has a right to be searched before a Gazetted Officer or a Magistrate and if the person wishes to be searched before a Gazetted Officer or a Magistrate he should be taken to the Gazetted Officer or the Magistrate and searched.

However, if the officer has reason to believe that it is not possible to take him to a Gazetted officer or a magistrate without giving him a chance to part with the drug, controlled substance, etc., he can search him under Section 100 of the Cr. P. C. [Section 50(5) and 50 (6)].

Searches: As per **Section 41 of the NDPS Act, Gazetted Officers of the empowered Departments can authorize searches**. Such authorization has to be based on information taken down in writing. As per Section 42, searches can be made under

certain circumstances without a warrant (from a magistrate) or an authorization (from a Gazetted Officer). **In case of such searches**, the officer has to send a copy of the information taken in writing or the grounds of his belief to his **immediate official superior within 72 hours**.

S. 42, 42(2) -43

Power to search, seizure and arrest without warrant ...

So, what mainly required is that -

1. If officer receives any information he should take down in writing;
2. If search is made between sunset and sunrise and warrant is not available, he should record grounds of his belief;
3. Shall within 72 hours send copy to immediate official superior.

State of Panjab Vs. Balbir Singh, AIR 1994 SC 187 Held: Procedure envisaged in S. 41(1) and (2) and S. 42A is mandatory and contravention of the same will affect prosecution case. Where information on the basis of which search and seizure were made is not reduced in writing there is violation of S. 42 – Trial vitiated.

15A. Ss. 8, 21, 42, 43 and 50 -Conviction-Sustainability-Need for independent Witnesses-Right of accused to be searched before gazetted officer and to be informed of the said right-Necessity-

Morphine alleged to have been seized from person of appellant and accused R & S- However accused alleging that PW 1 (SHO) and other constables had evil eye on his wife, DW 1: and when she resisted their advances, she was slapped 2-3 times, and thereafter he was arrested.

There was no independent witness to search and seizure as passers-by were stated to have refused to be a witness-besides name of persons who refused to be witnesses not recorded.

Further, time when information was received not stated in general diary, nor distance of the place from police station where such information was received, noticed-FIR disclosing that information was given at about 6 a.m. and raid conducted at about 6.15 a.m., while accused were stated to be sitting on roadside from before 6 a.m. Held, it thus, becomes difficult to believe the prosecution story-

Besides, appellant at no point of time was informed that he had statutory right of being searched by a gazetted officer -Further, combined reading of depositions of PWs are pointers to fact that so-called consent letters were obtained only after accused were arrested-

Even in relation to consent letters, there were glaring discrepancies -Nothing brought on record to show that S. 42 had been complied with-

Even SHO, admittedly, had no authority to make search -In such circumstances, impugned judgment affirming conviction of appellant under Ss. 8/21, unsustainable (Paras 2, 4 to 6, 10, 11 and 13 to 23). **Sarju v. State of U.P., (2009) 13 SCC 698: 2009 Cri LJ 4123 (2009) 81 AIC 90 (SC).**

Arrests: The person who is arrested should be informed, as soon as may be, the grounds of his arrest [Section 52 (1)]. If the arrest or seizure is based on a warrant issued by a magistrate, the person or the seized article should be forwarded to that magistrate [Section 52(2)].

The officer who arrests a person has to make a **full report to his official superior within 48 hours** [section 57].

7. Section 36A Offences triable by Special Courts

- a. All offences under this Act shall be triable only by the Special Courts
- b. When a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of section 167 CrPC, such Magistrate may authorize the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate,
- c. Provided that where such Magistrate considers when such person is forwarded to him as aforesaid; or upon or at any time before the expiry of the period of detention authorized by him, that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction.
- d. The Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of CrPC
- e. A Special Court may, upon a perusal of police report of the facts constituting an offence under this Act or upon a complaint made by an officer of the Central Government or a State Government authorized in the behalf, take cognizance of that offence without the accused being committed to it for trial.
- f. When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act, with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial.
- g. **Bail:** Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 and the Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted under section 36.
- h. In respect of persons accused of an offence punishable under section 19, 24, 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the CrPC, thereof to "**ninety days**", shall be construed as reference to "**one hundred and eighty days**": Provided that, if it is not possible to complete the investigation extendable upto one year, on the report of the **Public Prosecutor** indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days. For offences punishable under **S. 19 (embezzlement of opium by cultivator) or 24 (external dealings in NDPS) or 27A (financing illicit traffic & harbouring offenders)** or offences involving commercial quantity, the word "90 days" under **S. 167(2)** shall be construed to "180 days". For special reasons the detention at investigation stage can be extended up to 'One Year'.
- i) The offences punishable under this Act with imprisonment for a term of not more than three years may be tried summarily.

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

- a. every offence punishable under this Act shall be cognizable;
- b. no person accused of an offence punishable for [**S. 19 (embezzlement of opium by cultivator) or 24 (external dealings in NDPS) or 27A (financing illicit traffic & harbouring offenders)** or offences involving commercial quantity] shall be released on bail or on his own bond unless—

- i. The Public Prosecutor has been given an opportunity to oppose the application for such release, and
 - ii. Where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds to believe that he is not guilty and he is not likely to commit any offence while on bail.
2. The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.]

Ram Kishore v. State of U.P.; Cri Misc. Bail Appln. No. 11414/07 – Decided on 5.6.07 by Allahabad High Court – Every offence non-bailable.

N.R. Mon v. Mohd. Nasimuddin; (2008) 3 SCC (Cri) 29 – Bail without specifically considering parameters of S. 37(1)(b) – Held, renders the bail orders invalid.

9. Necessary conditions for grant of bail u/s 37 of the NDPS Act must be fulfilled: The following twin conditions prescribed u/s 37(1)(b)(ii) of the NDPS Act, 1985 must be fulfilled before grant of bail to an accused of offences under the said Act:

(i) That there are reasonable grounds for believing that the accused is not guilty.

(ii) That the accused is not likely to commit any offence while on bail. See: (i)

Union of India Vs. Shiv Shanker Kesari, (2007) 7 SCC 798 (ii) Superintendent, Narcotics Central Bureau, Chennai Vs. R. Paulsamy, 2001 CrLJ 117 (SC) 27

10. Bail by ASJ under NDPS Act, 1985: When the Special Judge exercises power to grant bail, he is bound by Section 37 of the NDPS Act, 1985. He has to consider the conditions laid down in Clauses (i) and (ii) of Clause (b) of Section 37(1) of the NDPS Act and if he is satisfied that those conditions have been fulfilled, he can release a person on bail under this Section. The other conditions laid down in Section 37 will also apply to him when he intends to grant bail in such a case.

While considering an application for bail under section 37 of the NDPS Act the court is not called upon to record the finding of not guilty at this stage. It is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence, he is charged with and further he is not likely to commit an offence under the act while on bail. The satisfaction of court about the existence of said twin conditions is for limited purpose and is confined to the question of releasing the accused on bail.

Union of India vs. Rattan Mallik, (2009) SCC 624.

Abdul Aziz vs State of U.P. on 22 March, 2002 Hon'ble Allahabad High Court: 2002 CriLJ 2913

The question was whether the offences related to recovery of small quantity of contraband, the offence is Bailable or Nonbailable: *analogy*

The question is whether the present offence is bailable. Section 37 of the Act overrides the provisions of the CrPC and provides that the offences punishable under the Act are cognizable and not bailable. The bare perusal of the above Section (34) show that the provisions of the Act will prevail over the provisions of the CrPC only to the extent that the offences under the Act shall be cognizable and regarding consideration of bail for offence under Sections 19, 24 and 27A only. The provisions of Section 37 override the provisions of the CrPC to this extent only. In other matters, the provisions of CrPC will apply to the offences under the NDPS ACT also.

Thus under the provisions of S 5 read with S 2 read with schedule 1 part 2nd of CrPC

“In view of the above the provisions, the offence alleged to have been committed are triable by the Magistrate is a bailable offence. Accordingly, it was decided that the offence committed by the petitioner is bailable offence.

Bail – section 18 read with section 20 recovery of narcotics much less than commercial quantity -Accused entitled to bail Ramprasad @ **parsa vs state of UP 2003(1) JIC All.**

11. Jurisdiction of Magistrates and Special Judges under NDPS Act, 1985 : As regards the jurisdiction of Magistrates and the Special Judges for conducting enquiries or trial or regarding other proceedings under the provisions of NDPS Act, 1985, the *Hon’ble Allahabad High Court, in compliance with the directions of the Allahabad High Court (by Hon’ble Justice B.K. Rathi), in the matter of Criminal Misc. Application No. 1239 of 2002, Rajesh Singh Vs. State of U.P. vide C.L. No.31/2006, dated 7.8.2006 has issued following directions to the judicial officers in the State of U.P.---*

“it is clear that, in case the punishment provided for the offence under the NDPS Act is more than three years, the offence is triable by Special Court and to that extent the provisio from the perusal of the above provision alongwith Section 4 of the Cr.P.C. of Section 36-A NDPS Act over rides the provisions of the CrPC. The trial for offences under the NDPS Act which are punishable for imprisonment of three years or less should be a summary trial by the Magistrate under Chapter XXI of the CrPC”

12. Search of person

Search u/s 50 of the NDPS Act does not include search & recovery from bag, briefcase and container etc. Sec.50 applies where personal search of a person is involved.

Jarnail Singh vs. State of Punjab, 2011 CrLJ 1738(SC)

Ajmer Singh vs. State of Haryana, (2010) 3 SCC 746

Where bags containing poppy husk were seized from truck in the accused were sitting, it has been held by the Supreme Court that it was not a case of personal search of the accused and Section 50 of the NDPS Act, 1985 was not attracted as Section 50 only applies in case of personal search of person and not applicable to search of vehicle, container, bag or premises. **Kulwinder Singh & Another Vs. State of Punjab, (2015) 6 SCC 674.**

13. Consent statement by accused to be searched in presence of police officer & its effect Where narcotic/opium was recovered from a bag carried by the accused and not from his person and option was given by the inspector of police to the accused as to whether he wanted to be searched in presence of gazetted officer or magistrate and the accused had infact signed consent statement expressing his confidence to be searched in presence of the inspector, it cannot be said that there was violation of Sec.50 of the NDPS Act, 1985. **Jarnail Singh vs. State of Punjab, 2011 CRLJ 1738(SC)**

14. Ss. 8 and 18-Investigation - Site plan- Preparation of, when place of offence clearly specified - Whether necessary - Where the accused was found to be in possession of opium while sitting on a bench on a particular public road, preparing of a site plan of the place concerned, held, was not necessary. **Sayar Puri v. State of Rajasthan, AIR 1998 SC 3224.**

Ss. 8 and 18-Conviction turning solely on the evidence of PW-1, a Sub-Inspector, Narcotics-Panch witnesses turning hostile and bus-driver and conductor not supporting

prosecution's story and denying witnessing a search and seizure-On facts, held, guilt not proved beyond reasonable doubt Conviction set aside. **Jagdish v. State of M.P.) (2003), AIR 2002 SC 2540.**

15. S. 15- Plea of false implication- Ground that police was inimical towards accused-Offences under NDPS Act- Recovery of poppy husk- Defence allegation that High Court in an earlier case (4 yrs back) had imposed fine of Sub Inspector H, for illegal detention of accused and, therefore the accused was involved in this case at the instance of H, held not sustainable – Further in view of recovery of large quantity of poppy husk it was not a case of implanted evidence – Hence, defence that the accused was falsely implicated not acceptable. **State of Punjab v. Balwant Rai, AIR 2005 SC 1576.**

16. Recovery of Narcotic Drugs by police when not supported by public witnesses

If after making efforts which the court considers in the circumstances of the case reasonable the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer is believable after taking due care and caution in evaluating their evidence.

Jarnail Singh vs. State of Punjab, 2011 CRLJ 1738(SC) Ajmer Singh vs. State of Haryana, (2010) 3 SCC 746

17. 8(c) r/w S. 20(b)(ii)-Investigation by complainant police officer himself-Validity of-Nothing pointed out to show that the said investigation has caused prejudice or was biased against the accused --Hence, held, valid-Criminal Procedure Code, 1973, S. 156.

The appellants were found guilty of offences under Section 8(c) read with Section 20(b)(ii) of the NDPS Act. They were found in possession of narcotic drug (hashish). The case was registered against the appellants on the basis of the statement of PW 8 (Inspector) who had conducted the search. Before the Hon'ble Supreme Court, it was argued that PW 8 was the complainant and he himself conducted the investigation and hence the entire investigation of the case was vitiated.

Held: The instant case, PW 8 conducted the search and recovered the contraband article and registered the case. Thereafter as part of his official duty he investigated the case and filed a charge-sheet. He was not in any way personally interested in the case. There is no bias in the process of investigation. The appellants also could not point out any circumstances by which the investigation caused prejudice or was biased against them. The appellants were thus rightly convicted and sentenced by the courts below. (Paras 3 and 4). **S. Jeevanantham v. State, (2004) 5 SCC 230: 2004 SCC (Cri) 1584.**

18. Section 106, Evidence Act to attract when recovery of contraband material is recovered from the possession or conscious possession of the accused: From the conjoint reading of the provisions of Sections 35 and 54 of the Act, it becomes clear that if the accused is found to be in possession of the contraband article, he is presumed to have committed the offence under the relevant **provisions of the Act** until the contrary is proved. Accordingly, to Section 35 of the Act, the Court shall presume the existence of mental state from the commission of an offence and it is for the accused to prove otherwise. **Gian Chand & Others Vs State of Haryana, AIR 2013 SC 3395**

19 a. S. 15-"Possession"- Conscious possession-Proof - Knowledge about thing possessed - Respondent-accused found sitting on bags containing poppy husk at an early hour i.e. 8 a.m., near religious place, and on seeing police party trying to hide behind

bags-Held, the said facts prove and establish that accused were in conscious possession of bags-Besides, they could not satisfactorily answer as to how and why they came from Haryana and were found sitting on bags of poppy husk (Paras 12, 13 and 15 to 17). **State of Punjab v. Lakhwinder Singh, (2010) 4 SCC 402.**

b. S. 15-Possession-Conscious Possession-Six bags each containing 32 kg of poppy husk recovered from premise of petitioner from a room which was opened by him with a key in his possession-Held, petitioner was, thus, in conscious possession of contraband-Impugned judgment convicting petitioner calls for no interference (Paras 21 and 7). **Bahadur Singh v. State of Haryana, (2010) 4 SCC 445.)**

c. S.5. 15-Conscious Possession-Determination of- -Held, to be determined with reference to factual backdrop in each case. (Para 13) **State of Punjab v. Hari Singh, AIR 2009SC 1966.**

20. If no information was taken down in writing by police officer or conveyed to immediate police officer then any oral evidence of police officer will not be in compliance with the provisions of Sec 42(2) of the NDPS Act, 1985.

1. State of Karnataka v. Dondusa Namasa Baddi, 2011(72) ACC 666 (SC).

2. Karnail Singh v. State of Haryana, 2009 (8) SCC 539 (Five judge Bench)....

21. Release of vehicle under NDPS Act : Where the narcotics was recovered from the truck when the accused, the brother of the owner of the truck, was sitting therein but the owner of the truck though a co-accused but was not arrested on the spot nor there was any evidence that carrying of the narcotics was in his knowledge, the Hon'ble High Court has held that in view of the law propounded by the Hon'ble Supreme Court in the case of **Sundarbhai Ambalal Desai Vs. State of Gujarat, 2003 (46) ACC 223 (SC)**, the truck should be released in favour of its registered owner u/s 451, 452 CrPC. **Samarjeet Vs. State of UP, 2014 (86) ACC 505 (All)**

Vehicle seized u/s 18/20 NDPS Act to be released in favour of its owner : Relying on the decision of the Hon'ble Supreme Court in Sundarbhai Ambalal Desai Vs. State of Gujarat, 2003 (46) ACC 223(SC), it has been held by the Hon'ble Allahabad High Court that a vehicle seized u/s 18/20 NDPS Act should be released in favour of its owner. **Prakash Sahu vs. State of UP, 2014 (86) ACC 214 (All).**

22. Confiscation

Section 60 Liability of illicit drugs, substances, plants, articles and conveyances to confiscation. —

Whenever any offence punishable under this Act has been committed, the narcotic drug, psychotropic substance, controlled substance, materials, apparatus and utensils in respect of which or by means of which such offence has been committed, shall be liable to confiscation.

S 60 Any animal or conveyance used in carrying any narcotic drug or psychotropic substance 2 [or controlled substances, shall be liable to confiscation.

- a. unless the owner of the animal or conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person-in-charge of the animal or conveyance and that
- b. each of them had taken all reasonable precautions against such use.

S. 62 Confiscation of sale proceeds of illicit drugs or substances. —under this Act, the sale proceeds thereof shall also be liable to confiscation having knowledge or reason to believe that the drug or substance is liable to confiscation Where any [narcotic drug, psychotropic substance or controlled substance] is sold by a person

S. 63. Procedure in making confiscations. — (1) In the trial of offences under this Act, whether the accused is convicted or acquitted or discharged, the court shall decide whether any article or thing seized under this Act is liable to confiscation under section 60 or section 61 or section 62 and, if it decides that the article is so liable,

It may order confiscation accordingly.

S. 63 (2) Where any article or thing seized under this Act appears to be liable to confiscation under section 60 or section 61 or section 62, but the person who committed the offence in connection therewith is not known or cannot be found, the court may inquire into and decide such liability, and may order confiscation accordingly:

Provided that no order of confiscation of an article or thing shall be made until the expiry of one month from the date of seizure, or without hearing any person who may claim any right thereto and the evidence, if any, which he produces in respect of his claim:

Provided further that if any such article or thing, other than a narcotic drug, psychotropic substance 5 [controlled substance], the opium poppy, coca plant or cannabis plant is liable to speedy and natural decay, or if the court is of opinion that its sale would be for the benefit of its owner, it may at any time direct it to be sold; and the provisions of this sub-section shall, as nearly as may be practicable, apply to the net proceeds of the sale

23. Determination of The Weight of NDPS substance

E. Micheal Raj vs Intelligence Officer, Narcotic ... on 11 March, 2008 Hon'ble Supreme Court observed that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance/s, for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration.”

In Hira Singh vs UoI on 22 April, 2020 Hon'ble Supreme Court viewed that In case of seizure of mixture of Narcotic Drugs or Psychotropic Substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the “small or commercial quantity” of the Narcotic Drugs or Psychotropic Substances;”

24. Report of F.S.L.

Report of F.S.L. does not require to be proved by Scientist/Analyzer formally in the view of provision contained in Section 293 Cr.P.C.

C.L. No. 76/IX f-16 dated 26th May, 1976

It invites attention to the provisions of Section 293 Criminal Procedure Code, 1973, (Act 11 of 1974) specially to its sub-section (2), and the court desires that the Director, Forensic Science Laboratory, as expert witness may not be summoned for examination in criminal cases in the ordinary course.

Ss. 2(iii)(a) and 20-Opinion of expert -Contraband seized if was "charas"- Where the analyst in his examination-in-chief stated in definite terms that the contraband

was "charas", the probative value of his evidence, held, could not be destroyed merely because in cross-examination he could not answer whether the contraband contained cowdung also-Evidence Act, 1872, S. 45 (Para 4). **Joseph Fernandez v. State of Goa, AIR 2000SC 3502**

Ss. 2(iii)(b) and 20(b)(ii)(B)-Actual weight of ganja at the time of seizure-Ascertainment of-Relevant considerations - Weight of moisture content if can be excluded - Ganja seized in present case consisting of greenish brown coloured leafy and flowery parts of the plant (in moist condition) -Held, weight of the contraband would be the weight taken at time of seizure, not excluding any moisture content-The seized ganja would include seeds and leaves of cannabis plant in terms of definition of "ganja" -There is nothing in NDPS Act suggesting that at time of seizure, weight of the ganja and the moisture content are to be ascertained separately so that the moisture content can be excluded for determining the actual weight of the ganja (Paras 14 to 16). **Shiv Kumar Mishra v. State of Goa, AIR 2009 SC**

S 2(xiv)-"Poppy husk"-Assumed to be covered within the expression "poppy straw. **Avtar Singh v. State of Punjab, AIR 2002 SC 3343,**

25. Notification regarding disposal of cases under NDPS Act

Ministry or Finance (Deptt. Of Revenue), Noti. No. G.S.R. 339(E), Dated May 10, 2007, published in the Gazette of India, Extra., Part 11, Section 3(i), dated 11th May, 2007, pp. 6.10, No. 217 (F.No. V-72/2004-NC11)

26 a. Drugs that can be disposed of.- All narcotic drugs and psychotropic substances can be disposed of under Section 52-A of the Act.

b. Officers who can dispose of drugs.- Any officer in charge of a police station or any officer empowered under Section 53 of the Act can dispose of drugs under Section 52-A of the Act.

c. Manner of disposal.- (1) Where any narcotic drug or psychotropic substances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under Section 53, of the Act, or if it is seized by such an officer himself, he shall prepare an inventory of such narcotic drugs or psychotropic substances as per Annexure to this notification and apply to any Magistrate under sub-section (2) of Section 52-A as per Annexure 2 to this notification.

(2) After the Magistrate allows the application under sub-section (3) of Section 52-The officer mentioned in clause (1) above shall preserve the certify inventory, photographs and samples drawn in the presence of the Magistrate as primary evidence for the case submit details of the drug consignments to the Chairman of the Drug Disposal Committee for a decision by the committee on the disposal. The officer shall send a copy of the details along with the drug consignments to the officer-in-charge of the go down.

27. Drug Disposal Committee: The Head of the Department of each Central and State drug law enforcement agency shall constitute one or more Drug Disposal Committees comprising three members each. Each such Committee shall be headed by an officer not below the rank of Superintendent of Police, Joint Commissioner of Customs and Central Excise, Joint Director of DRI or officers of equivalent rank. The Committee will be directly responsible to the Head of Department.

Functions: the functions of the Drug Disposal Committees will be to:

- meet as frequently as possible and necessary;

- conduct a detailed review of drugs pending disposal;
- order disposal of drugs; and
- advise the respective investigation officers/supervisory officers on the steps to be initiated for expeditious disposal.

Procedure to be followed by the Committee with regard to disposal of drugs: the functions-in-charge of go down shall prepare a list of all drug consignments that have been certified under Section 52-A of the Act to having become ripe for disposal and submit it to the Chairman of the concerned Drug Disposal Committee. After examining the list and satisfying that the drugs mentioned therein are fit for disposal and are no longer required for legal proceedings and that the approval of the court has been obtained for the purpose, the members of the respective drug disposal Committee shall endorse necessary certificates to this effect. The Committee shall thereafter physically examine and verify the weight and other details of each of the drug consignments with reference to the seizure report, report of chemical analysis, and any other documents and record its findings in each case.

Power of Committee for disposal of seized drugs: The committee can order disposal of drug consignments up to quantities or values indicated in the Table 1 below:

Table 1: Quantities and values up to which Drug Disposal Committees can order disposal of Drug Consignments

Name of drug	Quantity per consignment
1. Heroin	5 kg
2. Hashish (Charas)	100 kg
3. Hashish oil	20 kg
4. Ganja	1000 kg
5. Cocaine	2 kg
6. Mandrax	3000 kg
7. Pappy straw	Up to 10 MT
8. Other drugs	Up to value of Rs. 50 lakhs

Provided that if consignments are larger in quantity or of higher value than those indicated in Table 1, the Drug Disposal Committee shall send its recommendations to the Head of the Department who can order their disposal by a high-level Drug Disposal Committee specially constituted for this purpose.

28. Mode of disposal of Drugs:

- Opium, morphine, codeine and the baine shall be disposed of by transferring to the Government Opium and Alkaloid Works under the Chief Controller of Factories.
- In case of drugs other than the drugs mentioned in clause (i), the Chief Controller of Factories shall be intimated by the fastest means of communication available, details of drug consignments that are ready for disposal.
- The Chief Controller of Factories shall indicate within 15 days of the date of receipt of the communication, the quantities of drugs, if any, that are required by him to supply as samples under Rule 67-B.
- Such quantities of drugs, if any, as required by the Chief Controller of Factories under clause (iii) shall be transferred to him and the remaining quantities of drugs shall be destroyed as per the procedure outlined in para 4.1.2.

- Destruction shall be by incineration in incinerators fitted with appropriate air pollutin control devices, which comply with emission standards. Such incineration may only be done in places where adequate facilities and security arrangements exist. In order to ensure that such incineration may not be a health hazard or polluting, consent of the State Pollution Control Board or Pollution Control Committee, as the case may be, should be obtained. Destruction shall be carried out at the presence of the Members of the Drug Disposal Committee.

29. Intimation to Head or Department on destruction: The Disposal Committee shall intimate the Head of the Department regarding the programme of destruction at least 15 days in advance so that, in case he deems fit, he may either himself conduct surprise checks or depute an officer for conducting such surprise checks. After every destruction operation the Drug Disposal Committee shall submit to the Head of the Department a report giving details of destruction.

30. Certificate of destruction: A certificate of destruction (in triplicate) containing all the relevant data like go down entry number, gross and net weight of the drugs seized. Etc. shall be prepared and signed by the Chairman and members of the Drug Disposal Committee as per format at annexure 3. The original copy shall be pasted in the go down register after making necessary entries to this effect the duplicate to the retained in the seizure case file and the triplicate copy will be kept by the Drug Disposal Committee. Details of disposal of drugs shall be reported to the Narcotics Control Bureau in the Monthly Master Reports.

“

The said Act deals very stringent, strict compliance with requirements of the Act is needed.

*Union of India v. Kuldeep Singh, (2004)
2 SCC 590*

”

CHAPTER-18

AN OVERVIEW OF POCSO ACT, 2012

Distinctive Features of the Act:

- The Act defines a child as a person below the age of 18 years.
- Gender neutral and thereby includes child of any sex as a victim. The accused can also be of any sex.
- The Act includes both substantive as well as procedural provisions.
- Taking note of the dignity, vulnerability, physical & mental development of the child victim under the Act, has made special provisions for protecting the interest of the child both during the course of investigation and trial.
- Accordingly, the Act has provided for investigation through Special Police Unit, Trial by Special Court and Creation of Special Courts with requisite infrastructure.
- Presence of the Parents of the Child or any other person in whom the Child has trust or confidence; assistance of Translator or Interpreter, etc. during the various stages of investigation, medical examination and trial.
- Provision for Speedy and Timely Justice.

Penetration:

- Full penetration of male organ into vagina not necessary. Even if superficial, it can amount to penetrative sexual assault within the meaning of S. 3.
- Well settled that the slightest degree of penetration of penis without causing any injury or with or without emission of semen or even an attempt at penetration is sufficient for rape. *Bhupen Kaalita v. State of Assam*; *Madan Gopal Kakkad v Naval Dubey*, (1992) 3 SCC 204.

Special Procedure:

- Every person under an obligation to report to the Special Juvenile Police Unit (SJPU) or Local Police any offence relating to the child (Section 19).
- The Police shall record the statement of the child in plain clothes, in the language spoken by the child, at an appropriate place outside the Police Station; take assistance of specialized persons as per need; to take special measures for care and protection of the child etc. (Section 19 & 24).
- No person to make any report/provide any information through any form of media disclosing the identity of the child unless permitted by the Special Court. (Section 20 & 23).
- During the course of investigation or trial, all out efforts should be made to ensure that the child does not come in contact with any of the accused (Section 24 & 36).
- The Magistrate to record the statement of the child as spoken by the child in the presence of parents or special representative of the child. In case the child is physically or mentally disabled and requires assistance of any expert the same be provided and the statement of the child be also recorded by audio-video electronic means.
- Medical Examination of the Child be conducted irrespective of FIR being lodged; in case the victim is a girl child the medical examination be conducted by female doctor; medical examination be conducted in the presence of the parent of the child or a person in whom the child has trust and confidence (Section 27).

- Provision for designation of Special Court and Special Public Prosecutor (Section 28 & 32).
- Special Court shall also try any offence, other than the offences under the POCSO Act with which the accused may be charged at the same trial (Section 28(2)).
- Presumption about Commission/Abetment/Attempt of the Offence as the case may be under Sections 3,5, 7 & 9 of the Act and Presumption of culpable mental state with respect to other offence of the Act (Section 29 & 30).
- All 74 districts/Sessions Division in U.P. have more than 100 POCSO cases pending.
- Overall pendency more than 44,000
- The pendency ranges between more than 100 (5 districts) & more than 1000 cases (10 districts) – as on 25.07.2019.
- Re: Alarming Rise in the Number of Reported Child Rape Incident, (2020) 7 SCC 108 (12 connected orders)

Procedural Highlights for the Special Courts:

- To take cognizance of the case without committal of the case/accused (Section 33).
- No direct recording of evidence by the Special Public Prosecutor or Defence Counsel but only through the Presiding Officer. No aggressive questioning or character assassination of the child (Section 33).
- To permit a family member, guardian, a friend or relative of the child during trial (Section 33).
- Protection of the identity of the child (Section 33).
- The child not being called repeatedly for testifying and the evidence of the child be recorded within 30 days of cognizance (Section 33 & 35).
- The Special Court to complete the trial as far as possible within one year of cognizance (Section 35).
- In appropriate case direction for payment of compensation for the rehabilitation of the child (Section 33 & Rule 7 of POCSO Rules, 2012).
- Child not to be exposed in any way to the accused at the time of recording of evidence. Accordingly, appropriate arrangement in the court room or use of video conferencing for recording the statement of the child (Section 36).
- *In camera trial* (Section 37).
- Child to be provided free legal assistance as per requirement (Section 40).
- Alternate punishment where an act or omission constitutes an offence under this Act and also under certain specific offences under IPC, the offender found guilty shall be liable to punishment as may be greater in degree (Section 42).

Directions in – Nipun Saxena v. UoI, W.P. (Civil) No. 565/2012, Judgment – 11.12.2018:

- Identity of the child victim should be protected at all stages. Identity to be disclosed by the Special Court only if it is in the interest of the child.
- The privacy and dignity to be protected even if the child is dead.
- If the child is dead or is of a sound mind, the identity not to be disclosed even on authorisation of parents.
- FIR under POCSO Act not to be put in public domain.
- During recording of evidence of the child she should not be exposed to the accused.
- *In camera* proceedings in the presence of parents or person in whom the child has trust. The evidence shall be promptly recorded without unnecessary delay.

- *Trial of a case concludes with judgment therefore even in the judgments the identity of the child should not be disclosed.*
- *The privacy and other basic human rights of the child victim should be scrupulously protected to achieve goal of access to justice.*
- The Court should not permit repetitive, aggressive or harassing questioning of the child particularly as to his/her character assassination.
- In appropriate case the defence may be asked to submit its questions during cross examination in writing to the Court and the latter should put such questions to the victim in a comprehensive and decent manner.
- Where the victim is unable to appear in the Court, VC facility may be utilized or commission may be issued for recording evidence.
- Post registration of FIR, the Special Court on its own or on the application of the victim make enquiry as to the needs of the child and after hearing the State and affected parties pass orders for interim compensation and/or rehabilitation of the child.
- The Special Court if satisfied that the victim had suffered loss or injury due to the commission of the offence award just and reasonable compensation. If compensation not awarded reasons should be recorded (based on guidelines in Bijoy v. State of W.B., 2017 Cri LJ 3893 (Cal. HC))

Some Leading Judgments Pertaining to POCSO Act:

- Age of the victim to be determined as per the provisions of the JJ Act. Jarnail Singh vs. State of Haryana, AIR 2013 SC 3467; Mahadeo vs. State of Maharashtra, (2013) 14 SCC 637; State of M.P. vs. Anoop Singh, (2015) 7 SCC 773; Ali Mohammad vs. State of U.P., Special Appeal No. 559/2015 (Allahabad-DB) Judgment dated 25.08.2015; Smt. Priyanka Devi v. State of U.P., 2018 (103) ACC 438 (All HC).
- Mental age of the child not to be considered. Age determination only by determining the 'Chronological Age' or 'Biological Age' – Dr. Manjula Krippendorf vs. State (NCT of Delhi) & Another, (2017) 15 SCC 133.
- The Juvenile Justice (Care & Protection of Children) Act, 2015 provides for age determination under Section 94.
- In Sanjeev Kumar Gupta Vs. State of U.P., Criminal Appeal No. 1081/2019, DoJ 25 July, 2019, preference has been given to the recorded age in the school first attended over the age recorded in matriculation certificate.
- If doubts creep regarding the authenticity of documents medical opinion can be relied on – Prag Bhati vs. State of U.P., (2016) 12 SCC 744.
- Imputation of criminal liability of Doctors under Section 19 & 21 only when the evidence is of a nature which should indicate grave suspicion and not when there is mere likelihood of suspicion – Dr. Sr. Tessy Jose vs. State of Kerala, (2018) 18 SCC 292; (2019) 3 SCC Cri. 164.
- Broad guidelines about protecting the identity of the child has been laid down by the Apex Court in Nipun Saxena vs. Union of India & Others, (2019) 2 SCC 703.
- Guidelines of the Hon'ble Supreme Court to ensure timely justice and protection of dignity of the child during the course of investigation and trial – Alakh Alok Srivastava vs. Union of India, (2018) 17 SCC 291.
- Dealing with the question, whether the Special Court under the POCSO Act would have jurisdiction to the exclusion of the Special Court under the SC/ST Act, the Hon'ble Allahabad High Court in Rinku vs. State of U.P. (Criminal Misc. Bail Application No. 33075/2018, Judgment dated 11.02.2019) has held that looking into the object and purpose of the two enactments and the legislation which is later in

point of time, the provisions of POCSO Act have to be followed where the accused is charged for the offences under both the enactments. Thus, where an accused is tried for offences under both the enactments, the appropriate court to try the offence would be the Court designated under Section 28 of the POCSO Act.

- See also – In Re: Registrar (Judicial), High Court of Madras, 2007 CrLJ 4519; State of A.P. v. Mandili Yadagiri, 2016 CrLJ 1415; Guddu Kumar v. State of Bihar, Crl. Misc. Case No. 52792/2019; Smt. Sunita Gandharva v. State of M.P., Misc. Cri. Case No. 22615/2020, decided on 08 October, 2020.

Permissibility and Legality of Recording Multiple Statements:

- Law allows the investigating agencies to record multiple statements of the victims. There is no prohibition on such recording by the police.
- A seemingly contradictory initial account is not a reason to disbelieve subsequent accounts by the victim. The multiple statements should be carefully scrutinized by the trial court to ensure complete justice. Court on its Own Motion v. State, Cri. Ref. No. 2/2016, decided on August 04, 2018 (Delhi HC).
- Where the victim is deaf and dumb, the Court should see that the victim is not subjected to aggressive cross examination. As the victim has a limited vocabulary, which is expressed through sign language, the deposition should not be extended in nature. Further as such a victim is not in a position to protect herself fully, the offender found guilty warrants maximum punishment – Chander Singh vs. State, Crl. A. 751/2014, date of Judgment June 03, 2016 (Delhi High Court).

Oath to the Interpreter/Translator:

- As the POCSO Act lays down (S. 38) that the assistance of a translator or interpreter may be taken, while recording the evidence of the child, it is necessary that oath or affirmation should be administered to such a person, in terms of the Oaths Act, 1969 or Rule 44 & 45 of the G.R. (Criminal), 1977. State of Rajasthan vs. Darshan Singh, (2012) 5 SCC 789.

Deaf and dumb child witness:

- Chander Singh vs. State, Cri. Appeal No. 751/2014, Date of Judgment- 03 June, 2016 (Delhi).
- Hanumant vs. Bangar v. State of Maharashtra, Cri. Appeal No. 493/2019, Date of Judgment- 26 June, 2019 (Bombay).
- Mithailal v. State of Bihar, Cri. Appeal (SJ) No. 31/2015 (Patna).
- Sampath v. State, Cri. Revision No. 1271/2011 (Madras), Date of Judgment- 20 July, 2018.

Child Witness:

- Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341
- Ranjeet Kumar Ram v. State of Bihar, 2015 (6) Scale 529
- Nivrutti Pandurang Kokate v. The State of Maharashtra, (2008) 12 SCC 565
- Yogesh Singh v. Mahabeer Singh, (2017) 11 SCC 195
- Panchhi v. State of U.P., (1998) 7 SCC 177
- Satish v. State of Haryana, (2018) 11 SCC 300
- State of Madhya Pradesh v. Ramesh, (2011) 4 SCC 786

- Rameshwar v. State of Rajasthan, AIR 1952 SC 54
- Mangoo v. State of M.P., AIR 1995 SC 959
- Nivrutti Pandurang Kokate v. State of Maharashtra, (2008) 12 SCC 565
- State of U.P. v. Krishna Master, (2010) 12 SCC 324
- Gagan Kanojia v. State of Punjab, (2006) 13 SCC 516
- Digamber Vaishnav v. The State of Chattisgarh, Cri. Appeal Nos. 428-430 of 2019 (SC), DOJ 05 March, 2019.
- P Ramesh v. State, Cri.Appel No. 1013 of 2019 (SC) DOJ 9 July, 2019.

General Guidelines and Principles:

- Even in the absence of oath, if a child witness is found competent to depose to the facts and reliable one such evidence could be the basis of conviction.
- The witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.
- Evidence of the child witness and its credibility must depend upon the circumstances of each case.
- The trial judge must be satisfied that the child understands the obligation of having to speak the truth.
- Trial judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding the obligation of an oath.
- The evidence of a child witness must find adequate corroboration, before it is relied upon as a rule of corroboration is of practical wisdom then of law.
- As a child witness may be easy prey to tutoring, his evidence must be evaluated more carefully.
- An appellate court must interfere on the determination of reliability of a child witness, only where the records make it apparent that the trial court erred in regarding the child as a reliable witness.
- The trial court should always record their opinion about understanding the duty by the child to speak the truth.
- Conviction can be recorded on the basis of the solitary testimony of a child witness if found reliable.
- Court should determine whether the child has the intellectual and cognitive skills to recollect and narrate the incidents of the crime.
- No precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child competent witness.
- Child witness to be provided all protection during the trial.
- Sufficient interval to be provided to the child.
- Appropriate arrangements for preventing the child from coming in contact with the accused.
- Questions can be asked only by the Presiding Officer.
- Cross-examination if necessary through Video Conferencing.
- **Mahendra Chawla v. UoI, AIR Online 2018 SC 289.**

Conviction on sole testimony of victim:

- There can be conviction on the sole testimony of the victim. **Vijay @ Chinee v. State of M.P., (2010) 8 SCC 191.**
- A woman, who is the victim of sexual assault is not an accomplice to the crime but is a victim of another person's lust. A prosecutrix of a sex offence cannot be put on par

with an accomplice. She is a competent witness u/s 118 IEA and her evidence must receive the same weight as is attached to an injured in cases of physical violence. **State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC 550.**

- Even where the girl is shown to be of easy virtue or is habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. Consent has to be proved (immaterial in case of a minor). Absence of injury on the prosecutrix may not be a factor that leads the Court to absolve the accused. **State of U.P. v. Pappu, (2005) 3 SCC 594.**
- In cases involving sexual harassment, molestation, etc. the Court is duty bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies not material. Evidence of the victim is enough for conviction and does not require any corroboration unless there are compelling reasons for it. Delay in filing FIR for sexual offence may not even be properly explained, but if found natural, the accused cannot be given any benefit thereof. **State of Punjab v. Gurmit Singh, (1996) 2 SCC 384.**
- Evidence has to be weighed not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. **State of H.P. v. Raghubir Singh, (1993) 2 SCC 622; Wahid Khan v. State of M.P., (2010) 2 SCC 9; Krishna Kumar Malik v. State of Haryana (2011) 7 SCC 130.**
- Discussing with approval the judgments mentioned earlier, the Hon'ble Apex Court, upheld the conviction on the basis of sole and reliable testimony of a minor aged 15 years, u/s 7 & 8 of the POCSO Act, even though both the father and the mother turned hostile or did not support the prosecution case. **Ganesan v. State Represented by its Inspector of Police, CrI. Appeal No. 680/2020 (3 Judges), DoJ 14.10.2020.**
- In a case where the minor victim was deaf and dumb and mentally retarded, the Hon'ble Apex Court upheld the conviction without the victim being examined as a witness.
- The evidence of the mother showed that the accused took away the victim. PW-2 deposed that he had seen the accused and the victim together on the date of the incident. Victim immediately after the incident narrated the matter to her mother as reflected in the FIR. Rape confirmed by medical evidence and identity of the accused not in dispute. **State of Maharashtra v. Bandu @ Daulat, CrI. Appeal No. 1820/2017, DoJ 24.10.2017.**
- Section 375, Exception 2 IPC – Sexual intercourse or sexual acts by a man with his own wife, the wife not being under 15 years of age, is not rape.
- Section 5 (n) POCSO Act – Whoever being a relative of the child through blood or adoption or marriage or guardianship -----, commits penetrative sexual assault on such child (amounts to aggravated penetrative sexual assault).
- Harmonizing the provisions of POCSO Act and the IPC, the provision under Exception 2 Section 375 IPC has been read down and accordingly sexual intercourse with one's own wife, if she is below 18 years of age amounts to rape.
- **Independent Thought v. UoI, (2017) 10 SCC 800; Manish Kumar v. State of U.P., Habeas Corpus WP No. 451/2020 – 31 May, 2021.**

Presumption u/s 29 & 30:

- The presumption does not take away the primary duty of prosecution to establish the fundamental facts.
- Provision imposing reverse burden may be subject to proof of basic facts.

- In sexual offences matters, as mostly there may not be eye witness to the incident, the burden on the accused, even though partial is justifiable in the larger public interest. **Noor Aga v. State of Punjab, (2008) 16 SCC 417; Abdul Rashid Ibrahim v. State of Gujarat, (2000) 2 SCC 513; State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808.**

Presumption:

- The presumption u/s 29 is not absolute. It would come into operation only when the prosecution is first able to establish facts that would form the foundation for the presumption under Section 29.
- The suggestion that even if foundational facts are not established, the prosecution can involve the statutory presumption, would render Section 29 vulnerable to the vice of unconstitutionality. The statutory presumption would stand activated only if the prosecution proves the fundamental facts.
- **Anmol Dudhram Barsagade vs. State of Maharashtra (Cri. Appeal No. 600/2017, Date of Judgment- 23.04.2018).**
- It is trite law that negative cannot be proved (See **S.T. Khimchand Vs. Y Satyam, (1972) 4 SCC 562**). In order to prove a contrary fact, the fact whose opposite is sought to be established must be proved first.
- To hold otherwise, would compel the court to mechanically accept the mere ipse dixit of the prosecution and give a stamp of judicial approval to every prosecution however potentially absurd or inherently improbable it may be.
- **Sahid Hussain Biswas vs. State of West Bengal, CRA No. 736/2016, Calcutta High Court).**
- Even if the prosecution establishes such facts and the presumption is raised against the accused, he can rebut the same either by discrediting prosecution witnesses through cross-examination or the accused could lead evidence to prove his defence, in order to rebut the presumption.
- **Navin Dhanisam Bariya Vs. State of Maharashtra (Cri. Appeal No. 406/2017), Date of Judgment – 25.06.2018).**
- The word “is prosecuted” u/s 29 does not mean that the prosecution has no role to play in establishing the primary facts constituting the offence. Upon the prosecution laying the foundation of its case by leading cogent and reliable evidence the onus shifts upon the accused to prove the contrary.
- **Subrata Biswas vs. The State (CRA No. 011/2018 (Cal.), Date of Judgment – 11 June, 2019.**

Foundational Facts:

Foundational facts in POCSO cases include: -

- the proof that victim is a child;
 - that alleged incident has taken place;
 - that the accused has committed the offence;
 - whenever physical injury is caused, to establish it with supporting medical evidence.
- Sri Joubansen Tripura v State of Tripura, CRL. A.(J) 30/2018, Decided on 01.04.2021 (Tripura HC)**

Presumption Essentials:

- Prosecution has to prove the foundational facts against the accused, not based on proof beyond reasonable doubt, but on the basis of preponderance of probability.
- If above not fulfilled, the presumption under S.29 cannot be invoked against the accused.
- If foundational facts established, the presumption can be rebutted by the accused by discrediting the prosecution witness through cross-examination or by adducing his own evidence to demonstrate that the prosecution case is improbable based on the principle of preponderance of probability.
- Mere discrediting the evidence of prosecution through cross-examination may not be sufficient, and the defence may be required to adduce positive evidence to establish his innocence to negate the presumption of guilt. **Bhupen Kalita v State of Assam, Crl. Appeal (J) 87/2017, decided on 5 June,2020(Gauhati HC).**

Irrelevance of Consent:

- In a heinous and abhorrent crime of sexual assault if consent of minor is treated as mitigating circumstance, it may lead to disastrous consequences particularly in view of the provisions under the POCSO Act. **Satish Kumar Jayanti Lal Dabgar v. State of Gujarat, (2015) 7 SCC 359.**

Need of Child Friendly Courts:

- The Hon'ble Apex Court has observed that trial in the POCSO Act is required to be conducted with high degree of sensitivity, care and empathy for the victim. The establishment of child –friendly courts, and vulnerable witness court is perhaps one manner in which the justice delivery system can respond to ease their pain and suffering. *Sampurna Behura v. UoI, (2018) 4 SCC 433.*

Bail to the Accused:

While entertaining bail application of an accused under the POCSO Act, the Court has to consider:

- The provision of Section 29, which lays down presumption as to certain offences (Ss. 3, 5, 7 & 9) has to be taken into consideration.
- Ordinarily, to enable the prosecution (victim) to give her statement fearlessly and without any pressure, it would be necessary that she deposes when the accused is in custody. Social interest should outweigh personal interest.
- Taking note of threat perception, bail be not granted, until material witnesses are examined.
- **State of Bihar vs. Rajballav Prasad @ Rajballav Prasad Yadav, AIR 2017 SC 630.**
- In bail applications effect to the rule of presumption as laid down u/ss. 29 or 30 to be taken into consideration only after framing of charge.
- While dealing with bail application, the paramount consideration should be the reasonable apprehension as to whether the accused would tamper with evidence or interfere in trial or flee from justice. **State of Bihar v. Rajballav Prasad, (2017) 2 SCC 178; Dharmendra Singh @ Saheb v. State, Bail Appl. 1559/2020, decided on 22.09.2020.**

Aparna Bhat v. State of M.P., AIR 2021 SC 1492:

- Bail conditions should not mandate, require or permit contact between the accused and the victim.
- The nature of protection shall be separately considered and appropriate order made, in addition to a direction to the accused not to make any contact with the victim.
- In all cases where bail is granted, complainant to immediately inform and copy of bail order to be provided within two days.
- Discussions about the dress, behaviour, or past “conduct” or “morals” of the prosecutrix, should not enter the verdict granting bail.
- While adjudicating gender related crimes, the court should not make any suggestion towards compromise between the prosecutrix and the accused to get married or suggest any mediation or compromise as it is beyond the powers and jurisdiction of the court.
- Sensitivity should be displayed at all times by the judges, who should ensure that there is no traumatization of the victim during the proceedings, or anything said during the arguments.
- No use of words, spoken or written, that would undermine or shake the confidence of the survivor in the fairness or impartiality of the court.
- Court should desist from expressing any stereotype opinion during any stage of the proceedings/trial.

Guidelines for different stakeholders:

- SJPJ to inform CWC about offence within 24 hours.
- Bail application notice to be served upon child with date of hearing.
- Apprise the child about its rights as detailed in Form A of 2020 Rules.
- Produce the child before CWC as required under law.
- CWC
- Apprise the child about its entitlements and identify the person best suited to protect the interest of the child in all proceedings before the court and appoint lawyer/support person
- Prepare reports and provide information to the child in coordination with other agencies
- Coordinate with DLSA/HCLSC to provide free legal aid to the child
- The identity of the child has to be scrupulously protected at all stages,
- CWC and DLSA shall be joined as necessary parties to all bail applications. Child or her parents/legal guardian shall be impleaded as a party w/o disclosing their names, and other identifying details like address and so forth.
- Duty cast on police/SJPJ to inform and serve notice on all concerned. Also to inform CWC about need of legal aid and care and protection.
- Timeline for the entire process of registration of FIR until the disposal of bail applications laid down under Para 75.
- The procedure with necessary adaptations to apply to District courts. **Junaid v State of UP, CrI. Misc. Bail Appl.46998/2020, decided on 09.07.2021**

Forum for CCL Referred to Children/Special Court:

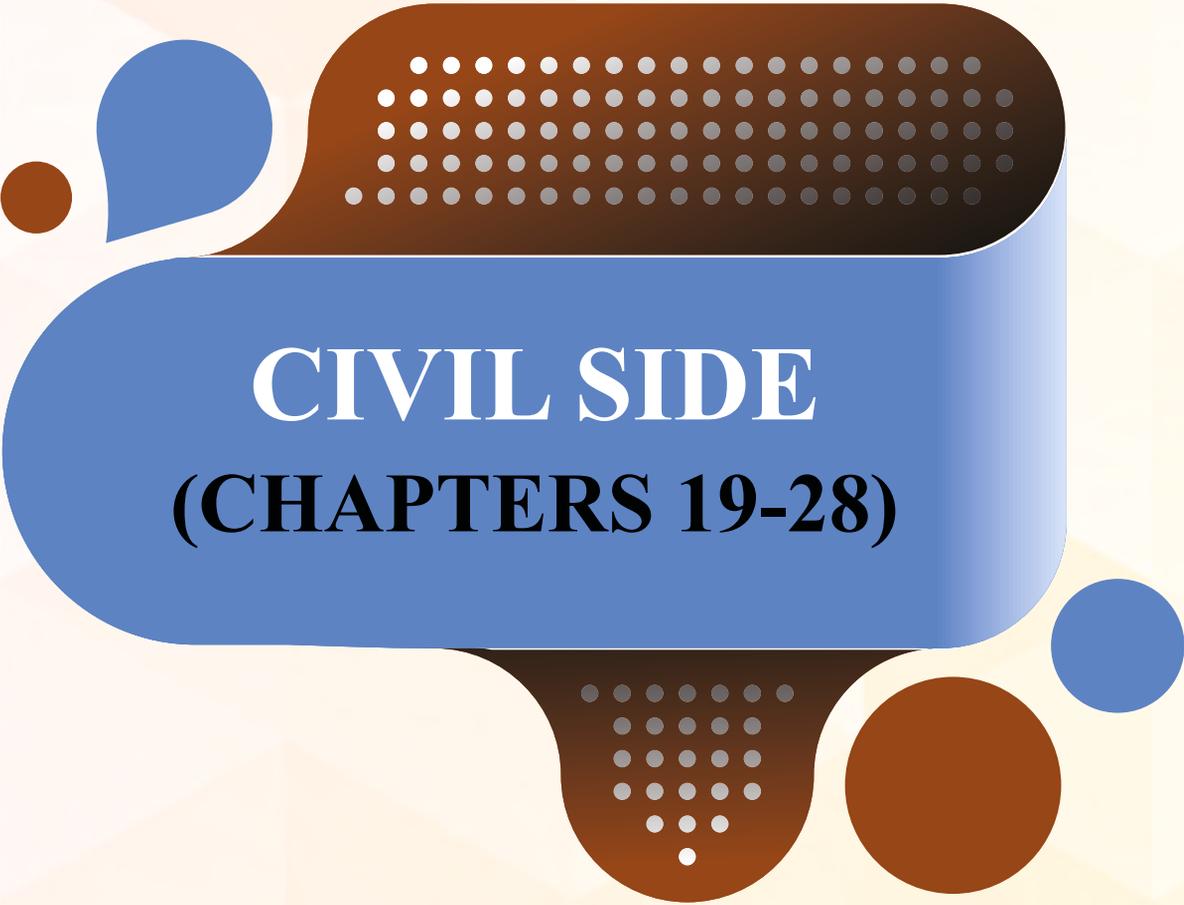
- S. 18 JJ Act - While deciding the bail applications of child delinquent in the age group of 16 to 18 years, the courts in addition to the grounds mentioned u/s 12 also to

consider the factors like mental and physical capacity, ability to understand the gravity of offence, role played and circumstances etc. Radhika (Juvenile) v. State of U.P., Cri.App. No. 4418/2019 decided on 05.08.2019; Yash Anand @ Iddu v. State of U.P., Cri.Rev.No. 3283/2017- 14.08.2018

- S. 18 (3) provides that once a CCL case is remitted to the Special Court such child shall be tried as an adult.
- U/s 12 bail for CCL of all nature irrespective of gravity and age of child provided.
- Therefore, even in such cases the CCL is legally bound to first approach the JJB.
- While adjudicating bail applications of such children, the court in addition to grounds mentioned u/s 12 also to keep in mind the factors mentioned u/s 15. Radhika (Juvenile) v. State of U.P., Cri. App. No. 4418/2019 decided on 05.08.2019.

Principle of Sentencing:

- Offence committed against minor girl child (here 7 years) cannot be viewed lightly and considering the serious nature of the crime, post conviction, suitable punishment/sentence shall be awarded. Kumar Ghimray vs. The State of Sikkim, (2019) 2 SCC (Cri) 758.
- The Court should ordinarily show no leniency in sentencing.
- Prem Bahadur @ Bhoj Bahadur vs. State, Cri. Appeal No. 888/2017, Date of Judgment 22 July, 2019.
- At the same time, reiterating the established principles regarding various mitigating and aggravating circumstances, in cases involving rape and murder of minor girls, the Hon'ble Apex Court has observed that imposition of life imprisonment stipulating reasonable time period of imprisonment without remission rather death sentence is reasonable. Sachin Kumar Singhraha v. State of M.P., (2019) 8 SCC 371; Viran Gyanlal Rajput v. State of Maharashtra, (2019) 2 SCC 311.
- Where victim below 18 years, a single/same act of sexual offence is covered both under Ss. 375/376 IPC and u/s 4 or 6, POCSO Act.
- No person can be punished twice for one offence. S. 42 is an exception to the general principle of criminal jurisprudence that if two punishments are provided, then the benefit of lower punishment be given to offender (S. 71 IPC).
- As such punishment either under IPC or POCSO can be awarded. Ramu v. State of U.P., 2021 (114) ACC 744 (All LB)
- With respect to amendment u/s 6 of the Act, which inter alia, provides that death sentence may also be awarded for an offence of aggravated sexual assault (w.e.f. 06 August, 2019), it has been held that the amendment should be given retrospective effect. State of Telangana v. Polepaka Praveen @ Pawan, SLP (Cri) Diary No. 9597/2020, Order dated 15 June, 2020.
- The degree of damage to the child, in such cases, is physical and psychological in equal measure. It is impossible for a court, peopled, after all, by lay human beings, to even conceptualize, let alone visualize, what a child, such as the prosecution, must have undergone.
- Rape is, on every occasion and without exception, a crime of power, more than one of lust, and, when committed on a child, is a brute and unrelenting savage expression thereof. No clemency or mercy, whatsoever, can be shown to the perpetrator of such an act, especially when the perpetrator is in full possession of the senses and faculties of the victim.



CIVIL SIDE
(CHAPTERS 19-28)

CHAPTER-19

PLEADINGS, DRAFTING & CONVEYANCING IN CIVIL CASES

Introduction

No doubt pleadings and drafting are the back bone of the Civil Suits it means that if there are no proper pleadings and drafting then the fate of the Suits cannot be in your favour. When we talk about pleadings and drafting regarding State of Uttar Pradesh then Code of Civil Procedure, 1908, General Rule Civil, 1957, Legal Pronouncements of Hon'ble Courts of Record and Practical experience of Legal professionals are very important. Order 6 CPC deals with Pleadings in general. Order 6, Rule-1, CPC defines pleading, Rule-2 lays down the fundamental principles of pleadings, Rule-3 to 13 requires the parties to supply necessary particulars, Rule-14 to 15 provide for signing and verification of the pleadings, Rule-16 empowers the Court to strike out unnecessary pleadings and Rule-17 and 18 contain provisions relating to amendment in pleadings. Even though pleading and drafting is a very vast and big topic, but for the sake of proper understanding, we can sub title the whole topic as below:

1. What is Pleading?
2. What is Drafting?
3. What is Conveyancing?
4. Principles of Pleadings.
5. Alternative Pleadings.
6. Amendment in Pleadings.
7. Practical problems in respect of Pleading and drafting.
8. Conclusion.

1. What is Pleading?

Now very important question before us is what is Pleading? Order VI of Civil Procedure Code deals with pleadings in general. Order VII deals with plaint and Order VIII deals with written statement. Order IV, Rule 1 of the Civil Procedure Code runs as follows:

1. Suit to be commenced by the plaintiff: -
 - (i) Every suit shall be instituted by presenting a [plaint in duplicate to the Court] or such officer as it appoints in this behalf.
 - (ii) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.
 - (iii) The plaint shall no be deemed to be duly instituted unless it complies with the requirements specified in sub rules (1) and (2).

So Pleadings shall mean plaint or written statement. The dictionary meaning of the term 'plead' means 'to state and argue a case'. Therefore, pleading comprises of respective contentions of the parties in a dispute, which are reduced into writing. Pleading is the beginning stage of a lawsuit in which parties formally submit their claims and defence. In Civil proceedings the plaintiff submits a plaint stating the cause of action -- the issue or issues in controversy. The defendant submits an answer- the reply- the written statement- stating his or her defence and denials. In other words, it is nothing but the formal presentation of claims and defence by parties to a lawsuit. Therefore, it includes every legal document filed in a lawsuit, petition, motion and/or

hearing, including complaint, petition, answer/reply, rejoinder, motion, declaration and memorandum of points and authorities (written argument citing precedents and statutes). Hence, the term pleading would apply to the Court proceedings including filing of the complaint, etc., replies to that and other incidental documents related to the dispute filed by either of the parties. Here, our legal system is an adversary legal system wherein there are two contesting parties. One party stakes its claim or right to a particular thing, disputed by the opposite side before the Court. Under these circumstances each of the parties supports its claim files in writing various contentions and submissions in terms of the different provisions under the Law before the Court. All these documents constitute pleadings. After the completion of the pleadings, a matter is argued and subsequently the dispute is adjudicated by the Court. See the below case laws-

Bharat Singh vs State of Haryana, AIR,1988 SC 218.

Virendra Kashinath vs Vinayak N. Joshi, AIR,1999 SC 162.

2. What is Drafting?

Drafting in general means, putting one's ideas in writing. Drafting of any matter is an art. Drafting of legal matters requires greater skills and efficiencies. It requires thorough knowledge of Law, procedure, settled judicial principles, understanding of facts of the case and proficiency in language. A legal professional who drafts better presents his case better. A good drafting skill indicates how well the advocate has understood the facts of the case & matter in issue between the parties.

3. What is conveyancing?

On the other hand, the dictionary meaning of the 'conveyance' is 'an act by which property is conveyed or voluntarily transferred from one person to another by means of a written statement and other formalities'. It also means 'instrument' itself. Therefore, the term conveyancing does not apply to the Court proceedings, rather it applies to the instrument, which have been documented not for Court proceedings, rather to create evidence of a particular transaction, which may be used before the Court in case of any dispute. So broadly speaking the pleading and conveyancing may be distinguished by simply stating that while the pleadings apply to Court proceedings. Conveyancing applies to the documentation done outside the Court and not meant for the Court proceedings particularly. However, they may be used in the Court proceeding to substantiate a particular contention, claim, or submission. There are some illustration of conveyancing but these are not exhaustive-

1. Will.
2. General Power of Attorney.
3. Special Power of Attorney to execute Sale Deed.
4. Agreement to sell.
5. Sale Deed.
6. Lease Deed.
7. Mortgage Deed.
8. Partnership Deed.
9. Deed of Dissolution of Partnership.
10. Relinquishment Deed.
11. Gift Deed.
12. Notice under section 106 of The Transfer of Property Act, 1882.
13. Notice under section 80 of Civil Procedure Code, 1908.

14. Notice under Section 138 of the Negotiable Instruments Act, 1881
15. Reply to Legal Notice under Section 138 of N.I. Act, 1881.
16. Acknowledge of the debt.

4. Principles of Pleadings.

The English Law of pleading has got four fundamental rules of pleading upon which Order 6 of the Code of Civil Procedure is based which are set out as under:

1. Every pleading must state facts and not Law.
2. It must state all material facts and material facts only.
3. It must state only the facts on which the party's pleading relies and not the evidence by which they are to be proved; and
4. It must state such facts concisely, but with precision and certainty.

(1) Facts, not Law

The first fundamental rule is that neither provisions of Law nor conclusions of Law should be alleged in a pleading. The pleading should be confined to facts only and it is for the judge to draw such inference from those facts as are permissible under the Law of which he is bound to take judicial notice. See the case laws-

- **Gauri Dutt Ganesh Lal Firm vs Madho Prasad, AIR 1943 PC 147.**
- **Kedar Lal vs Hari Lal, AIR,1952 SC 47.**
- **Manoj vs Shanti, AIR 1997 SC 2153.**
- **Lakhi Ram vs Trikha Ram, AIR 1998 SC 1230.**
- **Syed Dastagir vs T.R. Gopalkrishana Setty, AIR 1999 SC 3029.**

Illustration:

It will not be sufficient to state that 'Abu Mohammad made a gift of his property' to the plaintiff. The plaintiff should allege here the gift was made, how it was accepted and how possession was delivered; because these are the facts which constitute a valid gift under Muslim Law. To allege that 'Abu Mohammad made a gift' will be a conclusion of Law from the facts which are not to be state directly in the pleading. In a suit for damages for negligence, it is not enough for the plaintiff to state that the defendant has been guilty of negligence' without showing how and in what respect he was negligence and how he became bound to use due care to prevent an injury to other. When then defendant has to reply to the plaintiff's claim in a money suit, it is not sufficient for him to state that 'the defendant does not owe to the plaintiff'. But he must allege such a fact that proves that in the circumstances the defendant does not owe to the plaintiff. The defendant should state that he never borrowed from the plaintiff, or good were never ordered, or were never delivered, or that they were not equal to the sample. It is not sufficient in a suit upon a contract for the defendant to, merely, plead the 'the contract is rescinded', the defendant must plead in what manner and by what means he contends that is was rescinded. The reason for not mentioning the Law in the pleading is that the Court has to find out and examine all plea of Law that may apply to the facts of the case. However, the parties can make their submission about Law any time. For example, the non-maintainability of the suit which is a point of Law can be urged although no specific plea has been raised in the pleading. The rule that every pleading must state facts and not Law or an inference of Law, has got following exceptions:

(a) Foreign Laws: The courts do not take any judicial notice of foreign laws and hence they must be pleaded as facts. The status of the foreign country intended to be relied upon should be set-forth as substantially as any other facts.

(b) Mixed question of Laws and facts: Where a question is one of mixed Law and fact, it is permissible and proper to plead both the facts and the legal conclusion. For instance, the defendant may say that the Law of limitation bars the suit, or he may say he is entitled to set off after narrating the facts on which he bases his conclusions.

(c) Condition precedent: The Code of Civil Procedure provides that any condition precedent the performance of which is intended to be contested shall be distinctly specified in the pleading of the plaintiff or defendant (Order 6 r.6 of C.P.C.), for instance, the legality of the notice under section 80, C.P.C.

(d) Custom and Usage of Trades: Custom and usage of any trade and business shall be pleaded like any other facts, if a party wants to rely on them. But a custom repeatedly brought before Court and recognised by them regularly is deemed to have acquired the force of Law and need not be pleaded. For example, an occupancy tenant is entitled by local custom and usage to cut trees growing upon his holding it is not necessary for the occupancy tenant to plead this custom, if he wishes to rely on this right to cut the trees. Similarly, a party who wishes to rely on the usage of a particular trade and business and if it is at variance with any provision of the Contract Act must not plead the usage of such trade and business with its detailed incident. If it is not pleaded, no evidence to prove it shall be admitted.

(e) The facts of negligence, right or liability, unlawful or wrongful act should be specifically pleaded. Every plea of fact should be specifically raised and proved.

(2) Material facts

The second fundamental rule of pleading is that every pleading shall contain only a statement of material facts on which the party pleading relies for his claim or defence. This rule has been enunciated in Order 6, Rule 2 of the Code of Civil Procedure. The omission to observe this rule may increase the difficulty in the Court's task of ascertaining the parties' rights. See the case laws-

- (i) Virendra Nath vs Satpal Singh, AIR 2007 SC 581.**
- (ii) Union of India vs Sita Ram Jaiswal, AIR 1977 SC 329.**
- (iii) Brahma Prakash vs Manbir, AIR 1963 SC 1607.**

Now, the question arises what are material facts?

With respect to the facts which are essential to the plaintiff's cause of action or to the defendant's defence, it can be said that fact is material for the pleadings of a party which he is bound to prove at the trial unless admitted by the other party before he can succeed in his claim or defence. If one is in reasonable doubt about a particular fact as a material fact he should plead that fact rather than omit it because unless a fact is pleaded he shall not be allowed to prove it at the hearing of the suit. A plea of fraud and misrepresentation in a suit must set forth full particulars of fraud and misrepresentation, because these particulars constitute material facts unless raised by the plaintiff or the defendant in his pleading, he will not be allowed to prove at the trial. Of course, a material fact can be inserted in the pleading by amendment which is the right of the plaintiff and defendant; but when a pleading is amended one is likely to be saddled with

the cost of other side. When suit is brought under a particular statute, all facts which are necessary to bring the suit under the statute must be alleged. When a rule of Law applicable to a case has an exception to it, all facts are material which tends to take the case out of the rule or out of exception. For instance:

- If a childless Mohammedan widow claims one-fourth share in her husband's property as allowed by Shia Law, she must allege that her husband was a Shia.
- Where a plaintiff claims an alternative relief, he must plead facts entitling him, for such relief.
- Where the question of age or time affects the parties' right, the facts should be specifically pleaded.
- Where a plaintiff sues based on a title he must state the nature of the deed from which he has derived title.
- The plea that a woman claiming maintenance has lost her right due to continuous desertion or living in adultery should be specifically raised.

The plea is based on custom, it must be stated in the precise form what the custom is. For instance, if a childless Mohammedan widow claims one-fourth share in her husband's property as allowed by Shia Law, she must allege that her husband was a Shia. The following are exception to this fundamental rule of pleading.

(a) Content of documents: Whenever the contents of document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible. Though it is not necessary yet, sometimes it is desirable to commence a plaint with some introductory allegations stating who the parties are and what business they carry on how thole or any part thereof unless any precise words are material. For instance, if plaintiff's claim is based on a sale-deed, it is sufficient to state that "defendant has sold the property to the plaintiff by a sale-deed dated....."

(b) Matters of Inducement: they are related and connected and other surrounding circumstances leading up to the dispute. Though these are not material facts, yet these are allowed in England and hence in India too. But the matter of inducement should be reduced to the minimum need.

(3) Facts, Not Evidence

The third fundamental rule of pleading has been laid down by Order 6, rule 2 of the Code of Civil Procedure. It says that every pleading must contain a statement of material facts but not the evidence by which they are to be proved. The material facts on which a party relies are called *Facta Prabanda*, i.e. the facts to be proved, and they should be stated in the pleadings. The evidence or facts by which *Facta Probanda* are to be proved are called *Facts Probandia*, and they are not to be stated in the pleadings. *Facta Probanda* are not the facts in issue but only relevant facts that will be proved at the trial to establish facts in issue. For instance, in a suit of damages for malicious prosecution the plaintiff should only allege in the plaint that the defendant was actuated by malice in prosecuting him. He must not allege that he had previously given evidence against the defendant and the defendant had vowed to take revenge. The plaintiff is by all means entitled to tender evidence to prove this fact. Secondly, in a policy of life insurance, the condition that the policy shall be void, if the holder dies of his hand, in the defence it is not necessary to state that the assured brought the pistol a few days before his death and made all preparation to kill himself. It is sufficient to state in defence that the assured died of his hand.

In some cases where the facts in issue and relevant facts are so mixed up that it is very difficult to separate them and if it is so the relevant facts may be stated. For

example, custom is based on village administration paper, which is the basis of claim and its sole proof. In such cases the record has to be pleaded. See the below case laws-
Virendra Nath vs Satpal Singh, AIR 2007 SC 581.

R.M. Seshadri vs G. Vasantha Pai, AIR 1969 SC 692.

Kushalbhai Mahijibhai vs Firm of Mohmadhussain Rahimbux, AIR 1981 SC 977.

(4) Concise Form with Precision and Certainty

The material facts must be stated in a summary form, succinctly and in a strict chronological order. All unnecessary allegations and their details should be omitted to attain brevity in pleadings. Pleading is not a place for fine writing but only assertion of hard facts. It is desirable to go straight to the point and state fact, boldly, clearly and concisely, and avoid all paraphrasing and all circumlocutions. As far as possible an active voice should be preferred to passive in pleading. The same person or thing should be called by the same name throughout the pleading. The pleading shall be divided into paragraph numbered consecutively. Dates sums and numbers shall be expressed in figures, even though the pleading should be concise, it should never be obscure. It should be both concise, as well as precise. The parties cannot change the case and get the relief. A good pleader should bear in mind the following points concerning a pleading:

- Describe the names and places accurately and spell them correctly and adopt the same spelling throughout.
- One should always avoid pronouns as 'He', 'She', 'This', or 'That'. The plaintiff or the defendant should not be addressed by their names at some place and at some place by the word 'Plaintiff' and 'defendant', call them throughout your pleading by the expression 'the plaintiff' and 'the defendant' as the case may be. Where one has to distinguish between two or more plaintiffs or defendants, they can be referred to as 'the plaintiff Ramashankar' or 'the defendant-Hariharan' as the case may be.
- A lawyer should allege all facts boldly and plainly. He should use the language of the document or the act itself; and he should not invent his own language however correct it may be, e.g. of a policy becomes void in case, "the assured shall die of his own hand." Now, in this case while drafting the pleading instead "the assured killed himself" or he committed suicide," plead that "the assured died of his own hand."
- A lawyer should allege all facts boldly and plainly. He should avoid ifs and buts. As far as possible complex sentences should also be avoided. Facts should not be repeated. Pleading should be divided into separate paragraphs and as far as possible only one fact should be contained by one paragraph embodying all necessary particulars in the pleading.
- The party and his advocate shall sign every pleading and, if the party is unable to sign the pleading this agent may sign it.
- The party or the parties shall verify every pleading. Verification can also be made by any other person if acquainted with the facts of pleadings. False verification is an offence punishable by the Indian Penal Code.
- In cases where a corporation is a party, pleading may be verified by Secretary or by the director or by any other principal officer of that corporation who is able to depose the facts of the case. In verification clause one should denote according to the numbers of paragraph what he verified out of his own knowledge and what he verified upon the information received and believed to be true. See the below case laws-

Charan Lal Sahu vs Giani Zail Singh, AIR 1984 SC 309.

Virendra Kashinath vs Vinayak N. Joshi, AIR, 1999 SC 162.

5. Alternative Plea:

Law does not prohibit a plaintiff from relying on several distinct and different rights in the alternative or a defendant from raising as many distinct and separate defences as he likes.

For example, a plaintiff may sue for possession of a house belonging to A, as an adopted son of A, and in the alternative under a will executed by A in the plaintiff's favour. A plaintiff may claim proprietary right in a land, or, in the alternative easementary right in an action for pre-emption the defendant is not prohibited from setting up a plea of estoppel in addition to a plea of denial of custom of pre-emption. A Hindu person claiming under a sale deed from a Hindu widow may support his claim by pleading that the widow separated during the life time of her husband and hence she was the owner of the property which she had sold to him, or in the alternative the widow was in possession for over 12 years and thus became owner by adverse possession. A defendant in money suit due on promissory note against him may plead that he did not execute the promissory note, and in the alternative the plaintiff's claim is barred by the Law of limitation. But it must be carefully borne in mind by the draftsman and separately be stated in the pleading. The Court will not allow any such pleas on the ground covered by implication unless specifically set out. Thus, in a suit by a son to set aside certain transfers made by his mother on the ground of unsoundness of mind of his mother at the time of the transfer and further averred that the donee was residing with his mother and was completely under his dominion and control and the donee knew the mental condition of the donor. See the below case laws-

Srinivas Ram Kumar vs Mahabir Prasad, AIR 1951 SC 177.

Akshaya Resturent vs P. Anajanappa, AIR 1995 SC 1498.

6. Amendment of pleading:

Application for amendment of the pleading is filed under Order VI, Rule 17, CPC. Any amendment which alters the very nature of the suit, its fundamental character, new ground of claim based on new cause of action is not to be allowed. Amendment of pleadings plays an important role in civil litigation. Though courts should not be too technical while considering amendment applications. A liberal approach is to be applied but applications of amendment should not be used as a tool to misuse law and delay the trial. There are a number of landmark judgments on this aspect delivered by the Supreme Court and various High Courts. Advocates and readers are requested to refer those judgments for details. You are aware that pleadings include plaint and written statement. So, Order VI, Rule 17 is applicable even for amendment of written statements. But there is little confusion regarding Order VIII, Rule 9 C.P.C. There is a feeling that Order VI, Rule 17 is applicable for amendment of plaints and Order VIII, Rule 9 for amendment of written statement. It is completely wrong. Order VIII, Rule 9 is intended only for subsequent pleadings by way of additional written statement by the defendant and written statement by plaintiff, where the defendant claims set off or counter claim.

Hence Order VIII, Rule 9 is not for amendment of written statement. The scope for amendment of pleadings is very wide, more so, regarding plaint. Each and every minute alteration in plaint including amendment of cause title, adding legal representatives, correcting type mistakes also amounts to amendment of pleadings.

7. Practical problems in respect of Pleading and drafting.

Some Practical problems in respect of pleadings are as follows-

Whether merit of amendment application may be Considered?

The answer is in negative, it means that while deciding amendment application the merit of the application can not be taken into consideration. see the case laws-

- *Sampath Kumar vs Ayakannu, (2002) 7 SCC 559.*
- *Usha Devi vs Rijwan Ahmad, (2008) 3 SCC 717.*

Whether Irregularity in verification and signing of the pleadings is curable?

Most of the people in India are legally not aware and sound hence the pleadings must be construed liberally. The answer is in affirmative that means irregularity in signing and verification in pleadings should be cured in the latter stage of the proceeding, suit cannot be dismissed on that ground. It means that procedural error should be cured because substantive justice should be done and give preference over procedural justice. It is also mandate of the law the person verifying the pleading should also furnish an affidavit in support of his pleadings. Similarly, if affidavit filed by the party is defective, a Court instead of rejecting it, may give and opportunity to the party to file a proper affidavit. See the case laws as below-

- *Bhikaji vs Brijlal, AIR 1955 SC 610.*
- *Purushottam Umedbhai & Co. vs Manilal & Sons, AIR 1961 SC 325.*
- *Dwarka Nath vs. ITO, AIR 1966 SC 81.*

8. Conclusion

It is well established that in the purview of pleadings comes the plaint, written statement, counterclaim, set off, replication etc. Pleadings should be based on the fundamental principles and if pleadings are not up to the mark then Court may order for striking out of the pleadings or may be amended with the leave of the Court. Procedural errors may be cured at later stage of the proceedings and last but not the least pleadings should be construed liberally & preference should be given to substantive justice.

“

Provision relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met to enable the courts to determine what is really at issue between parties.

*M/S Ganesh Trading Company v. Moziram
(1978) 2 SCC 891*

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CHAPTER-20

PREPARATION OF RECORDS AND MARKING OF EXHIBITS IN CIVIL CASES

Introduction

To deliver justice on merits & without delay, is the paramount duty of courts. Inefficient and ineffective judicial system leads to injustice, in the same way as Justice delivered after long delay is symptomatic to injustice. If you know the procedures and rules of the court then only, you will be able to deliver effective and technically defect-free judgments.

When we talk about how to arrange the documents in different files, how to do marking on the documents, how to prepare index etc. in essence, we are talking about the file management. A correct and properly updated daily causelist, helps in running the court smoothly, efficiently and effectively. The question is what is this cause list? It is indexing of or listing of cases fixed for hearing on a particular day. This index also shows the stage of the court proceedings in any particular case, name of the parties and their counsels. This was a simple example of indexing and its relevance in any working system. Let us have another example. Suppose, during hearing of a case, counsel for the plaintiff as well as defendant respectively moved applications for interim injunction and amendment of pleadings along with ten documents from both the side. Now, you have four applications and 20 documents and say, 10 of them were original. How you will distinguish them? It is the duty of the court to arrange them systematically and mark them for the purpose of identification in a manner as per the rule prescribed for the same. Similarly, the concept of exhibit in literal sense, means to mark a document for its identification.

Detail discussions about imports of indexing and exhibits in law provisions related to indexing and exhibits:

General Rules (Civil), 1957: Chapter III, Rules 42 to 64 & Chapter V, Rules 142 to 161
Civil Procedure Code, 1908: Rules: Order VII, VIII, XI, XIII.

Highlights:

- **Who can produce documents in Court:** Documents may be produced in Court by parties to the lis; by persons other than parties; and/ or on requisition issued by the Court (**Rule 40, GR Civil**).
- **Indexing or listing is must:** Documents are required to be produced by the parties along with plaint under **Order VII Rule 14 CPC**; along with written statement under **Order VIII Rule 1-A C.P.C.** and by any persons under **Order XIII Rule 1 C.P.C.** The documents produced by the parties have to be accompanied by list of all documents in duly filled up form (Part IV-71) & that list as well as the documents shall be immediately entered in the general index. (**Rule 43, GR Civil**). **Rule 44 of GR Civil** further deals with reference of statement about erasures, additions or interlineations contained in any private documents except registered document or certified copy by the party who produced it in the list form (part IV-71).

Order VII Rule 14, C.P.C. states that where a plaintiff sues upon a document or relies upon documents in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is

presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint. Where the nature of such document is a shop-book or other account in possession or power of the plaintiff, he shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies and shall forthwith mark it, for the purpose of identification by the Court or such officer as it appoints in this behalf, and, after examining and comparing the copy with the original, shall, if it is found correct, certify it to be so and return the book to the plaintiff and cause the copy to be filed except where saved in law (**Rule 17 of Order VII, C.P.C.**).

Order VIII Rule 1A, C.P.C. states that where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set-off or counter-claim, he shall enter such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.

ORDER XIII Rule 1, C.P.C. states, that the parties (or their pleader) shall produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed along with plaint or written statement. And, the Court shall receive the documents so produced if accompanied by an accurate list thereof prepared in such form as the High Court directs. However, it shall not apply were the documents produced for the cross-examination of the witnesses of the other party; or handed over to a witness merely to refresh his memory.

Production of document during pendency of a case on court's order: Order XI C.P.C. deals with discovery and inspection of documents. Rule 14 of order XI stated that during the pendency of any suit, at any time, the Court may order any party thereon, for the production of any document relating to any matter in question in such suit which is in his possession or power of any party thereon.

In case of matters pertaining to a commercial court (Order 11 C.P.C), Plaintiff as well as the defendant as the case may be, has to file a list of all documents and photocopies of all documents, in its power, possession, control or custody, pertaining to the suit, along with the plaint or written statement or counter-claim (as the case may be), including documents referred to and relied on by them in their respective pleadings; documents relating to any matter in question in the proceedings, in the power, possession, control or custody of the plaintiff/ defendant, as on the date of filing the plaint/ WS/ CC, irrespective of whether the same is in support of or adverse to their case subject to its relevance for the cross-examination of the witnesses of opposite parties; or in answer to any case set up by the opposite parties subsequent to the filing of the plaint/ WS/ CC, or handed over to a witness merely to refresh his memory. The list of documents filed with the plaint/WS/CC shall specify whether the documents in the power, possession, control or custody of the plaintiff/ defendant are originals, office copies or photocopies and the list shall also set out in brief, details of parties to each document, mode of execution, issuance or receipt and line of custody of each document. The plaintiff or the defendant as the case may be, shall not be allowed to rely on documents, which ought to be produced and were in their power, possession, control or custody and not disclosed along with the plaint/ written statement or counterclaim except by leave of Court and such leave shall be granted only upon establishing reasonable cause for non-disclosure of the

same. Also, it is to be noted that duty to disclose documents, which have come to the notice of a party, shall continue till disposal of the suit.

- **How to deal with the documents produced in court:** All documents produced must be received by the Court and must be dealt with in one or other of the following ways, viz.: - (a) returned, (b) placed on the record, or (i) impounded (**Rule 52, GR Civil**).
- **Duty of Court upon production of documents:** The Court shall inspect and consider all documents as soon as practicable after they have been produced and deal with them as follows (**Rule 53, GR Civil**):
 - (i) Documents which are proved or admitted by the party against whom they are produced in evidence shall be admitted in evidence and **marked as exhibits in the manner prescribed in Rule 57 GR (Civil)** and the fact shall be noted in the record.
 - (ii) Documents which are not proved or admitted by the party against whom they are produced in evidence shall be kept on the record pending proof and shall be rejected at the close of the evidence, if not proved or admitted.

(Order XIII Rule 7, C.P.C.: Recording of admitted and return of rejected documents: (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under Rule 5 (**Rule 5. Endorsements on copies of admitted entries in books, accounts and records**), shall form part of the record of the suit and the documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

- (iii) Documents that are found to be irrelevant or otherwise inadmissible in evidence shall be rejected forthwith. (**Order XIII Rule 3, C.P.C.: Rejection of irrelevant or inadmissible documents:** The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

This rule further provides a note to the effect that no document unless admitted in evidence shall be marked as an exhibit. We will discuss on the issue of marking a document as exhibit later.

Endorsement on documents:

- (i) Admission of a document by a party shall be indicated by the endorsement “Admitted by the plaintiff” or “Admitted by the defendant”;
- (ii) Admission of a document in evidence by the Court shall be indicated by the endorsement “Admitted in evidence”.
- (iii) If any question is raised as to the correctness of a copy and the correctness of it is admitted, the endorsement shall be “correctness of copy admitted”. The use of the expression “Admitted as a copy” in endorsement on document is prohibited. (**Rule 53, GR Civil**)
- (iv) Documents filed in suits, which are dismissed for default or compromised be endorsed with the particulars mentioned in Order XIII, Rule 4 and the result of the suit before being dealt with in the manner provided in Rules 59 and 60, GR civil. (**Rule 56, GR Civil**)
- (v) **Order XIII Rule 4, C.P.C.: Endorsements on documents admitted in evidence:** There shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely: (a) the number and title of the suit, (b) the name of the person producing the document, (c) the date on which it was produced, and (d) a statement of its having been so admitted, and the endorsement shall be signed or initiated by the Judge.

Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialed by the Judge.

- (vi) Order XIII Rule 5, C.P.C. deals with endorsements on copies of admitted entries in books, accounts and records.
- (vii) Order XIII Rule 6, C.P.C.: Endorsements on documents rejected an inadmissible in evidence: Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of rule 4, sub-rule (1) together with a statement of its having been rejected, and the endorsement shall be signed or initiated by the Judge.

Admission or denial on documents (Rule 42, GR Civil):

- (i) A party desiring to produce any document in Court shall, before producing it in Court, obtain admission or denial recorded on the back of the document by the opposite party's lawyer. If the opposite party is not represented by a lawyer, the Court shall get admission or denial recorded by the party in its presence and may, for the purpose, examine the party.
- (ii) Commercial Courts- ORDER XI RULE 4. Admission and denial of documents: Each party shall submit a statement of admissions or denials of all documents disclosed and of which inspection has been completed, within fifteen days of the completion of inspection or any later date as fixed by the Court;
The statement of admissions and denials shall set out explicitly, whether such party was admitting or denying:
 - (a) Correctness of contents of a document; (b) existence of a document (include the admission or denial of the contents of a document); (c) execution of a document; (d) issuance or receipt of a document; (e) custody of a document.

Each party shall set out reasons for denying a document under any of the above grounds and bare and unsupported denials shall not be deemed to be denials of a document and proof of such documents may then be dispensed with at the discretion of the Court.

Any party may however submit bare denials for third party documents of which the party denying does not have any personal knowledge of, and to which the party denying is not a party to in any manner whatsoever.

Order XI Rule 7 of Commercial Court's provision says, it is hereby clarified that Order XIII Rule 1, Order VII Rule 14 and Order VIII Rule 1A of the Code of Civil Procedure, 1908 (5 of 1908) shall not apply to suits or applications before the Commercial Divisions of High Court or Commercial Courts.

Marking of documents and other consequences

- (i) Documents produced by a plaintiff and duly admitted in evidence shall be marked with a number (like 1, 2, 3...); and
- (ii) Documents produced by a defendant shall be marked with a number and the letter A (like 1A, 2A, 3A...) or, where there are more than one set of defendants by the letter A for the first set of defendants, by the letter B for the second, and so on (like 1A, 2A, 3A...; 1B, 2B, 3B ...).
- (iii) Where a document is produced by order of the Court and is not produced by any party, the serial number shall be prefaced by the words "Court Exhibit" or an abbreviation of the same (like Court Ex. 1, Court Ex. 2 ...).

- (iv) Documents produced by a witness at the instance of a party, shall be endorsed thereon the number of that witness like Ex.P.W.1 if it is produced by the plaintiff's first witness and Ex.-A/D.W.1 if it is produced by the defendant's first witness.
- (v) Every exhibit-mark shall be initiated and dated by the Judge. (Rule 57, GR Civil)
- (vi) Where a number of documents of the same nature are admitted, like, a series of receipt for rent, the whole series should bear one figure or capital letter or letters, a small figure or letter in brackets being added to distinguish each paper of the series. (Rule 58, GR Civil).
- (vii) Return of unproved documents (Rule 59, GR civil): A document which is rejected as irrelevant or otherwise inadmissible under **Order XIII Rule 3 of C.P.C.**, or is **not proved** shall, unless impounded under **Order XIII Rule 8 of C.P.C.**, or rendered wholly void or useless by force of the decree, be returned to the person producing it or to his pleader, and such person or pleader shall give a receipt for the same in column 4 of list (Form Part IV-71).
- (viii) Retention of impounded and certain other documents (Rule 60, GR Civil): Documents impounded shall be dealt with in accordance with **Order XIII Rule 8, C.P.C.**, and the word "impounded" should be noted in *red ink* across columns 3-5 of the list (Form Part IV-71) against the entries relating to such documents in the said list.

Where the parties are entitled to receive any document but either being absent or for good cause unwilling to receive, such documents shall be marked "*not part of the record*", a note of the same being made in column 5 of the list (Form Part IV-71).

And, a document, which is the basis of a suit or defence, or the proof of which is discussed in the judgment and which is ultimately held to be not proved, shall be entered in the General Index and shall not be returned to the party, nor marked "not part of the record".

(Order XIII Rule 8, C.P.C.: Court may order any document to be impounded: Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit).

- (ix) Return of documents (Rule 63 GR Civil): documents filed in any suit or proceeding which may legally be returned, must be withdrawn as soon as the decree or order made in the suit or proceeding has become final or after four months of the decree or order, whichever is longer. A general notice shall be posted in a conspicuous part of every Court house in this regard. (Court's duty as of custodian of such documents discharged)
- (x) Document if Books of business (Rule 64 GR Civil): If a document be an entry in a letter book, a shop book, or other account in current use or an entry in a public record, produced from a public office or by a public officer, a copy of the entry, certified in the manner required by law, shall be substituted on the record before the book, account or record is returned, and the necessary endorsement should be made thereon, as required by **Order XIII Rule 5 of C.P.C.**

(Order XIII Rule 9, C.P.C.: Return of admitted documents: Any person, whether a party to the suit or not, desirous of receiving back any documents produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same, (a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and (b) where the suit is one in

which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of Provided that a document may be returned at any time earlier than that prescribed by this rule.

Preparation of Records

Particulars of every case (i.e. the name of the Court, the register number, the year of original suit and the names of the parties to the suit) are to be noted on every paper. (Rule 142, GR Civil)

- There should be general index in Form No. 1 and an order-sheet in Form No. 2. The exhibit mark of every documents admitted in evidence shall be noted in bold letters and figures on the right-hand margin of the index (Form no.1) opposite the entry relating to such document. (Rule 143 & 144, GR, GR Civil)
- Rule 151, GR Civil. Parts of Record. In every suit and case instituted in a Civil Court, from its institution to the final proceeding in execution of decree, there shall be kept only one record, except as provided elsewhere in this rule.
- The record shall consist of not more than two parts (Part I and Part II):
- Either part of the record may consist of several sub-parts, each sub-part being the complete record of the proceeding to which it relates.
- Part I of the record shall contain every paper in a suit, an appeal, reference, revision and review.
- Part II of the record shall contain every paper relating to the execution or adjustment of the decree or order, or relating to any proceeding, whether original or appellate, in or arising from any application for the execution of the decree or order.
- A separate general index in Form No. 1 shall be prepared for each sub-part of Parts I and II. Each such separate general index shall be headed with the name of the Court in which the suit was instituted, the register number and year of the suit and the names of the original parties to the suit.
- The papers in each sub-part of Parts I and II shall be serially numbered and entered in its general index as they are brought on the record.
- Every paper which is brought on a record shall be marked with a letter indicating the file to which it belongs, and shall be placed with such file, and shall without delay be entered in the general index of Part I or Part II, as the case may be, by the official for the time being in charge of that part, who shall certify in column 6 of such index the state of every document filed or produced as an exhibit, noticing any blots, erasures, or interlineations appearing therein.
- The serial numbers in each sub-part of Part II shall have added to them the letter E, as for instance, 1E, 2E, 3E, and so on. They shall commence with the first paper in that proceeding relating to the adjustment or execution of the decree or order, and shall continue consecutively in respect of all papers brought upon the record of that proceeding.
- If, in any case, proceedings other than those relating to the execution or adjustment of the decree or orders are continued or instituted in a Court, while that part of the record of the case to which the papers of such proceedings would appertain is in another Court or in the record room, all papers filed in such proceedings shall be entered in a supplementary general index in the Court in which such proceedings are, with new serial numbers to be used for the time being.
- The supplementary general index shall be added unblock to the general index of that part, and shall form part thereof; and the serial numbering of the general index shall be continued by entering in red ink a number against each entry in the supplementary general index.

- Except in the case of a supplementary general index being brought on the general index, no entry shall be made in the general index otherwise than in black ink.
- The serial number in red-ink in the general index appropriate to a paper shall also be entered in red-ink on that paper.
- Each sub-part of the record shall have its index but the general index of the first sub-part shall be the general index for the whole of Part II comprising the papers contained in all subsequent sub-parts.
- Rule 152 to Rule 157, GR (Civil). Related to Classification of records. There shall be four classes of records: Class I, Class II, Class III and Class IV.
- Every part of records of Class shall be sub-divided into files: (Records of Class I is to consist of four files marked A 1, A 2, C and D; Records of Class II is to consist of 3 files B, C and D; Records of Class III is to consist of one file C; Records of Class IV is to consist of file D).
- A paper when placed in any of these files shall be stitched to the other papers already therein.
- Files A1 and B shall respectively be put into brown cartridge demy card-board covers; and files A2, C and D shall respectively be put into ordinary paper covers; and on each cover a copy of the entries on the wrapper shall be made under a letter indicating the file.
- There is List of papers to be placed in files A1, A2, B, C provided in Rule 155 -157, GR Civil.
- Rule 158, GR Civil. - Papers taken out of a record to be replaced by its copy: When a document in any record civil or criminal, is made an exhibit in another record, civil or criminal, and is removed to that record, a certified copy of the document shall be retained in the record from which the document is removed and a note of the removal made on the general index or order-sheet. The certified copy shall be prepared by the Court Reader or clerk, and shall be signed by the Presiding Officer of the Court. After the decision of the appeal or after the expiry of the period of appeal, if no appeal has been brought the document shall be returned to the record of which it originally formed part, its place being taken by the certified copy.
- Rule 159, GR Civil. -Documents forming basis of suit how dealt with: A party filing an original document on which his suit is founded (except in a Small Cause Court) must file also a copy thereof. This shall contain, at the top, a note of the stamp duty paid on the original document. The copy will either be prepared by the copying department on payment of fees, or compared there on payment of one –quarter of the charges for preparing a copy.
- The file of documents will be produced at the hearing of the suit for the purpose of proving the documents; but except when the file is being shown to a witness the file will remain on the table of the Presiding Officer. On the termination of the hearing the Munsarim will take the file into his custody.

CHAPTER-21

CIVIL SUITS: FROM INSTITUTION TO JUDGMENT

Introduction

The organization and jurisdiction of the civil courts in this State is governed by the Bengal, Agra and Assam Civil Courts Act, XII of 1887. The pecuniary jurisdiction of District Judges and Civil Judges of senior division cadre is unlimited, while that of the cadre of junior division is up to Rupees Five Lakhs only. District Judges can hear appeals from the judgments of Civil Judges in suits up to a particular valuation and revisions from the decisions of the Court of civil judges and the court of Small Causes. In certain cases, appeals from Revenue Courts also lie to the District Judge. All appeals from Munsifs lie to the District Judge.

The remedial measures ensured to the people in the case of a civil wrong are based on the Latin maxims ‘*damnum sine injuria* (damage without injury), *injuria sine damnum* (injury without damage)’ and *ubi jus ibi remedium*. According to the first two maxims, if the legal right of a person is violated, he will get the remedy even in those cases where no actual damage is caused to him; but where he has no legal right, he will not be entitled to get the remedy in spite of the fact that actual damage is caused to him, the maxim ‘*ubi jus, ibi remedium*’ (where there is a right there is a remedy), speaks of the remedies available to a person having a right. Such remedies are sought by the institution of a suit. The term suit is not defined under the CPC but on the basis of the various decisions, it can be said that ‘suit ordinarily’ means a civil proceeding instituted by the presentation of a plaint. Civil suit is the institution of the litigation for enforcement of civil rights (or substantive rights, it may be against state or individual). There are four essentials of a suit: -

1.Name of Parties

There must be at least two parties: the plaintiff (who claims) and the defendant (against whom the plaintiff claims). There is no limitation with regards to the number on either side.

2.Cause of Actions

Without a cause of action there is no existence of the suit. Cause of action is a set of facts or circumstances that a plaintiff is required to prove. It means that set of facts and circumstances constituting the right and its infringement. The cause of action means every fact which is necessary for the plaintiff to be proved with a view to obtain a decree in his favour. Where a plaint is not disclosing a cause of action, it is the duty of the court to reject the plaint under Or. 7 R.11.

3.Subject matter

The third essential for a suit is subject matter, meaning in what respect or aspect a civil dispute is related.

4. Relief claimed by the plaintiff

The fourth essential is the relief claimed by the plaintiff in his suit. No court will grant relief unless it is specifically claimed by the party.

Proceedings of a Civil Suit

Proceedings of a civil suit could be understood by knowing the various main steps and important stages of the suit. The main stages of a civil suit may be addressed as follows:

1. Presentation of plaint. (Institution)
2. Service of summons on the defendant,
3. Appearance of parties,
4. Interim/Interlocutory Proceedings,
5. Filing of written statement by defendant,
6. Production of documents by parties,
7. Examination of Parties and direction to choose ADR Mechanism.
8. Discovery and Inspection
9. Admission (Order 12):
10. Framing of issues by the court.
11. Summoning, Attendance and Examination of Witnesses
12. Argument
13. Judgment & Decree

The decree will be of no value unless it is properly executed. The victim of a civil wrong gets remedy only when the decree is properly executed. The final stage of a civil suit generally takes too much time to reach to its logical conclusion. That is why the role of each stakeholder becomes more important to provide speedy justice. In this regard, it is essential to understand the procedure and law applicable to a civil suit. Here we will try to understand it step by step.

Step 1. Institution of a civil suit

Why is this stage so important?

This is a very important stage because, the presiding officer of the court, has to decide the admissibility of the plaint. In other words, the court has to decide, as to whether the plaint presented by a party is liable to be registered as a suit or not. Points to be considered at the time of institution are jurisdiction, limitation, legal bar, prior permission of the court, any other legal issue.

Section 26 and Order 4 provide for the institution of suits. According to this, every suit must be instituted by the presentation of a plaint in duplicate or as in such other manner as may be prescribed by the Code. Therefore, generally, a proceeding which does not commence with a plaint is not a "suit".

The expression "plaint" has not been defined in the Code, but it means "a private memorial tendered to a court in which a person sets forth his cause of action; the exhibition of an action in writing."

Section 26(1), CPC says that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

According to Rule 1 of Order 4:-

1. Every suit shall be instituted by presenting a plaint in duplicate to the Court or such officer as it appoints in this behalf.
2. Every plaint shall comply with the rules contained in Order VI and VII, so far as they are applicable.
3. The plaint shall not be deemed to be "duly instituted" unless it complies with the requirements specified in sub-rules (1) and (2).

It is also important to mention here that, "duly institution", is a pre- condition for issuing summons to defendants. As per law provided under section 27 CPC and order 5

rule 1 CPC, summons to the defendants can only be issued when the suit is duly instituted and admitted by the court.

What is duly Institution? Sub-rule 3 of Order 4 Rule-1 CPC says that the plaint shall not be deemed to be “duly instituted” unless it complies with the requirements specified in sub-rules (1) and (2) meaning thereby: -

1. The plaint is filed in duplicate.
2. The plaint complies with the requirements of order VI and VII of CPC.

The entire legal machinery under the Civil Law is set in motion by filing of a plaint and hence the plaint is the actual starting point of all pleadings in a case. At the time of institution of a suit, it is the content of the plaint which enables the court to apply its judicial mind to decide the question of admissibility of that suit. For due institution of a suit, the plaint must comply with the requirements of Order VI and VII of CPC.

Order 6 CPC deals with pleadings in general. Rule 1 defines pleading, while Rule 2 lays down the fundamental principles of pleadings. Rules 3 to 13 require the parties to supply necessary particulars. Rules 14 and 15 provide for signing and verification of pleadings. Rule 16 empowers a court to strike out unnecessary pleadings, Rules 17 and 18 contain provisions relating to amendment of pleadings. Sub-Rule (1) of Rule 2 lays down the fundamental principles of pleading which are as under:

- (i) Pleadings should state facts and not law;
- (ii) The facts stated should be material facts;
- (iii) Pleadings should not state the evidence; and
- (iv) The facts should be stated in a concise form.

Order 6 Rule 14 CPC says that every pleading shall be signed by the party and his pleader (if any). Provided that where a party's pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

Rule 15 says that every pleading shall be verified, and the person verifying the pleading shall also furnish an affidavit in support of his pleading.

Order 7 CPC is related to the format and essential contents of Plaint

1. According to Order 7 Rule 1 CPC the particulars to be contained in a plaint are:
 - a. The name of the Court in which the suit is brought;
 - b. The name, description and place of residence of the plaintiff;
 - c. The name, description and place of residence of the defendant, so far as they can be ascertained;

Note: Rule 26 of GR Civil provides that the names of parties shall bear consecutive numbers, and a separate line shall be allotted to the name and description of each person

- a. Where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;
- b. The facts constituting the cause of action and when it arose;
- c. The facts showing that the Court has jurisdiction;
- d. The relief which the plaintiff claims;
- e. Where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and
- f. A statement of value of the subject matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits (other rules regarding the contents of a plaint):

2. In money suits the plaint shall state the precise amount claimed (Rule 2).
3. Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers (Rule 3). Such description enables the Court to draw a proper decree as required by Order 20 Rule 3 of the CPC. The plaintiffs have to file map of the suit property annexed with the plaint. If the plaintiffs committed an error, the defendants should object to promptly. The default or carelessness of the parties does not absolve the Trial Court of its obligation which should have, while scrutinizing the plaint, pointed out the omission on the part of the plaintiffs and should have insisted on a map of the immovable property forming subject-matter of the suit being filed. **Pratibha Singh vs Shanti Devi Prasad 2003(2) SCC 330**
4. Where the plaintiff sues in a representative character, the plaint shall show not only that he has an actual existing interest in the subject matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it (Rule 4).
5. The plaint shall show that the defendant is or claims to be interested in the subject matter, and that he is liable to be called upon to answer the plaintiff's demand (Rule 5).
6. Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed (Rule 6).
7. Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement (Rule 7).
8. Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly (Rule 8).
9. Order 7 Rule 9 talks about the procedure on admitting plaint, Rule 10 return of plaint and Rule 11 relates to rejection of plaint

Presentation of a Plaint

As per Section 26 CPC and Order 4 of CPC, suit can be instituted by presentation of a plaint.

Who can present the plaint?

Now the question is who can present the plaint for the institution?

The plaint may be presented either by the affected person (plaintiff) himself, or by his advocate or by his recognised agent or by any person duly authorised by him. (Order III Rule -1 CPC will apply.)

Rule 29 of GR CIVIL provides that - Except an application for a copy, no application or petition and no pleading required or authorised by law to be made by a party in court, shall be received from any person other than the party himself, or his pleader, or his recognised agent.

As per proviso to this rule and as per Rule 607 of GR CIVIL, a registered Clerk can present the plaint only before the reader or Munsarim of the court but he cannot argue the case before the court.

In the case of **Kanhaiya Lal vs The Panchayati Akhara AIR 1949 All 367** hon'ble Allahabad High Court has held in para 39 - that when the presentation of the

plaint is necessary for the institution of a suit, it is necessarily implied that it must be presented by the plaintiff personally or by some person duly authorised by him. The relevant para of the judgement reads as follows-

*“39. Section 26 , Civil P.C., provides: Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. The word "suit" ordinarily means and, apart from some context, must be taken to mean a civil proceeding instituted by the presentation of a plaint. The institution of a civil proceeding implies the existence of a person who initiates the proceedings. That person is described as a plaintiff and his name has to be mentioned in the plaint. In Section 26, no doubt, there is no mention as to who is to present the plaint; but from the omission it is not possible to infer that the plaint can be presented by any person other than the plaintiff. In **Wali Mohammad Khan v. Ishak Ali Khan A.I.R. (18) 1931 All. 607 (F.B.)**, it was pointed out that when the presentation of the plaint is necessary for the institution of a suit, it is necessarily implied that it must be presented by the plaintiff personally or by some person duly authorised by him. It could never have been the intention of the Legislature that the proceeding by way of suit should be initiated by a stranger; and there is no indication of such an intention in the Code of Civil Procedure.”*

Time for Presentation of Plaint:

Rule 32 of GR Civil, provides that applications and petitions which can be presented to the Munsarim of a court, shall be received on any day other than an authorised holiday between 10:30 a.m. and such hour as may be fixed by the court;

Provided that an application or petition presented after such hour and before 4 p.m. may be received on the ground, if any, of limitation or other urgent reason. Presiding Officers when accepting plaints or applications after Court hours will note on such papers the time of their presentation.

It has been held in the case of **Tula Ram vs Bhajan Singh : AIR 1953 All 609** that, “a claim should not be allowed to get time-barred by a judicial officer refusing to accept a plaint presented after court hours on the last day of limitation, which through some honest mistake could not be filed earlier. The Limitation Act, which prescribes the period of limitation for a suit, no doubt does not lay down that on the last day of limitation the plaint should be filed within court hours after which it would get time-barred. In this connection may refer to the case of -- **Din Ram v. Hari Das', 9 All LJ 743 (FB) (A)**, where a memorandum of appeal presented at the residence of the District Judge on the last day of limitation after court hours was held to be not time-barred. After court hours, however, a judicial officer is not bound to do judicial work and he is, therefore, not bound to accept plaints or applications at his residence. The difficulty is not felt so much by a court of appeal as Section 5, Limitation Act, applies to appeals and on sufficient cause being shown delay can be condoned, but in a court entertaining original suits the refusal to entertain a plaint filed after court hours puts an end to the claim of the plaintiff if that is the last day of limitation as Section 5, Limitation Act, does not apply to original suits. Therefore, though a judicial officer is not bound to accept a plaint or an application presented to him after court hours, as far as possible if that is the last day of limitation he should, if it is not too inconvenient, accept the plaint or application and direct it to be put up before him the next day in court for further orders.

Duty of Munsarim after presentation of a Plaintiff:

Rule 35 of General Rule Civil provides that on presentation of a plaintiff, a Munsarim who is appointed to receive plaintiffs, shall examine each plaintiff, and shall report thereon:

1. Whether the provisions of Code of Civil Procedure and Court Fees Act have been observed?
2. Whether the claim is within the jurisdiction of the court?
3. Whether the claim constitutes a cause of Action?
4. Has the suit been presented within the prescribed time period? and
5. Whether the Plaintiff is in Proper Form (means as required by Section 26, Order IV, VI and VII of CPC) including that in a suit where a notice under Section 80 CPC is necessary, such a notice has been given.

On the back of all plaintiffs the Munsarim shall note: -

- a. Date of presentation of the plaintiff,
- b. Name of presenter,
- c. Classification of suit,
- d. Court-fee paid.

Registration of the Suit

Rule 2 of Order 4 CPC provides that the Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered every year according to the order in which the plaintiffs are admitted.

As per Rule 400 of GR CIVIL, register of civil suits are maintained in every Civil Court in Form No.3.

In the absence of any adverse report by the Munsarim if the court decides to admit the plaintiff and proceed with the case, then the court orders to register that plaintiff as a suit, and orders to issue notice and summons for the objection on temporary application, if any, and for written statement. On such order, Munsarim will register that plaintiff as a suit in Register no. 3 and all entries will be recorded in the register. This Register No.3 is called the Register of civil suits.

Step 2. Service of summons

When the plaintiff files a suit, the defendant has to be informed that the suit has been filed against him, and that he is required to appear in the court to defend it. The intimation which is sent to the defendant by the court is technically known as "summons". The object of issuing summons is that the defendant must be given an opportunity as to what he has to say against the prayer made by the plaintiff. This is in consonance with the principle of natural justice as no one can be condemned unheard (*Audi alteram partem*). When the suit is duly instituted summons may be issued to the defendant to appear and answer the claim.

Section 27 and Order V of the Code of Civil Procedure, 1908 deal with 'issue and service of summons' on the defendant/respondent. Order 16 deals with summoning and attendance of witnesses. Order V of CPC contains Rules 1 to 30. Chapter IV (Rule 102 to 141) of General Rule Civil, 1957, deals with the Law regarding Summons and other processes.

O-V-Rule 1 Sub-Rule 1 provides that- "When a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, within thirty days from the date of service of

summons on that defendant: Provided that no such summons shall be issued when a defendant has appeared at the presentation of plaint and admitted the plaintiffs claim:

Object of the provisions u/O. 5 CPC is to ensure the presence of the defendant. If the defendant is having knowledge of the suit and participating through counsel, he cannot claim thereafter that summons was not served upon him and thus the proceedings are vitiated. *Sri Nath Agrawal vs. Santosh Kumar, AIR 1981 All 400*

Essentials of Summons

As per the provisions of Civil Procedure Code, GR Civil and various Circulars of Hon'ble Allahabad High Court Followings are the essentials of summons:

1. Every summon shall be accompanied by a copy of the plaint. (O-5, R-2)
2. Every summon should be in the forms prescribed in Appendix B to the first schedule of the code.

Notices and summons should be issued in the forms in Hindi in Devanagari script as specified in Civil Prakriya Sanhita (Hindi version of Civil Procedure Code) for the facility of the litigant public. (C.L. No.29/Xc-5 dated 27th March 1968.)

Translation- As provided in Rule 102 (f) GR Civil, where a process is sent to the Court of a district of another state where a different language is in ordinary official use, a translation, certified by the transmitting Court to be correct, into such other language may also accompany the process.

G.L. No. 1902/35 (a)-1(7) dated 9 March, 1921 read with C.L. No. 25d dated 19 March, 1959

Ordinarily every process shall be written in the court language. But where a process is sent for execution to a court where the court language is different it shall be written in English and shall be accompanied by a letter in English requesting its execution.

In cases where the return of service is in a language different from that of the district from which it is issued it shall be accompanied by an authorized English translation.

3. **As per rule 102 (a) of General Rules Civil 1957**, the party must file a printed summons/notice in the prescribed form in duplicate duly filled up except the date of appearance/hearing and the date of issue of summons/notice. The presiding officer may in his discretion direct that such forms in general or any particular form be filled up entirely in the office of the court. There shall be two types of form or process, one printed on white paper to be used in ordinary cases and the other printed on pink paper to be used in urgent cases. Where there is prescribed form but no printed copies are available a process shall be written in the prescribed form, in a case where there is no prescribed form, if possible shall be modified to meet the requirements of the particular case.
4. **According to Order 5 Rule 1 Sub-Rule 3 of CPC and Rule 102(b)-(d) of GR Civil** every summons shall be signed by the judge or such officer appointed by him and Shall be sealed with the seal of the court and must be accompanied by a plaint. In all cases, all judicial officers and munsarims shall sign their names distinctly and legibly. No such signature shall be made using a stamp.
5. **Expenses or postage on processes (Sec. 143 CPC & Rule 105, G.R. Civil) :** Expenses/ postage etc. for the issuance of a process in civil cases shall be ordinarily borne by the party applying for issue of the process and paid in court fee – stamps.

Contents of a summons:

1. Name of the Issuing Court
2. Name and description of the person for whom the process is intended.
3. Complete address (including district, mohalla if any, village, or town), of the person for whom the process is intended. (Rule 103 GR Civil).
4. Date for appearance if any.
5. Direction: -The summons must contain a direction whether the date fixed is for settlement of issues only or final disposal of the suite. In the latter case, the defendant should be directed to produce his witness.

SERVICE OF SUMMONS:

The problem of the service of summons is one of the major causes of delay in the progress of the suit. The Civil Procedure Code and General Rules Civil prescribes the principal modes of serving a summon to a defendant.

Modes of Service (O.5, Rule 9, 9-A, 10 CPC): The different modes of service of processes are as under:

- (1) Process server
- (2) Special messenger
- (3) Dasti Summons by the party himself
- (5) Registered post & Speed post
- (6) Courier Services (If approved by High Court)
- (7) Fax message
- (8) Electronic mail service
- (9) Publication (substituted service)

Step 3. Appearance of parties

On the day fixed in the summons the defendant is required to appear and answer the claim of plaintiff, and the parties shall attend the court unless the hearing is adjourned to a future day fixed by the court. As stated under Rule 1 of Order IX of the Code of Civil Procedure, the parties to the suit are required to attend the court either in person or by their pleaders on the day which has been fixed in the summons.

If the plaintiff or a defendant does not appear before the court, the court is empowered under Order IX as follows.

1. If the plaintiff does not appear, dismiss the suit.
2. Where the plaintiff appears and defendant does not appear when suit is called up for hearing and summons is properly served the court may make an order that the suit will be heard ex parte (Order 9, Rule 6(1)(a) of civil procedure code).
3. Where on the day so fixed it is found that summons has not been served upon the defendant as a consequence of failure of plaintiff to pay the court fee or postal charges the court may dismiss the suit.
4. Where neither the plaintiff nor the defendant appears, the court may dismiss the suit.

Proceeding ex-parte u/O- 9, R 6(1-a) and duty of the Court:

In the first situation, which is relevant here, when it is proved that the summons was duly served, the Court may make an order that the suit be heard ex-parte. The provision casts an obligation on the Court and simultaneously invokes a call to the conscience of the Court to feel satisfied in the sense of being 'proved' that the summons

was duly served when and when alone, the Court is conferred with a discretion to make an order that the suit be heard ex-parte. The date appointed for hearing in the suit for which the defendant is summoned to appear is a significant date of hearing requiring a conscious application of mind on the part of the Court to satisfy itself on the service of summons. Any default or casual approach on the part of the Court may result in depriving a person of his valuable right to participate in the hearing and may result in a defendant suffering an ex- parte decree or proceedings in the suit wherein he was deprived of hearing for no fault of his. ***Sushil Kumar Sabharwal vs Gurpreet Singh and Ors, AIR 2002 SC 2370***

It has been held in the case of ***Nahar Enterprises vs Hyderabad Allwyn Ltd. And Anr 2007 (9) SCC 466*** that “The Court, furthermore, in our opinion, committed a manifest error in so far as it failed to take into consideration that the summons having been served upon the appellant after the date fixed for his appearance, it was obligatory on its part to fix another date for his appearance and filing written statement and direct the plaintiff to take steps for service of fresh summons. This legal position is explicit in view of the provisions of order 9 Rule 6 (1) (C) of CPC

Setting Aside Ex-Parte Decree

When an ex-parte decree is passed, the defendant has two remedies –

- a. Either to file an application under Order IX Rule 13 CPC to set aside the ex-parte decree by satisfying the court that the summons was not served or if served, the defendant was prevented by “sufficient cause” from appearing in the court when the suit was called for hearing; and/or
- b. to file a regular appeal from the original decree to the first appellate court in terms of Section 96(2) CPC and challenge the ex-parte decree on merits. See- ***N Mohan vs. R. Madhu, AIR 2020 SC 41.***

An appeal under Section 96(2) CPC is a statutory right, the defendant cannot be deprived of the statutory right merely on the ground that earlier, the application filed under Order IX Rule 13 CPC was dismissed. ***See- N Mohan vs. R. Madhu AIR 2020 SC 41***

In the case of ***Bhivchandra Shankar More vs Balu Gangaram More (2019) 6 SCC 387*** Hon’ble Supreme Court has held-

“10. A conjoint reading of Order IX Rule 13 CPC and Section 96(2) CPC indicates that the defendant who suffered an ex-parte decree has two remedies:- (i) either to file an application under Order IX Rule 13 CPC to set aside the ex-parte decree to satisfy the court that summons were not duly served or those served, he was prevented by “sufficient cause” from appearing in the court when the suit was called for hearing; (ii) to file a regular appeal from the original decree to the first appellate court and challenge the ex-parte decree on merits”.

11. It is to be pointed out that the scope of Order IX Rule 13 CPC and Section 96(2) CPC are entirely different. In an application filed under Order IX Rule 13 CPC, the Court has to see whether the summons was duly served or not or whether the defendant was prevented by any “sufficient cause” from appearing when the suit was called for hearing. If the Court is satisfied that the defendant was not duly served or that he was prevented for “sufficient cause”, the court may set aside the ex- parte decree and restore the suit to its original position. In terms of Section 96(2) CPC, the appeal lies from an original decree passed ex-parte. In the regular appeal filed under Section 96(2) CPC, the appellate court has wide jurisdiction to go into the merits of the decree. The scope of enquiry under two provisions is entirely different. Merely because the defendant pursued the remedy under Order IX Rule 13 CPC, it does not prohibit the

defendant from filing the appeal if his application under Order IX Rule 13 CPC is dismissed.”

Similarly, in the case of *Neerja Realtors (P) Ltd. v. Janglu (Dead) Through Legal Representative (2018) 2 SCC 649*, it has been held that, “A defendant against whom an ex parte decree is passed has two options: the first is to file an appeal. The second is to file an application under Order 9 Rule 13. The defendant can take recourse to both the proceedings simultaneously. The right of appeal is not taken away by filing an application under Order 9 Rule 13. But if the appeal is dismissed as a result of which the ex parte decree merges with the order of the appellate court, a petition under Order 9 Rule 13 would not be maintainable. When an application under Order 9 Rule 13 is dismissed, the remedy of the defendant is under Order 43 Rule 1. However, once such an appeal is dismissed, the same contention cannot be raised in a first appeal under section 96.”

In *Bhanu Kumar Jain v. Archana Kumar and another (2005) 1 SCC 787*, the Hon’ble Supreme Court considered the question whether the first appeal filed under Section 96(2) of the Code was maintainable despite the fact that an application under Order IX Rule 13 CPC was dismissed. Observing that the right to appeal is a statutory right and that the litigant cannot be deprived of such a right, the Supreme Court held as under: -

“36. ... A right to question the correctness of the decree in a first appeal is a statutory right. Such a right shall not be curtailed nor shall any embargo be fixed thereupon unless the statute expressly or by necessary implication says so. (See *Deepal Girishbhai Soni v. United India Insurance Co. Ltd. (2004) 5 SCC 385* and *Chandravathi P.K. v. C.K. Saji (2004) 3 SCC 734*.)

38. The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex parte hearing by the trial court and/or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the first appeal filed by him under Section 96(2) of the Code on the merits of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. We, however, agree with Mr Chaudhari that the “Explanation” appended to Order 9 Rule 13 of the Code shall receive a strict construction as was held by this Court in *Rani Choudhury (1982) 2 SCC 596*, *P. Kiran Kumar (2002) 5 SCC 161* and *Shyam Sundar Sarma v. Pannalal Jaiswal (2005) 1 SCC 436*.

In either case of non-filing of an application under Order 9 Rule 13 CPC or after filing and its rejection, the defendant has a right to avail the statutory remedy of appeal under section 96 CPC but vice versa is not permissible. When the defendants filed an appeal under section 96 of the CPC against the ex-parte decree and if the said appeal has been dismissed the defendants cannot file an application under Order 9 Rule 13 CPC because the original decree passed in the suit merges with the decree of the appellate Court.

Step 4. Interlocutory proceedings

The period involved between initiation and disposal of litigation is substantially long. The intervention of the court may sometimes be required to maintain the position as it prevailed on the date of litigation. In legal parlance it is known as "status quo". It means preserving the existing state of things on a given day. In that context interlocutory orders are provisional, interim, temporary as compared to final. It does not

finally determine cause of action but only decides some intervening matter pertaining to the cause. Those interim measures are as follows: -

1. Arrest and attachment before judgment (Order 38. CPC)
2. Temporary injunctions and interlocutory orders (Order 39 CPC)
3. Appointment of receiver (Order 40 CPC)
4. Appointment of commissioner (Order 26 CPC)

Step 5. Filing of written statement by defendant

Rule 1, Order 8 CPC states that a defendant should, within thirty days from the service of summons on him, present a written statement of his defence. The said period under the proviso to the said rule, can be extended up to 90 days. It has, however, been held that the proviso to Rule 1 is discretionary in nature and the court has discretion to allow the defendant to file a written statement beyond that period by recording reasons. *See: Salem Advocate Bar Assn. (2) v. Union of India, (2005) 6 SCC 344; Jati & Bros. v. Subhashchandra, (2007) 6 SCC 420; Sandeep Thapar v. SME Technologies (P) Ltd., (2014) 2 SCC 302; Atcom Technologies Ltd. v. Y.A. Chunawala & Company, (2018) 6 SCC 639; Rajinder Tiwari v. Kedar Nath, (2019) 14 SCC 286; Desh Raj v Balkishan, (2020) 2 SCC 708; Sugandhi v. P. Rajkumar, (2020) 10 SCC 706.*

The defendant is required to file a written statement of his defence at or before the first hearing or such time as may be allowed. If the defendant disputes maintainability of the suit or takes the plea that the transaction is void it must be specifically stated. A general denial of grounds alleged in the plaint is not sufficient and denial has to be specific. The denial should not be an evasive denial but it must be on point of substance. Every allegation of fact in the plaint if not denied specifically or by necessary implication or stated to be not admitted in the pleading shall be deemed to be admitted. (Order 8 Rule 5 CPC). Before amendment 2002 in C.P.C., there was no time limit to file a written statement by the defendant. By amendment 2002 under order 8 rule 1 of C.P.C. the defendant has to present a written statement within 90 days from the date of service of summons on him. Under this rule discretion is given to court that if a defendant fails to file a written statement within a period of 30 days he shall be allowed to file the same on such other day which may be specified by the court but such period shall not be later than 90 days from the date of service of summons.

By Amendment 1999 in Rule 1-A of order 8 CPC a duty is cast upon the defendant to produce documents on which he bases his defense or other documents which are in his possession along with a list of documents. Such list of documents should be supplied with his written statement. Rule 1A states that along with the written statement the defendant must produce the documents upon which he relies for his defence, if the documents are in his power or possession, and must exhibit it in the file by providing the list of such documents specifically. If the defendants fail to exhibit such documents along with a written statement, he will be restrained from producing it as evidence in his defence unless the court permits.

“Rule 10 of Order 8 provides that where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the court, as the case may be, the court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit, and on the pronouncement of such judgment, a decree shall be drawn up.”

Rule 10 contemplates two contingencies, namely (1) where a party from whom a written statement is required under Rule 1 fails to present the same within the time permitted by the Court; and (2) where a party from whom a written statement is required under Rule 9, CPC fails to present the same within the time fixed by the Court. Under Rule 10, when any party fails to present a written statement under any of the

circumstances stated above, the two courses are open to the Court. First, the Court may proceed to pronounce judgment. Secondly, the Court may make such an order in relation to the suit as it thinks fit.

Set-off to be given in a written statement. As per Rule 6 of Order 8 (1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, presents a written statement containing the particulars of the debt sought to be set-off.

Effect of set-off. —The written statement shall have the same effect as a plaint in a cross-suit so as to enable the court to pronounce a final judgment in respect both of the original claim and of the set-off, but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the cost's payable to him under the decree. The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

Counter-claim by defendant. As per Rule 6A of Order 8 CPC, A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not: Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the court. Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pro-nounce a final judgment in the same suit, both on the original claim and on the counter-claim. The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the court. The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.

In the case of **Ashok Kumar Kalra v. Surendra Agnihotri [(2020) 2 SCC 394: (2020)1 SCC (Civ) 545]**, Hon'ble Supreme Court has held that "the whole purpose of the procedural law is to ensure that the legal process is made more effective in the process of delivering substantial justice. Particularly, the purpose of introducing Rule 6A in Order VIII of the CPC is to avoid multiplicity of proceedings by driving the parties to file separate suit and see that the dispute between the parties is decided finally. If the provision is interpreted in such a way, to allow delayed filling of the counterclaim, the provision itself becomes redundant and the purpose for which the amendment is made will be defeated and ultimately it leads to flagrant miscarriage of justice. At the same time, there cannot be a rigid and hypertechnical approach that the provision stipulates that the counterclaim has to be filed along with the written statement and beyond that, the Court has no power." The Courts, taking into consideration the reasons stated in support of the counterclaim, should adopt a balanced approach keeping in mind the object behind the amendment and to subserve the ends of justice. There cannot be any hard and fast rule to say that in a particular time the counterclaim has to be filed, by curtailing the discretion conferred on the Courts. The trial court has to exercise the discretion judiciously and come to a definite conclusion that by allowing the counter-claim, no prejudice is caused to the opposite party, process is not unduly delayed and the same is in the best interest of justice and as per the objects sought to be achieved through the amendment. But however, we are of the considered opinion that the

defendant cannot be permitted to file counterclaim after the issues are framed and after the suit has proceeded substantially. It would defeat the cause of justice and be detrimental to the principle of speedy justice as enshrined in the objects and reasons for the particular amendment to the CPC. “We may note that even if a counterclaim is filed within the limitation period, the trial court has to exercise its discretion to balance between the right to speedy trial and right to file counterclaim, so that the substantive justice is not defeated. The discretion vested with the trial court to ascertain the maintainability of the counterclaim is limited by various considerations based on facts and circumstances of each case. We may point out that there cannot be a straitjacket formula, rather there are numerous factors which needs to be taken into consideration before admitting counterclaim.” We sum up our findings, that Order VIII Rule 6A of the CPC does not put an embargo on filing the counterclaim after filing the written statement, rather the restriction is only with respect to the accrual of the cause of action. Having said so, this does not give absolute right to the defendant to file the counterclaim with substantive delay, even if the limitation period prescribed has not elapsed. The court has to take into consideration the outer limit for filing the counterclaim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counterclaim, after taking into consideration and evaluating inclusive factors provided below which are only illustrative, though not exhaustive:

- a. Period of delay.
- b. Prescribed limitation period for the cause of action pleaded.
- c. Reason for the delay.
- d. Defendant’s assertion of his right.
- e. Similarity of cause of action between the main suit and the counterclaim.
- f. Cost of fresh litigation.
- g. Injustice and abuse of process.
- h. Prejudice to the opposite party.
- i. Facts and circumstances of each case.
- j. In no case, after framing of the issues.

Step 6. Production of documents by parties

Rules 14 to 17 of Order VII, Rule 1A of Order VIII and Order XIII of CPC deal with the production of documents by the plaintiff and the defendant. the plaintiff has to produce at the time of the presentation of a plaint copies of all documents on which he sues or seeks to rely. Like a plaintiff, a defendant is also bound to produce all the documents in support of his defence, or claim for set-off or counterclaim which are in his possession.

According to Order XIII CPC, the parties or their pleader shall produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed along with plaint or written statement. The Court shall receive the documents so produced: Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

A document which ought to be produced in the court by the plaintiff when the plaint is presented or to be entered in the list to be added or annexed to the plaint, and is not produced or entered accordingly, shall not, without the leave of the court, be received in evidence on his behalf at the hearing of the suit. Likewise, If the defendant fails to produce the documents with his ws, they will not be received in evidence except with the leave of the court.

These provisions, however, do not apply to the following documents:

- a. Documents reserved by plaintiff for the purpose of cross-examination of the defendant's witnesses; or

- b. Documents reserved by the defendant for cross-examination of the plaintiff's witnesses; or
- c. Documents handed over to a witness merely to refresh his memory.

The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

There shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely: —

- (a) The number and title of the suit,
- (b) The name of the person producing the document,
- (c) The date on which it was produced, and
- (d) A statement of its having been so admitted and the endorsement shall be signed or initialled by the Judge.

Rules 40 to 53 of General Rule Civil provides a detail procedure for production of documents which are as follows-

As per Rule 40 Documents may be produced in Court –

- (i) By parties,
- (ii) By persons, other than parties; and
- (iii) On requisition issued by the Court.

As per Rule 41 Every document produced by a party or his witness not written in Hindi, Urdu or English shall be accompanied by a correct translation of the document into Hindi written in the Devanagari script. The translation shall bear a certificate of the party's lawyer to the effect that the translation is correct. If the party is not represented by a lawyer, the Court shall have the translation certified by any person appointed by it on this behalf at the cost of the party concerned.

As per Rule 42 a party desiring to produce any document in Court shall, before producing it in Court, obtain admission or denial recorded on the back of the document by the opposite party's lawyer. If the opposite party is not represented by a lawyer, the Court shall get admission or denial recorded by the party in its presence and may, for the purpose, examine the party.

As per Rule 43, the list of documents required by O. VII R. 14 and O. XIII R.1 shall be in form (Part IV-71) and no document, whensoever produced, shall be received unless accompanied by the said form duly filled up. In the case of a document produced by a witness or person summoned to produce a document, the form shall be supplied by the party at whose instance the document was produced. The list as well as the documents shall be immediately entered in the general index.

As per Rule 44, whenever any private document, other than a registered document or certified copy, containing erasures, additions or interlineations is produced by a party to a case, it shall be accompanied by a statement clearly describing each such erasure, addition or interlineations, and signed by such party. Reference to such statement shall be made in the list form (Part IV-71) with which the paper is filed.

As per Rule 45, small documents when filed in Court shall be filed pasted on a paper equal to the size of the record, and the margin of the paper should be stitched to the file so that no part of the document is concealed by the stitching. If a document contains writing both on the front and the back, it should be kept in a separate cover, which should be stitched to the file at the proper place leaving the main document untouched.

As per Rule 46 when a party requires the production of a public record, the application shall, unless the Court otherwise directs, be accompanied by an affidavit showing how the party requiring the record has satisfied himself that it is material to the suit and why a certified copy of the document cannot be produced or will not serve the purpose.

As per Rule 47 when a Court decides that in the interests of justice it is necessary that it should have before it a document which cannot be produced without the sanction of the head of the department concerned, it shall in its order asking for such document set out as clearly as possible (a) the facts, for the proof of which the production of the document is sought; (b) the exact portion or portions of the document required as evidence of the facts sought to be proved. The Court summoning the document shall fix a date for its production, which should not be less than three weeks from the date of issue of summons.

As per Rule 48- (1) A summons for the production of any register or book belonging to the office of a Sub-Registrar shall be addressed to the District Registrar and not direct to the Sub Registrar.

(2) A summons for the production of documents in the custody of the police should be addressed to the Superintendent of Police concerned, and not to the Inspector General.

(3) When duly authenticated and certified copies of documents in the possession of Municipal and District Boards 15 are admissible in evidence, the Court shall not send for original records unless, after perusal of copies filed, the Court is satisfied that the production of the original is absolutely necessary.

(4) When any journal or other record of a post office is produced in Court, the Court shall not permit any portion of such journal or record to be disclosed, other than the portion or portions which seem to the Court necessary for the determination of the case then before it.

As per Rule 49, when a Court requires the production of any Settlement Record in which the Settlement Officer acted in a judicial capacity, it shall be summoned in the manner provided by O. XIII, r.10. In other cases, the procedure prescribed in O. XVI, r. 6 shall be followed. The summons to produce such documents shall be issued to the Collector/Deputy Commissioner, who may send the document by messenger or registered post.

As per Rule 53 the Court shall inspect and consider all documents as soon as practicable after they have been produced and deal with them as follows: -

(a) Documents which are proved (or admitted by the party against whom they are produced in evidence) shall be admitted in evidence and marked as exhibits in the manner prescribed in rule 57 and the fact shall be noted in the record.

(b) Documents which are not proved (or admitted by the party against whom they are produced in evidence) shall be kept on the record pending proof and shall be rejected at the close of the evidence, if not proved or admitted.

(c) Documents that are found to be irrelevant or otherwise inadmissible in evidence shall be rejected forthwith.

Note: No document unless admitted in evidence shall be marked as an exhibit.

Step 7. Examination of parties and direction to choose ADR mechanism. (Order 10 CPC)

Examination of parties is an important stage after appearance. At first hearing of the suit the court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement. Such admissions and denials shall be recorded. The examination may be an oral examination. After recording the admissions and denials, the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of section 89 CPC. On the option of the parties, the court shall fix the date of appearance before such forum or authority as may be opted by the parties. (ORDER 10 RULE 1A OF CPC.)

The most common types of ADR for civil cases are Arbitration, Conciliation, Mediation, Judicial Settlement and Lok Adalat. The Parliament has amended the Civil Procedure Code by inserting Section 89 as well as Order 10 Rule 1-A to 1-C. Section 89 of the Civil Procedure Code provides for the settlement of disputes outside the Court. It is based on the recommendations made by the Law Commission of India and Malimath Committee. It was suggested by the Law Commission of India that the Court may require attendance of any party to the suit or proceedings to appear in person with a view to arriving at an amicable settlement of dispute between the parties and try to settle the dispute between the parties amicably. The Malimath Committee has recommended to make it obligatory for the Court to refer the dispute, after issues are framed, for settlement either by way of Arbitration, Conciliation, Mediation, Judicial Settlement through Lok Adalat. It is only when the parties fail to get their disputes settled through any of the alternate disputes resolution methods that the suit could proceed further. In view of the above, new Section 89 has been inserted in the Code in order to provide for alternative dispute resolution.

Here it is expedient to mention the Father of Nation Mahatma Gandhi who said;

“I realized that the true function of a lawyer was to unite parties... The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromise of hundreds of cases. I lost nothing thereby not even money; certainly not my soul”.

--- Mahatma Gandhi

Step 8. Discovery and inspection

Order 11 CPC provides procedures for discovery and inspection. The purpose of discovery and inspection of documents and facts is to enable the parties to ascertain the facts to be proved. With the leave of the court the plaintiff or defendant may deliver interrogatories in writing for examination of opposite parties which are required to be answered and which are related to the matter.

Discovery essentially implies a pre-trial procedural perspective wherein each party is allowed a chance to get proof from the opposite party. It is a proper process wherein the parties get an opportunity to exchange information concerning the witnesses and proof which will be introduced before the court during the procedure of trial. The primary reason for discovery is to make the parties aware of the case, which implies there will not be any vagueness between parties while the trial is going on. Both the parties will be clear about the plaint made and issues consequently. The extent of this provision is fundamentally dictated by the degree of discovery that can be made by the parties with the interference of the court. The information which is obtained during the discovery shouldn't have been admitted in court. According to the prerequisite, parties can get an order from the court for the revelation of required facts or documents from the opposite party to comprehend the goal or objective behind the case. Accordingly, the degree of extensibility of applying this section relies on the idea of the case and material that is asked by the other party. So it is the discretion of the court to choose whether the application is covered according to the degree given to the section under the code or not. When such particulars concerning the case are posed through inquiries, then they are named as interrogatories.

Every party to a suit shall be entitled at or before the settlement of issues to give notice to any other party, in whose pleadings or affidavits reference is made to any document, 2 [or who has entered any document in any list annexed to his pleadings,] to produce such document for the inspection of the party giving such notice, or of his

pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

Step 9- Admission:

Order 12 CPC provides that, either party may call upon the other party to admit within seven days from the date of service of the notice, any document saving all just exceptions. In case of refusal or neglect to admit after such notice, the cost of proving such document shall be paid by the party, so neglecting or refusing whatever be the result of the suit may be, unless the court otherwise directs and no cost of proving any such document shall be allowed unless such notice is given, except where the omission to give the notice is in the opinion of the court a saving of expenses. The above procedure is rarely followed by the advocates of parties.

Step 10-Framing of Issue

The next stage is framing of issues. The job of framing issues is exclusively assigned to a judge. Issues are framed considering provisions of Order 14 rule 1 of C.P.C. Rule 1 sub rule (1) states that, "Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other." According to sub rule (2), "Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defense,"

Each material proposition affirmed by one party denied by another shall form the subject of distinct issues. It may be the Issues of fact or Issues of law. The Court is not required to frame and record issues where the defendant at the first hearing of the suit makes no defence.

In **Makhan Lal Bangal v. Manas Bhunia [2001 (2) SCC 652]**, the Hon'ble Supreme Court held that the issues are important as they determine the scope of a trial by laying down the path for the trial to proceed, free from diversions and departures. The Court observed:

"The evidence shall be confined to issues and the pleadings. No evidence on controversies not covered by issues and the pleadings, shall normally be admitted, for each party leads evidence in support of issues the burden of proving which lies on him. The object of an issue is to tie down the evidence and arguments and decision to a particular question so that there may be no doubt on what the dispute is. The judgment, then proceeding issue-wise, would be able to tell precisely how the dispute was decided."

Step 11. Summoning, attendance and examination of witnesses

(A). Summoning and Producing Witnesses

After the plaint has been presented by the plaintiff and the written statement by the defendant in the court and the issues are framed by the court, a stage has been reached when the parties to the suit are in a position to know What facts and what documents should be proved by them. For this purpose, any party to the suit may apply

to the court for summons to persons whom he proposes to call as his witness. Section 30 to 32 and Order 16 to 18 CPC contain the necessary provisions for summoning, attendance and examination of witnesses. Order 16 CPC provides for summoning and attendance of witnesses. Order 16A CPC makes special provisions for attendance of witnesses confined or detained in prisons. Order 17 CPC deals with adjournments whereas order 18 makes provisions for hearing of suit and examination of witnesses.

Sub Rule (1) of Rule 1 Order 16 CPC provides that the parties to the suit have to present in court a list of witnesses whom they propose either to give evidence or to produce documents and to obtain summons for their attendance in court. Such a list must be filed on or before such date as the court may appoint but not later than 15 days after the issues are framed. The object underlying this provision is to give notice to a party about the witness which his adversary is to examine in the case so that he could be in a position to know the nature of evidence he has to meet.

The legislature has not put total prohibition on the party to produce witnesses for proof of his case. But when he seeks the assistance of the court, he has to give reasons why he has not filed an application within the prescribed time limit. *See Lalitha v. Aithappa (1995) 4 SCC 244.*

Sub rule 3 of Rule 1 CPC empowers the court to permit a party to call any witness whose name has not been mentioned in the list filed under sub rule (1) if such party shows sufficient cause for the omission to mention the name of such witness in the said list. ordinarily it is for the parties to move the court to issue summons to witnesses, rule 1A as inserted by the Amendment Act of 1976 enables a party to bring any witness to give evidence or to produce documents without applying for summons. Rule 1 and 1A operate in different situations. where the party wants the assistance of the court to produce the presence of a witness on being summoned through the court, It is obligatory for him to follow the procedure laid down in Rule 1. But where he wants to produce his witnesses without the assistance of the court, he can do so under Rule 1 A and the court has no jurisdiction to decline to examine such witnesses (*Mange Ram vs Brij Mohan (1983) 4 SCC 36*).

(B) Hearing of Suits and Examination of Witnesses

The plaintiff is entitled to have first right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of relief. In such a case the defendant has the right to begin. The plaintiff has to state his case in front of the judge. The plaintiff has to submit the evidence that was earlier marked. If any evidence was not marked earlier then it will not be considered by the court. Then the plaintiff will be cross-examined by the defendant's Advocate. The witnesses from plaintiff's side also have to appear in the court, who are also cross-examined by the defendant's lawyer.

The defendant also presents his side of the story supported by his witnesses and evidence from his side. The evidence needs to be marked earlier by the court, otherwise it will not be considered by the court. The plaintiff's lawyer will then cross-examine the defendant.

As per **Rule 87 of GR CIVIL**, On the day fixed for recording the evidence of witnesses, the evidence of all witnesses in attendance shall, so far as is possible, be recorded. That some witnesses have not attended is no reason for not recording the evidence of those in attendance. If the examination of all the witnesses is not concluded on the same day, it shall be proceeded with, if possible, from day to day.

Procedure if parties fail to appear on a fixed day

Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX CPC or make such other order as it thinks fit.

Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion proceed with the case as if such party were present.

Step 12- Argument

As soon as evidence of both sides is over then the suit is kept for argument. Once the evidence has been submitted and cross-examination is conducted by the plaintiff and defendant, both sides are allowed to present a summary of their case and evidence to the judge in the Final argument session.

Procedure for Argument is provided under Order 18 Rule 2 sub Rules 3A to 3F CPC which are as follows-

(3A) Any party may address oral arguments in a case, and shall, before he concludes the oral arguments, if any, submit if the Court so permits concisely and under distinct headings written arguments in support of his case to the Court and such written arguments shall form part of the record.

(3B) A copy of such written arguments shall be simultaneously furnished to the opposite party.

(3C) A copy of such written arguments shall be furnished simultaneously to the opposite party.

(3D) The Court may, if it deems fit, after the conclusion of arguments, permit the parties to file revised written arguments within a period of not more than one week after the date of conclusion of arguments.

(3E) No adjournment shall be granted for the purpose of filing the written arguments unless the Court, for reasons to be recorded in writing, considers it necessary to grant such adjournment.

(3F) It shall be open for the Court to limit the time for oral submissions having regard to the nature and complexity of the matter.]

Step 13- Judgment

Judgment means the statement given by the judge on the ground of which a decree is passed. The Court, after the case has been heard, shall pronounce judgment in an open Court, either at once, or as soon thereafter as may be practicable and when the judgment is to be pronounced on some future day, the Court shall fix a day for that purpose, of which due notice shall be given to the parties or their pleaders. Where the judgment is not pronounced at once, every endeavour shall be made by the Court to pronounce the judgment within thirty days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of the exceptional and extraordinary circumstances of the case, the Court shall fix a future day for the pronouncement of the judgment, and such day shall not ordinarily be a day beyond sixty days from the date on which the hearing of the case was concluded, and due notice of the day so fixed shall be given to the parties or their pleaders.

Effect of Lockdown Time for Pronouncement of Judgment:

It is important to mention here the view of Hon'ble Delhi High Court expressed in the case of **Dalbir Singh vs. Satish Chand, 2021AIR CC 1448 (DEL)**. Hon'ble Court has held that, "As per the settled law, orders which are reserved have to be pronounced within two months. If the same are not pronounced for three months, the litigant is entitled to approach the High Court. The same is clear from a reading of the Supreme Court's judgment in **Anil Rai v. State of Bihar, (2001) 7 SCC 318**. The Hon'ble Supreme Court in Anil Rai (supra) has also passed certain guidelines regarding pronouncement of judgments. The same are reproduced below:

"(i) The Chief Justices of the High Courts may issue appropriate directions to the Registry that in a case where the judgment is reserved and is pronounced later, a column be added in the judgment where, on the first page, after the cause-title, date of reserving the judgment and date of pronouncing it be separately mentioned by the Court Officer concerned.

(ii) That Chief Justices of the High Courts, on their administrative side, should direct the Court Officers/Readers of the various Benches in the High Courts to furnish every month the list of cases in the matters where the judgments reserved are not pronounced within the period of that month.

(iii) On noticing that after conclusion of the arguments the judgment is not pronounced within a period of two months, the Chief Justice concerned shall draw the attention of the Bench concerned to the pending matter. The Chief Justice may also see the desirability of circulating the statement of such cases in which the judgments have not been pronounced within a period of six weeks from the date of conclusion of the arguments amongst the Judges of the High Court for their information. Such communication be conveyed as confidential and in a sealed cover.

(iv) Where a judgment is not pronounced within three months from the date of reserving it, any of the parties in the case is permitted to file an application in the High Court with a prayer for early judgment.

(v) If the judgment, for any reason, is not pronounced within a period of six months, any of the parties of the said lis shall be entitled to move an application before the Chief Justice of the High Court with a prayer to withdraw the said case and to make it over to any other Bench for fresh arguments. It is open to the Chief Justice to grant the said prayer or to pass any other order as he deems fit in the circumstances."

Though the present revision petition has now been pronounced, it is reiterated that the lockdown ought not to affect pronouncement of judgments/ orders where arguments have been heard and the same is reserved. Repeated adjournments 'FOR ORDERS' or for 'Pronouncement of judgment' would not be permissible even during the lockdown."

“

*There are witnesses who testify, with the appearance of candour, to what they know to be false; there are witnesses who, because they are biased, or for other reasons, have deceived themselves into believing that what they say is true; there are witnesses who are honest, but mistaken; there are witnesses whose evidence in chief, although it is true and accurate, tends to mislead because material facts are omitted, or because undue emphasis has been laid upon some parts of their testimony and too little emphasis on others; there are witnesses whose evidence ought to be received with caution because of their temperaments, their habits, their history, or their interests. And there is no court, however wise and experienced, which can hope to avoid errors arising from the testimony of such witnesses, if there has been no competent cross-examination.**

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*G. Colman - Cross Examination: A Practical Handbook, CreateSpace Independent Publisher (2017)

CHAPTER-22

INTERIM INJUNCTION & STAY ORDERS

General Principles

The principles of Chancery Courts postulated that a man will be punished if he does what his conscience tells him not to do. Consequently, the best and the surest way was to prevent him from doing that act by means of an injunction. These principles arose out of the inadequacy of the Common Law and the general tendency of the condemnation of common law. For example, when a person had by contractual obligations undertaken not to set up a rival business, or not to engage himself in another's service for particular period, or not to encroach upon another's land, equity would restrict or prevent him from doing that act. Injunction is thus a mode of enforcing specific performance of negative agreements. Since the general purpose of injunction is to restrain the commission, continuance or repetition of some wrongful act which, one is under an obligation not to do, the relief provided by the Chancery Courts at its discretion to the plaintiff is called preventive relief.

Definition of Injunction

Injunction is a judicial process by which one who has invaded or is threatening to invade the rights, legal or equitable, of another, is restrained from continuing or commencing such wrongful Act.

A.W. Rentin: Encyclopedia of the Law of England (Vol.-6 Page 464)

Injunction is an order of the court to a party to the proceedings to do or to refrain from doing a specified act. It is granted in cases in which monetary compensation affords an inadequate remedy to the injured party. (Snell's principles of Equity, p. 624). The object of an injunction, is usually preventive rather than prohibitive.

In simple words, injunction is an order of the Court granted for the purpose of restraining the doing, continuance or repetition by the person enjoined, his agents or servants some wrongful acts which constitutes infringements of a legal or equitable right as far instance breach of contract.

Kind of Injunction Orders

- **Perpetual Injunction:**
 - **Prohibitory**
 - **Mandatory**
- **Interim or Temporary Injunction**

Permanent or perpetual injunction is granted only after the plaintiff has established his right and the actual or threatened infringement of it by the defendants. As the section 38 Specific Reliefs Act, 1963 provides that a perpetual injunction can only be granted by the **decree** made at the hearing and upon the merits of the suit. The defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act which would be contrary to the rights of the plaintiff. Permanent injunction is granted to preserve and protect the right established by the plaintiff. A perpetual injunction concludes a right; it is in fact a decree. Perpetual Injunction is granted after hearing of the suit by way of judgment and decree in mandatory or prohibitive form Under provisions of Indian Specific Reliefs Act, 1963(Section 36 to 42). These provisions are mostly based on leading English principles.

Mandatory injunction is granted to prevent the breach of an obligation and also for the purpose of compelling specific performance of certain Acts which the court is capable of enforcing. The principles underlying these injunctions are the same as those underlying perpetual injunctions. Two things have to be considered by the court before it proceeds to grant a mandatory injunction, **(i)** what acts are necessary to be done in order to prevent the breach of an obligation, and **(ii)** the requisite acts must be such as the court is capable of enforcing. Such acts may be of various kinds. It must be noted that a mandatory injunction can be granted even after the injury has been completed, provided the plaintiff has not lost his right to relief by delay or by acquiescence.

Temporary or interlocutory injunction- Temporary injunctions are such directions/orders which are to continue **until a specified time, or until the further order of the court, and they may be granted at any stage of the suit** and are regulated by Section 94 (C) and Order 39 Code of Civil procedure, 1908 (5 of 1908). Temporary or interlocutory injunction is an order made at an interim stage during the trial. Its object is to keep matters in status quo until the question at issue between the parties is determined. **As the section explains, temporary injunctions are as such to continue until a specified time, or until further order of the court, and they may be granted at any stage of a suit and are regulated by the Code of Civil procedure, 1908.** They are also called interim injunctions. The nature of a temporary injunction is provisional. It can be granted at any stage of the suit, even ex-parte, without notice to the other party to show cause why it should not be granted. It does not conclude any right. Grant of temporary injunction is regulated by the Code of Civil Procedure Order 39. It is *quia timet* (i.e. because he fears that the defendant might in future case some harm and fringe his rights). This is granted till a specific date or until further orders or at most till the disposal of suit.

Order 39 Rule 1 CPC

(i) Cases in which temporary injunction may be granted- Where in any Suit it is proved by affidavit or otherwise—

- a. that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
- b. that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,
- c. that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the court may by Order grant a temporary injunction to restrain such act, or make such other Order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the court thinks fit, **until the disposal of the suit or until further orders.**

High Court Amendments

Allahabad. - In Clause (a) the words “or wrongfully sold “alienation” are now restored which were deleted by former amendment.

Order 39 Rule 2 CPC

Injunction to Restrain Repetition or Continuance of Breach.- (1) In any suit for restraining to defendant from committing a breach of contract or other injury of any

kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

The Court may be order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

UP State Amendment, 1976 (w.e.f. 1.2.1977)

In Rule 2, in sub-rule (2), the following proviso shall be inserted, namely: —
“Provided that no such injunction shall be granted —

- (a) where no perpetual injunction could be granted in view of the provisions of Section 38 and Section 41 of the Specific Relief Act, 1963, or
- (b) to stay the operation of an order for transfer, suspension, reduction in rank, compulsory retirement, dismissal, removal or otherwise termination of service of, or taking charge from, any employee including any employee of the Government, or
- (c) to stay, any disciplinary proceeding pending or intended or, the effect of any adverse entry, against any employee of the Government, or
- (d) [Omitted]
- (e) to restrain any election, or
- (f) to restrain, any auction intended to be made or, the effect of any auction made, revenue **unless adequate security is furnished**, or
- (g) to stay the proceedings for the recovery of any dues recoverable as land revenue **unless adequate security is furnished**, or
- (h) in any matter where a reference can, be made to the Chancellor of a University under any enactment for the time being in force; and any order for injunction granted in contravention of these provisions shall be void.”

UP Act 57 of 1976, S. 13 (w.e.f. 1.1.1977) and Ins. (w.e.f. 2.10.1981) (Vide Noti. dated 3.2.1981).

Pre-requisites for grant of Interim Injunction u/S. 94 CPC R/W. Order 39, Rule 1 & 2 CPC

Before obtaining interim injunction u/s. 94 CPC r/w. Order 39, rule 1 and 2 CPC, the party must show following pre-conditions in his favour---

- **Prima facie case**
- **Balance of convenience**
- **Irreparable injury**
- **Bonafide conduct**

It is well settled that fulfilment of certain conditions (noted below) are must for grant of interim injunctions----

- **Prima facie case;**
- **Balance of convenience;**
- **Irreparable injury.**

A finding on ‘**prima facie case**’ would be a **finding of fact**. However, while arriving at such finding of fact, the court not only must arrive at a conclusion that a case of trial has been made out but also that other factors requisite for grant of injunction exist. U/s. 94 CPC r/w. Order 39 of the CPC, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely **equitable** and, therefore, the Court, on being approached, will, apart from other considerations, also look to the **conduct** of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature,

the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he is seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction u/o 39, r. 1 or 2 of the CPC, but also in respect of the party approaching the Court for **vacating** the ad-interim or temporary injunction order already granted in the pending suit or proceedings under Order 39 Rule 4 CPC.

1. **K.R. Jadeja vs. Maruti Corporation, 2009 (107) RD 265 (SC)**
2. **M. Gurudas vs. Rasaranjan, 2006 (65) ALR 331 (SC)**
3. **Transmission Corp. of A.P. Ltd. vs. Lanco Kondapalli Power (Pvt.) Ltd., (2006) 1 SCC 540**
4. **M/s. Gujarat Bottling Co. Ltd. vs. Coca Cola Company, AIR 1995 SC 2372**
5. **U.P. Avas Evam Vikash Parishad vs. N.V. Rajgopalan Acharya, AIR 1989 All 125 (D.B.)**

Meaning of-

- **Prima facie case**
- **Irreparable injury**
- **Balance of convenience**

Prima facie case is not to be confused with prima facie title which has to be established on evidence at the trial. Prima facie case is a substantial question raised, bonafide, which needs investigation and a decision on merits. Satisfaction of court that there is a prima facie case by itself is not sufficient to grant injunction. The court has to further satisfy that non-interference by court would result in **“irreparable injury”** to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession.

“Irreparable injury” however does not mean that there must be no physical possibility of repairing the injury but means only that the injury must be material one, namely one that cannot be adequately compensated by way of damages.

The third condition is that the **“balance of convenience”** must be in favour of grant of interim injunction. The court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief of injury which is likely to be caused to the parties if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. **If on weighing competing possibilities or probabilities of likelihood of injury, the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued.**

Dalpat Kumar vs. Prahlad Singh, AIR 1993 SC 276

U.P. Avas Evam Vikash Parishad vs. N.V. Rajgopalan Acharya, AIR 1989 All 125 (D.B.): On balance of Convenience: Held- Public interest in a relevant consideration while dealing with an application to grant ex-party injunction, under the principle of balance of convenience, the court is required to consider, the public convenience and if it omits to do so the order is rendered illegal.

In **Dalpat Kumar Case**, it was a suit for specific performance of agreement for sale which was decreed by the trial court and sale deed was also executed by the executing court. Thereafter a separate suit to set aside that decree was filed and during the pendency of the suit, the High Court granted temporary injunction which was set

aside by the Supreme Court by holding that the High Court committed manifest error of law in jumping to the conclusion that the balance of convenience lies in favour of granting injunction and the order of High Court was set aside.

Smt. Shefali Roy vs. Hero Jaswant Dass, AIR 1992 All 254 (D.B.)

The principle upon which injunction is granted is well settled. Party to the litigation, who seeks an injunction, must satisfy the court that there is a serious question to be tried at the hearing of the suit and every probability tilt in his favour for the relief sought for i.e. prima facie is in his favour. However, at this juncture it is made clear that prima facie case may not be confused with prima facie success, but simply if there is a serious question to be tried the test of prima facie is satisfied and further court's interference is necessary without which a right accrued in favour of the party concerned, cannot be protected from species of injury which is known as irreparable injury and comparative mischief which is likely to cause in the absence of the injunction will be greater and not compensable, thus the balance of convenience also tilts in his favour, Broadly these principles apply where injunction is sought by the party.

The party must show that following conditions exist-

1. that there is a serious question to be tried in the suit and that on the facts before the court there is a probability of his being entitled to the relief asked for by him,
2. that the court's interference is necessary to protect him from that species of injury which the Court calls irreparable, before his legal right can be established on trial, and
3. that the comparative **mischief** or **inconvenience** which is likely to ensue from withholding the injunction will be greater than that which is likely to arise from granting it.

Kashi Math Samsthan vs. Shrimad Sudhindra Thirtha Swamy, AIR 2010 SC 296

The first of the above conditions is what is generally termed “**a prima facie case**”. In other words, the **prima facie existence of a right** and its **infringement** are the first condition for the grant of temporary injunction. Injunction application has to be rejected if prima facie case is not made out and, in that case, it is not necessary to discuss other conditions necessary for granting of injunction order. Prime facie case is not to be confused with prima facie title which has to be established on evidence but it only means a **substantial question** raised bona fide which at first sight needs investigation and decision.

Bonafide Conduct

M/s. Gujarat Bottling Co. Ltd. vs. Coca Cola Company, AIR 1995 SC 2372.

Equitable conduct of the party must for temporary injunction--- U/o 39 of the CPC, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction u/o 39, r. 1 or 2 of the CPC, but also in

respect of the party approaching the Court for vacating the ad-interim or temporary injunction order already granted in the pending suit or proceedings.

The Court is duty bound to deny relief to persons misbehaviourly approaching it with under hands.

- (1) **Oswal Fats and Oil Ltd. V. Addl. Commr., Bareilly Division; (2010) 14 SCC 28:**
- (2) **Sripal v. South Delhi Municipal Corporation, Delhi High Court, decided on 10.03.2017**

Falsehoods etc.—In the case of falsehood and fraud by a party to a litigation, Court has inherent power to protect itself and further stop the perpetuation of fraud. Nicety of law and the Court's reception to it are for those who come clean. Such parties may seek redressal of their actionable claims and the academics of legal or statutory interpretations. Parties harbouring falsehoods and deceit are to be shown the door out of Court. This is for the protection of the Court. Otherwise, the people will be losing faith in public justice system when in the case of fraud, the Courts will listen to judicial polemics. Thus, notwithstanding anything contained in Order 39 Rule 2 of the CPC as applicable in U.P., let no person indulge in falsehood and fraud and then say that a Court will not protect itself under its inherent powers by passing such orders as may be deemed necessary. **Naresh Chandra vs. District Magistrate, Nainital, AIR 1990 All 188**

Conduct of Plaintiff & Temporary Injunction—Equitable relief of Injunction cannot be granted to plaintiff guilty of inequitable conduct, meaning thereby indulgence in falsehood, fraud, misrepresentation and concealment of material fact. Note— In this case, the plaintiff had abused process of law by instituting different cases at different fora to evade his eviction under orders from lower court to High Court and **had ultimately filed an injunction suit against his eviction just to frustrate the eviction decree. Kanchusthabam Satyanarayana vs Namuduri Atchutaramayya & Ors, 2005 (2) AWC 1239 (SC).**

Hon'ble Courts held in following cases:

1. **The National Textile Corporation U.P. Ltd. vs. Swadeshi Cotton Mills Ltd., 1987 ALJ 1266 (All—D.B.)**
2. **Shivnath vs. District Judge, Nainital, 1991 AWC 30 (All)**
3. **Naresh Chandra vs. D.M., Nainital, AIR 1990 All 188**
4. **Arunima Baruah Vs. Union of India, (2007) 6 SCC 120.**

In case of **fraud, concealment or suppression of material facts or misrepresentation etc.**, temporary injunction is to be refused even if all the three ingredients are fulfilled- No interim injunction can be granted in favour a party concealing from court some material facts, playing fraud and misrepresentations etc. even if all the three legally required conditions for grant of interim injunctions (**prima facie case, balance of convenience & irreparable loss**) are fulfilled and if already granted, the same should be vacated by the court. **Material fact would mean material for the purpose of determination of lis i.e. whether the same was material for grant or denial of relief.**

Public Interest-

It would thus be clear that in a suit for perpetual injunction, the court should enquire on affidavit evidence and other material placed before the court to find strong

prima facie case and balance of convenience in favour of granting injunction otherwise irreparable damage or damage would ensue to the plaintiff. The court should also find whether the plaintiff would adequately be compensated by damages if injunction is not granted. It is common experience that injunction normally is asked for and granted to prevent the public authorities or the respondents to proceed with execution of or implementing scheme of public utility or granted contracts for execution thereof. Public interest is, therefore, one of the material and relevant considerations in either exercising or refusing to grant ad interim injunction. **Mahadeo Savlaram Shelke vs. Pune Municipal Corporation, 1995 AIR SCW 1439**

Misleading the Court - Where the plaintiff in the suit for injunction against defendants restraining them from interfering with the construction of wall in a passage, obtained an ex-parte interim injunction wrongly by misleading the Court in as much as the Sale deed on the basis of which the plaintiff claimed ownership of the suit property was not placed before the Court and the defendants were not heard before passing the order of interim injunction, and after obtaining the order the plaintiff completed the construction of the wall and then applied for withdrawal of the suit and prayed for dismissal of injunction application as not pressed, the order passed by Court u/s. 151 CPC for demolition of wall would be justified even if Sec. 144 CPC is not applicable, Sec. 151 CPC is therefore to undo the wrong done by the Court on being satisfied that the order was passed on being misled by the party. **Rakesh Singhal vs. Vth ADJ, Bulandshhar, AIR 1990 All 12.**

Order 39 Rule 4 CPC provides for discharge, varying or temporary injunction order by the Court on application made by any party dissatisfied with such order. It proviso provides that **if in an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interest of justice.**

Above proviso makes explicit that an ex-parte ad interim injunction obtained by a party by knowingly making falls or misleading statement in relation to a material fact, it is mandatory for court to vacate such order unless it is not found necessary to do so in the interest of justice.

Delayed request for interim injunction - It will be inequitable conduct on the part of the party who seeks the relief of interim injunction after much delay and the grant of the interim injunction would not be proper in such a case. **K.R. Jadeja vs. Maruti Corporation, 2009 (107) RD 265 (SC).**

Grant of Interim Injunction in Exercise of inherent power u/S. 151, CPC

CPC has been divided into sections and rules under various orders. Sections create jurisdiction of the court while rules indicate manner in which jurisdiction is to be exercised. Power to grant injunction u/s. 94 CPC can be exercised **only if the circumstances under Order 39, Rule 1 & 2 CPC** are existing. Even if in a given case, circumstances do not fall within the ambit of Order 39 CPC, the courts have inherent jurisdiction to issue temporary injunction u/s. 151 CPC if the court is of the opinion that interest of justice requires issue of such interim injunction. **Vareed Jacob vs. Sosamma Geevarghese, (2004) 6 SCC 378.**

- A. Even if in a given case, circumstances do not fall within the ambit of Order 39 CPC, the courts have inherent jurisdiction to issue temporary injunction u/s. 151 CPC if the court is of the opinion that interest of justice requires issue of such interim injunction.
- **Vareed Jacob vs. Sosamma Geevarghese, (2004) 6 SCC 378**
 - **State of Maharashtra vs. Admane Anita Moti, AIR 1995 SC 350**
 - **Shiv Ram Singh vs. Smt. Mangara, 1988 ALJ 1516 (All)**
 - **Ram Chand & Sons Sugar Mills vs. Kanhyalal Bhargava, AIR 1966 SC 1899**
 - **Manohar Lal Chopra vs. Ram Bahadur Rao, AIR 1962 SC 527**
- B. As regards the exercise of inherent powers of the court u/s. 151 CPC for purposes of granting interim injunction or any other relief, the Hon'ble Supreme Court in the case of **State of U.P. vs. Roshan Singh, 2008 (71) ALR 1 (SC)**, has ruled as under: -
- “(i) Inherent powers of the court u/s. 151 CPC are not to be used for the benefit of a party or litigant who has remedy under CPC similar in the position vis-à-vis other statute.
- Object of inherent powers u/s. 151 CPC is to **supplement and not to replace** the remedies provided for in the CPC. Sec. 151 CPC will not be available when there is alternative remedy.
 - Sec. 151 CPC cannot be invoked when there is express provision under which relief can be claimed by the aggrieved party.
 - Inherent powers of court u/s. 151 CPC are in addition to the powers specifically conferred on the court.”
- C. A Division Bench of the Hon'ble Allahabad High Court has held in the case of **Satya Prakash Tiwari vs. Civil Judge (J.D.), Etawah, 2006 (62) ALR 431 (All—D.B.)** that powers u/s. 151 CPC cannot be invoked to deal with an application for which there is a statutory provision and temporary injunction in that event can be granted u/o. 39, r. 1 & 2 CPC and not u/s. 151 CPC.

Some Principles Governing Temporary Injunction

- a. Granting of an injunction is a matter of **judicial discretion** for the court. Though the grant of injunction is discretionary the same **must be exercised on settled principles of law** to advance the cause of justice. (**Timil Nadu Housing Bd. Vs. A. Vishwam, (1996) 8 SCC 259**) The exercise of discretion is thus not arbitrary or capricious but is based on sound common sense and is regulated by well settled principles. (**Ganpatlal vs. nandlal Haswani, AIR 1989 MP 209**)
- b. The court must see that there is a bona fide case between the parties. And in that case is must also see on which side, in the event of success, will lie the balance of convenience if the injunction does not issue. (**Doherty vs. Allman, (1878) 3 AC 709, S.S.V. Krishnan Pillai vs. Kilasathammal, AIR 1928 Mad. 810**)
- c. Whenever a right **exists** or is **created by a contract**, by ownership of property or otherwise, cognizable by law, an injunction will be issued to protect a violation of that right and the restraining power of the court extends through the whole range of rights and duties recognized by law. (**Pritam Kumar vs. Nagar Palika (M.C.), 1986 1CLJ (C & Cr.) 213 P & H.**)

- d. If the effect of not granting an injunction will be to deprive the plaintiff **forever** of the right claimed by him in the suit, the court should grant a temporary injunction. (**Secretary, Civil Station Sub-Committee, Nagpur vs. G.K. Somalwar, AIR 1937 Nag. 137**)
- e. Injunction is granted to maintain the status quo ante. (**L.D. Meston School Society vs. Kashi Nath Misra, AIR 1951 All 558**)
- f. Courts are very slow in granting an injunction against an isolated or occasional breach but in case of **continuous** breach or wrong, injunction would be more readily issued.
- g. No interim injunction can be granted when the suit is for declaration only. (**Mohammad Ibrahim Khan vs. Raja Pateshwari Prasad Singh, AIR 1960 All 252**)
- h. A mandatory injunction requires more stronger grounds than those required for obtaining a restrictive injunction. (**AIR 1925 Sind 347**)
- i. The relief of injunction being **equitable and discretionary it cannot** be issued in favour of a **trespasser** or a person who gained unlawful possession as **against the true owner**. It is settled law that injunction cannot be issued against true owner of property, on pretext of dispute of identity land and should not be an excuse to claim injunction against true owner. (**Premji Ratansey Shah vs. Union of India, (1994) 5 SCC 547, Mahadev Sarlaram Shelke vs. Pune Municipal Corporation, 1995 (3) SCC 33, Sopan Sukhdeo Sable & Ors vs Assistant Charity Commissioner, (2004) 3 SCC 137.**)
- j. While granting an injunction the court may in its discretion impose equitable conditions according to the circumstances of each case.
- k. An injunction cannot be granted against a person to restrain him from discharging his public duties. (**Palapatti Raghdu vs. Nallagadda Erraiya, AIR 1938 Mad. 881**). **Ramchandra vs. DM, AIR 1952 All. 520** in later case, **Section 16 UP (Temp) Accommodation Requisition Act, 1947 was involved which reads as under; "Except as provided in this Act no order made in exercise of any power conferred by under this Act shall be called in any Court"**.
- l. Injunction rests on the equitable principle that he who seeks equity must do equity, and that the **plaintiff requesting it must come with clean hands**. If the plaintiff has acted in **an unfair and inequitable** manner, he cannot have relief. (**Basheswar nath vs. Municipal Committee, AIR 1940 Lah 69**)
- m. Defendant transferee obtaining possession over property in part performance of contract, possession is protected even if period of limitation for bringing suit for Specific Performance of an agreement to sale has expired. [**S.S. Suryavanshi vs. P.B. Suryavanshi, AIR 2002 SC 960**]
- n. A person in **permissive possession** cannot not get injunction temporary or perpetual against rightful owner. [**1995 AHIC 236 (All.)**]

As U.P. Amendment in rule 2 sub rule 2 to order 39 rule 2 CPC by which a proviso is added to the effect that no perpetual injunction could be granted in view of the provisions of section 38 and 41 of Act No. 47, 1963, it is expedient to quote **Section 41 Specific Relief Act, 1963**.

Injunction when refused. -An injunction cannot be granted

- a. to restrain any person from **prosecuting a judicial proceeding** pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

- b. to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;
- c. to restrain any person from applying to **any legislative body**;
- d. to restrain any person from **instituting or prosecuting any proceeding** in a criminal matter;
- e. **to prevent the breach of a contract the performance of which would not be specifically enforced**;
- f. to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;
- g. to prevent a continuing breach in which the plaintiff has acquiesced;
- h. when **equally efficacious relief can certainly be obtained** by any other usual mode of proceeding except in case of breach of trust; **Ratnagiri Nagar Parishad vs. Gangram Narayan Ambedkar, May 6, 2020 SC – 2020 (5) MLJ 35, (2020) 7 SCC 275.**
- i. when the **conduct of the plaintiff or his agents** has been such as to disentitle him to the assistance of the court;
- j. when the plaintiff has no **personal interest** in the matter.

For the applicability of order 39 Rule 1(a), CPC so as to grant an injunction, it is necessary to prove by affidavit or otherwise that property in dispute is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree. The question as to what constitutes danger or waste or damage will depend upon the facts of each case. Under this head, it is not the plaintiff alone, but even the defendant can apply for an injunction in respect of any act covered by clause (a) of the rule. In clause (b) and (c), the plaintiff can apply for the injunction where the defendant threatens or intends to remove or dispose of his property with a view to defrauding his creditors or where the defendant threatens to dispose or otherwise cause injury to him in relation to any property in dispute. An injunction will be granted only when the suit is pending. **An order of temporary injunction takes effect only from the time when it is communicated to the party. It will terminate as soon as the suit in which it is granted, terminates.** The operation of the order cannot be stretched, even if its duration in the order has been stated to be “**until further orders**”.

Whether Court Has Power to Grant Temporary Injunction in Mandatory Form

This power has been conceded in only very rare cases that a mandatory injunction is granted by means of an ‘ad-interim order’ and it can only be granted to restore status quo and not to establish a new state of things, differing from the state which existed at the date when the suit was instituted. [**State of U.P. vs. Ram Sukhi Debi, 2005 (25) AIC 328 (SC), Kishore Kumar Khaitan vs. Preveen Kumar Singh, AIR 2006 SC 1474**]

It is also established law that the court should not interfere only because the property is a very valuable one. **Grant or refusal of injunction has serious consequences depending upon the nature** thereof and in dealing with such matters the court must make all endeavours to protect the interest of the parties.

Permission for construction or any ancillary work cannot be granted during pendency of suite. (**Makers Development Services Private Limited vs. M. Visvesvaraya Industrial Research and Development Center, (2012) 1 SCC 735**).

Exparte Injunction

Issuance of the notice to the opposite party is a rule and grant of an exparte injunction order is an exception. Only being satisfied is not necessary for the court to

grant an ex parte injunction order, but the court is further under a mandatory obligation to record the reasons that in case if ex-parte injunction order is not granted, the object of granting the injunction would be defeated by the delay. (**Shiv Kumar Chaddha vs. Municipal Corpn. Delhi, (1993) 3 SCC 161**) There will be still further more obligation in such contingencies **when the ex-parte injunction would be granted by the court. In such cases the court will require the applicant that he should comply with the two obligations contained in the proviso clause of order 39, Rule 3.**

Compliance of Rule 3 Mandatory in Case of Grant of Exparte Injunction

The result of non-compliance will be that the party will not be able to complain about any breach or disobedience committed by opposite party nor any relief will be available against it. {**A. Venkatasubbiah Naidu vs. S. Chellappan, AIR 2000 SC 3032**} But if the ex-parte order has been heard and confirmed on merits, non-compliance will become insignificant. {**U.P. Pasi Jagriti Mandal, Lucknow vs. Devi Dayal Chauhan, 1997 (1) JCLR 5 (All—L.B.)**} It has been held that **ex-parte injunction should not be granted against state and public projects** and public scheme or development work should not be interfered with normally. The State has to discharge public function to protect general welfare and public interest and therefore ex-parte injunction should always be avoided against state. {**BALCO employees Union vs. Union of India, AIR 2002 SC 350**}

While granting ex-parte ad-interim injunction- **Court has to exercise extreme caution-** While granting such injunction Court should bind plaintiff/petitioner to pay full restitution, actual costs and means profits if his suit gets dismissed. Experience reveals that ex-parte interim injunction orders some cases can create havoc and getting them vacated or modified in existing judicial system is a nightmare. Therefore, as a rule, the Court should grant interim injunction or stay order only after hearing the defendants or the respondents and ex-parte injunction should only be granted in exceptional cases and that to after imposing suitable conditions. (**Ramrameshwari Devi and ors. Vs. Nirmala Devui and Ors., 2011 AIR SCW 4000**) In **Sri Ravindra Kumar Mohanty vs. Smt. Sujata Mohapatra, 2015 Orissa High Court**, held that even in grant of ex part injunction, all the three injunctions must be fulfilled.

As a safeguard the court will require the applicant to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with-a copy of the affidavit filed in support of the application; a copy of the plaint; and Copies of documents on which the applicant relies, and to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent.

The proviso inserted in Order 39 Rule 3 now leaves no scope for any further discretion to the Court to dispense with such obligations as aforesaid mentioned by the plaintiff. Consequent to the failure of the compliance, ex-parte injunction order shall stand vacated.

- **Bombay Dyeing & Manufacturing Co. Ltd. vs. Bombay Environmental Action Group, (2005) 5 SCC 61**
- **Morgan Stanley Mutual Fund vs. Kartickdas, (1994) 4 SCC 225**

In the above cited cases, Hon'ble Supreme Court held that - Ex-parte injunction can be granted only under exceptional circumstances. The Supreme Court has enumerated **following principles** and factors which should weigh with the court for grant of ex-parte injunction-

Whether irreparable or serious mischief will ensue to the plaintiff;

- whether the refusal of ex-parte injunction would involve greater injustice than the grant of it would involve;
- the court will also consider the time at which the plaintiff first had notice of the act complained of so that the making of improper order against a party in his absence is prevented;
- the court will consider whether the plaintiff had acquiesced for some time and in such circumstances, it will not grant ex-parte injunction;
- the court would expect a party applying for ex-parte injunction to show utmost good faith in making the application;
- even if granted, the ex-parte injunction would be for a limited period of time;

General principles like prima facie case, balance of convenience and irreparable loss would also be considered by the court.

Consequences of non-compliance of provisions of Order 39 Rule 3 CPC and non-disposal of application for temporary injunction on merits with reasonable time

Hon'ble Supreme Court considered above question in **A. Venkatasubbiah Naidu vs S. Chellappan and Ors, AIR 2000 SC 3032**, Hon'ble Court observed

“The aforesaid Rule casts a three-pronged protection to the party against whom the ex parte injunction order was passed. First is the legal obligation that the Court shall make an endeavour to finally dispose of the application of injunction within the period of thirty days. Second is, the legal obligation that if for any valid reasons the Court could not finally dispose of the application within the aforesaid time the Court has to record the reasons thereof in writing. What would happen if a Court does not do either of the courses? We have to bear in mind that in such a case the Court would have by-passed the three protective humps which the legislature has provided for the safety of the person against whom the order was passed without affording him an opportunity to have a say in the matter. First is that the Court is obliged to give him notice before passing the order. It is only by way of a very exceptional contingency that the Court is empowered to by-pass the said protective measure. Second is the statutory obligation cast on the Court to pass final orders on the application within the period of thirty days. Here also it is only in very exceptional cases that the Court can by-pass such a rule in which cases the legislature mandates on the court to have adequate reasons for such bypassing and to record those reasons in writing. If that hump is also bypassed by the Court, it is difficult to hold that the party affected by the order should necessarily be the sole sufferer.”

..... “It is the acknowledged position of law that no party can be forced to suffer for the inaction of the court or its omissions to act according to the procedure established by law. Under the normal circumstances the aggrieved party can prefer an appeal only against an order passed under Rules 1,2,2A, 4 or 10 of Order 39 of the Code in terms of Order 43 Rule 1 of the Code. He cannot approach the appellate or revisional court during the pendency of the application for grant or vacation of temporary injunction.”

In such circumstances the party who does not get justice due to the inaction of the court in following the mandate of law must have a remedy. So we are of the view that in a case where the mandate of Order 39 Rule 3A of the Code is flouted, the aggrieved party, shall be entitled to the right of appeal notwithstanding the pendency of the application for grant or vacation of a temporary injunction, against the order

remaining in force. In such appeal, if preferred, the appellate court shall be obliged to entertain the appeal and further to take note of the omission of the subordinate court in complying with the provisions of Rule 3A. **In appropriate cases the appellate court, apart from granting or vacating or modifying the order of such injunction, may suggest suitable action against the erring judicial officer, including recommendation to take steps for making adverse entry in his ACRs. Failure to decide the application or vacate the ex-parte temporary injunction shall, for the purposes of the appeal, be deemed to be the final order passed on the application for temporary injunction, on the date of expiry of thirty days mentioned in the Rule.**

S. 148 A. CPC Right to lodge a caveat. –

- i. Where an application is expected to be made, or has been made, in a suit or proceeding instituted, or about to be instituted, in a Court, any person claiming a right to appear before the Court on the hearing of such application may lodge a caveat in respect thereof.
- ii. Where a caveat has been lodged under sub-section (1), the person by whom the caveat has been lodged (hereinafter referred to as the caveator) **shall serve a notice of the caveat by registered post, acknowledgement due, on the person by whom the application has been, or is expected to be, made, under sub-section (1).**
- iii. Where, after a caveat has been lodged under sub-section (1), any application is filed in any suit or proceeding, the Court, **shall serve a notice of the application on the caveator.**
- iv. Where a notice of any caveat has been served on the applicant, he shall forthwith furnish the caveator at the caveator's expense, with a copy of the application made by him and also with copies of any paper or document which has been, or may be, filed by him in support of the application.
- v. Where a caveat has been lodged under sub-section (1), such caveat shall not remain in force after the expiry of ninety days from the date on which it was lodged unless the application referred to in sub-section (1) has been made before the expiry of the said period.]

Hon'ble Allahabad High Court in **Raj Bahadur & another v. Civil Judge (JD), Musafir Khana, Sultanpur in Misc. (single) No. 6380 of 2014 vide order dated 20.11.2014**, held that sub section 3 of section 148A, CPC, thus, makes it mandatory for the court to serve a notice on the caveator. Right to lodge caveat u/s. 148A of the CPC has been conferred on a person who apprehends or expects any impending legal action against him. The provision for giving a notice or for providing a copy of the application and documents to the caveator are in conformity with the principles of Natural Justice, any violation thereof renders any judicial process adopted by any authority specially by a judicial authority nugatory. An ex-party ad-interim injunction granted by Trial Court overlooking caveat filed by the proposed defendant, cannot be sustained and has to be recalled by the Court concerned and fresh order to be passed after hearing the parties on application for temporary injunction.

Issue of Jurisdiction of Court & Application for Temporary Injunction

When the jurisdiction, valuation, court fees or maintainability has been challenged, the court should decide these objections and then proceed to decide the application for temporary injunction. (**Arun Kumar Tiwari vs. Smt. Deepa Sharma,**

2006 (1) ARC 717 (All.)). If facts and circumstances so warrant, the court is not prevented from issuing interim order. (**Tayabhai M. Bagasarwalla vs. Hind Rubber Industries Pvt. Ltd., (1997) 3 SCC 443**)

Restoration and Extension of Temporary Injunction Order

An injunction order will be obeyed during the period, it lasts. On suit being dismissed for default, the order granting temporary injunction till date fixed or till further order will cease, but it will not automatically revive, when subsequently, the suit is restored and the applicant will have to move an application for it. Alienation made contrary to an order of injunction is not on that account void, but the person guilty of violation, shall be liable for contempt or damages.

If an injunction order has been passed on merit and the suit is dismissed in default, the injunction order will automatically be revived on restoration of the suit. (**Vareed Jacob vs. Sosamma Geevarghese, (2004) 6 SCC 378**), but in **Jaghdari vs. Vth ADJ Azamgarh, 1992 AWC 1152 (All)**} it has been held that no interim order can be passed unless the suit is restored. Meanwhile Interim order if not extended after date fixed, it will be taken to be nonexistent and it cannot be extended except by passing a fresh interim order. There was no warrant for proposition that unless and order of stay passed once even for the limited period is vacated by express order or otherwise, the same would continue to operate. (**Ashok Kumar vs. State of Haryana, AIR 2007 SC 1411.**)

Hon'ble Allahabad High Court in **Re Suo motu vs. State of U.P.** taking cognizance of outbreak of COVID-19 and grim situation created by it due to lockdown, directed on 26.03.2020 that all interim orders passed by the High Court as well as subordinate courts and other tribunals in the State which has been expired subsequent to 19th March, 2020 or are due to expire with a period of one month from today will continue to operate upto 24.04.2020 and limitation expiring during the period of lockdown shall stand extended and this direction was extended by Hon'ble Court from time to time and recently on 01.12.2020 Hon'ble Court observed that this court modified the order on 19.08.2020 it was made mainly in reference to the interim orders and caveat intered u/s 148-A CPC which was extended till 01.12.2020. The position obtaining today is same as was on 20.10.2020 when the last order was passed, thus the order 20.10.2020 is extended and made operative till 05.01.2020.

Where Injunction Should Not Be Granted

1. Where applicant is not in possession of the property {**S.R. Batra vs. Smt. Taruna Batra, 2007 (67) ALR 175 (SC)**},
2. to restrain damage to crops caused by the smoke of brick kiln {**Subha Satya vs. Ram Narain, AIR 1994 All. 120 (LB)**}
3. to protect encroachment on any public street, structure, drain etc. {**Town Area Committee, Naraini Banda vs. SSP Banda, 1998 (33) ALR 322 (All. DB)**},
4. where the property in dispute is not identifiable {**Smt. Phoolmati Devi vs. Manik Lal, 2005 (2) AWC 1823 (All LB)**},
5. to restrain public servant from exercising his legal powers {**Cotton Corporation of India Ltd. Vs. United Industrial Bank Ltd., AIR 1983 SC 1272**},
6. to prevent disconnection of electricity by board {**M/s Geeta Pump (P) Ltd. Vs. District Judge, Saharanpur, AIR 2000 All 58**},
7. to declare result of examination and seeking director for admit card and appearance in examination or directing for revaluation and other disciplinary and administrative matters {**Varanaseya Sanskrit Vishwavidyalaya vs. Dr.**

Rajkishore Tripathi, AIR 1977 SC 615, Bhushan Uttam Khare vs. The Dean, B.J. Medical College, AIR 1992 SC 917;

8. Equitable relief of injunction **cannot be granted to plaintiff guilty of inequitable conduct.** In this case the plaintiff has abused the process of law by instituting different cases at different forum to evade his in eviction under orders from lower court to High Court and has ultimately filed an injunction suit against his eviction just to frustrate eviction decree. (**Kanchusthavan Satyanarainan v. Namuduri Atchutramayya, 2005(2) AWC 1239 SC**),
9. Hindu Marriage Act 1955 vis-a-vis order 39 rule 1 and 2 C.P.C.: when Hindu Marriage Act being special statute not providing for temporary injunction, interim injunction can be granted under general law (C.P.C.). Held – Yes general law can be resorted to restrain party from contacting/performing void act that second marriage. (**Km. Kirti Sharma v. Civil Judge Senior Division Etah, 2005 (2) AWC 1741 Justice D.P. Singh**). - In this case in a suit was filed by husband for restitution of conjugal rights and an application for temporary injunction against wife, restraining her second marriage was also filed. Revisional court granted an interim injunction.

A Government servant who has been allotted a quarter is nothing more than a licensee. License can be cancelled at any time. It may be that cancellation of this licence in a given set of circumstances may infringe some service rule or some obligation to provide a quarter to the Government servant concerned. If the cancellation is invalid or illegal or contrary to any rule of, law it will be open to challenge in appropriate proceedings. If the Government servant is transferred to some other place and started paying market rent, the cancellation of his allotment and eviction proceedings cannot be challenged in as much as such cancellation and eviction can be made with retrospective effect: [**Hardwari Lal vs. Estate Officer, AIR 1977 Del. 268**].

Temporary Injunction should not be granted to prevent eviction of retired government servant from a building of government estate in exercise of powers under UP (PP) (Eviction of unauthorized Occupants) at, 1972. [**State of UP vs. Roop Lal Sharma, 1997 (29) ALR 773(SC)**]. In this case respondent a retired government servant remains in unauthorized occupation of a government accommodation in Allahabad for about 20 years due to litigation and ultimately Hon'ble Supreme Court cleared the road for his eviction.

Temporary Injunction in a suit for specific performance of contract

It is settled law that a valid agreement to sell does not give itself any right, title or interest in subject matter of suit. It gives a right to obtain a sale deed of the property on fulfillment of necessary conditions provided under law.

The cardinal principles of grant of temporary injunction were considered in **Dalpat Kumar vs. Prahlad Singh, (1992) 1 SCC 719** it was held that the court has to exercise its sound judicial discretion in granting or refusing the relief of interim injunction pending the suit. It can be issued to maintain subject matter in suit in status-quo. A plaintiff seeking temporary injunction in a suit for specific performance will have to establish a strong *prima facie* case on the basis of undisputed facts. The conduct of plaintiff will also be a very relevant consideration for purposes of injunction. [**Amba Lal Sarabhai Interprise Ltd. vs. K.S. Infra Space LLP Ltd. and other, 2020 JC (SC) 1869**].

In above case the grant of temporary Injunction was not held to justified in a suit for specific performance for contract filed on basis of oral agreement to sell and some receipts in support of payment of earnest money.

Agreement for sale and temporary injunction

Where the purchaser/plaintiff had sought for ad-interim injunction restraining the seller/defendant from alienating the property on the basis of agreement for sale, in a suit for perpetual injunction simpliciter only, it has been held by the Hon'ble Allahabad High Court that injunction cannot be granted by court on the basis of agreement for sale in view of the provisions of Section 41(h) of the Specific Relief Act, 1963 read with Order 39, Rules 1 & 2, CPC as equally efficacious relief can be obtained in suit for specific performance of contract. **Rajendra Kumar v. Mahendra Kumar Mittal; AIR 1992 All 35 (DB).**

Interim Injunction in Favour of Defendant in A Suit Filed by Plaintiff

An interim injunction in favour of defendant in a suit filed by plaintiff can be granted by court even u/s. 151 CPC and the court is not bound in such cases by the limitations u/o. 39, r. 1 & 2 CPC. However, such interim injunctions should be granted in very rare and exceptional circumstances. **Shiv Ram Singh vs. Smt. Mangara, 1988 ALJ 1516 (All)**

An interim injunction can also be granted under Order 39, Rule-1(A), CPC where it is provided that injunction can be granted, where the property is in danger of being vested, damaged or alienated by any party to the suit are wrongfully sold in execution of a decree. In sub clause (b) & (c), it is clear that the temporary injunction can only be directed against defendant. Mischief to be prevented by the temporary injunction in situations under clause (a) of Rule-1 can be from either of the parties in respect of situations covered by clause 1(a) of rule-1, injunction can be granted in favour of either of the parties whereas in respect of situations covered by other clauses, injunction can be granted only in favour of the plaintiff and not in favour of the defendant. **Harishchandra Narayan Mauraya v. Rajendra Prasad Dargahi; 1997 (1) BOM CR 28**

However, Hon'ble Supreme Court in **Manoharlal Chopra v. Raibahadur Rao Raja Seth Hiralal; AIR 1962 SC 527**, held that – provisions of section 94, CPC do not prohibit grant of temporary injunction in cases not covered strictly under purview Order 39, Rule- 1 & 2 and court can grant temporary injunction in appropriate cases U/s. 151, CPC.

Order of Status-quo

Simply directing the parties to maintain status quo without indicating what the status quo was, is not an order that should be passed at the initial stage of litigation. Especially when it is found that the court had no reason to grant an ex-parte order of injunction. An interim mandatory injunction is not a remedy that is easily granted. It is an order that is passed only in circumstances which are clear and the prima facie material clearly justify. **Kishore Kumar Khaitan and others v. Praveen Kumar Singh, (2006)3 SCC 312.**

Order of status-quo and order resembling Injunction

The Court should be extremely slow in passing orders of ad interim injunction against public interest and should explore other means of redressing the wrong, one of which can be awarding compensation to the plaintiff. Apart from considering three **cardinal principles** of prima facie case, balance of convenience and irreparable loss the Courts while making an order of temporary injunction have also to consider the parties'

relevant prospects of success on merits and effect on the public interest, if any, involved. **Nizam Uddin v. Nagar Nigam, Allahabad, 2008(2) AWC 1946.**

(A) **Status Quo order:** Order maintaining status quo is also of the nature of injunction order. The purpose is to preserve the status which preceded the pending controversy. It is generally said that if the order to maintain status quo is passed, the same will not cause any loss to the parties. The ex facie, it appears to, be so, but it becomes difficult for court to find the same. It is, thus clear, that such course should be sparingly used. **M. Ismail Faroqui vs. Union of India, AIR 1995 SC 605 (Five Judge Constitution Bench)**

(B) **Undertakings given to the Court:** Where a court accepts an undertaking from a party that he would not do a particular act and the order amounts, an injunction restraining from acting in breach thereof, the said breach is also punishable under order 39 Rule 2A.

Public Purpose vs. Private Interest

Public purpose of removing traffic congestion was sought to be served by acquiring the building for widening the road. By orders of injunction, for 24 years the public purpose, was delayed. As a consequence, execution of the project has been delayed and the costs now stand mounted. The Courts in the cases where injunction are to be granted should necessarily consider the effect on public purpose thereof and also suitably mould the relief, in the event the plaintiffs losing ultimately the suit. They should necessarily bear the consequences, namely escalation of the cost or the damage to the Corporation suffered on account of injunction issued by the Courts. Appellate Court had not adverted to any of the material aspects of the matter. Therefore, the high Court has rightly, through for different reasons, dissolved the order of an interim injunction. Under these circumstances, in the event of the suit to be dismissed while disposing of the suit, the trial Court is directed to assess the damages and pass a decree for recovering the same at pro rata against the appellants. [**Mahadeo Savlaram Shelke vs. Pune Municipal Corporation, 1995 AIR SCW 1439**]

When plaintiff is not in possession, it is not permissible to grant injunction with regard to land of which he is out of possession. **Lal Chand v. IVth Addl. District Judge, Mirzapur, Allahabad Rent Cases 1992 (1) 31.**

It is settled law that injunction would not be issued against the true owner of the property. Issuing of injunction is absolutely discretionary and equitable relief. Injunction is personal right u/s 41 (J) of Specific Relief Act and for an injunction, **plaintiff must have personal interest in the matter.**

Even assuming that the party had any possession over the property but his possession is wholly unlawful possession of trespasser then an injunction cannot be issued in favour of trespasser or a person who gained unlawful possession as against the owner. Pretext of dispute of identity of land should not be an excuse to claim injunction against true owner. **Premji Ratansey v. Union of India, 1994 III ADSC(C) 514(SC)**

Exhibition of T.V. Serial

Where interim injunction was granted by court against the exhibition of certain episodes of a T.V. serial entitled “**Honi Anhoni**”, the Hon’ble Supreme Court interpreting the provisions of Order 39, r. 1 & 2 CPC, Article 19(1)(a) of the Constitution and the provisions of Cinematograph Act, 1952, has held that as no prima facie evidence was produced to show that the exhibition of the **serial was prejudicial to**

certain community or likely to cause any grave prejudice to public generally or endanger public morality and therefore the grant of interim injunction against the exhibition of the serial was held improper. **Odyssey Communications Pvt. Ltd. vs. Lokvidayan Sabnghatana, AIR 1988 SC 1642.**

Invoking Bank Guarantee & Injunction

Court cannot restrain the defendant from invoking bank guarantee given under a contract of supply of goods. **The State Trading Corporation of India Ltd. vs. Jainsons Clothing Corporation, AIR 1994 SC 2778**

Religious Matters & Injunction

Where a suit was filed under order-1, R.8, CPC to restrain defendants from using land belonging to a deity by plaintiff as representing the worshippers of the deity in the temple after obtaining permission from court which was given after notice and contest, the suit would be maintainable at the instance of the plaintiff when the defendants failed to prove that the plaintiffs were Arya Samajists, i.e., non-believers in worship of deity and the plaintiffs were descendants of persons who had constructed the temple for the idol. **Vidya Sagar Sharma vs. Anand Swarup Dublish, AIR 1981 All 106.**

No injunction can be granted to restrain recovery of public dues like electric bill, telephone bill, taxes, land revenue, bank loans or any other loans taken from financial institutions.

- **Balram vs. State of U.P., 2002 (47) ALR 30 (All—D.B.)**
- **M/s Chandranand Packaging vs. U.P. Financial Corporation, ALR 1996 (27) 173 (All) (UPFC Loan) Union of India vs. Shree Ganesh Steel Rolling Mills Ltd., 1996 (2) CCC 225 (SC) (Revenue Dues)**
- **Pawan Kumar Jain vs. I and I Corporation of U.P. Ltd., AIR 1998 All. 57 (Dues of financial corporation) Mahesh Chandra vs. Zila Panchayat, Mainpuri, AIR 1997 All. 248(Arrears recoverable as land revenue) U.P. State Industrial Development Corporation Ltd. vs. C.R. Newar, (1995) JCLR 27 All. (Industrial Loan) Guru Nanak Beverages and Comp. vs. D.M., Allahabad, AWC 1996 All. 653(Bank Loan) Radha Krishna Bhatt vs. State of U.P., 1992 RD 1 (All.) (Recovery of forest dues)**

Construction of multi-storeyed building and injunction order

Where construction of multi-storeyed building has been started after getting permission from the development authority no injunction could be granted to restrain the defendant from raising the construction on the mere apprehension of personal discomfort like deprivation of free air and light. **It was held that in the age of rapid urbanization, unless there was clear proof of health hazard and environmental pollution, temporary injunction against raising of construction could not be granted (Ratan Paul vs. Subhodh Ranjan pal; AIR 2001 Gau 133)**

U.P. Municipalities Act (2 of 1916) by section 61 ousts Civil Court's jurisdiction in the matter of grant of licences and the Act provides complete mechanism for redressal of disputes. Therefore, once Municipal Board cancels the licences and refuses to grant fresh licences the Civil Court cannot entertain a suit for grant of licence u/section 41(h) Specific Reliefs Act, 1963. **Chhedalal vs. Rajrani, AIR 1008 (NOC) 334(All.)**

No Injunction in Service Matters

An injunction against a transfer order or against holding a departmental enquiry in the facts of the present case would clearly amount to imposing an employee on an employer, or to enforcement of a contract of personal service, which is not permissible under the law. An employer cannot be forced to take an employee with whom relations have reached a point of complete loss of faith between the two. Where there is no service statute governing service condition and term prohibiting transfer of the employee, prima-facie the transfer order cannot be called in question.

No injunction to enforce contract of personal service

Section 41(e) Specific Relief Act specifying provides that an injunction cannot be granted to prevent breach of contract, the performance of which cannot be specifically enforced. The remedy of plaintiff lies in a claim for damages. (1) **Chandra Shekher Malhotra vs. Nirlon Ltd., 2000(1) Bom. CR 638**, (2) **Sunilchand C. Mazumdar vs The Aryodaya Spg. And Wvg. Mills: (1963) GLR 795**.

Injunction Against Co-Owner

Normally possession of one co-owner is taken to be possession of all co-owners and every co-owner has right over every portion of undivided property and injunction should not be granted in favour of or against a co-owner except in case of ouster or eviction of one co-shearer or demolition or construction over joint land or against transfer or sale of joint property. Gangubai Vs. Sita Ram, AIR 1983 SC 742.

A coparcener cannot get an injunction against the Karta of the joint family restraining him from transferring coparcenary property. **AIR 1988 SC 576 Sheoraj vs. M/s Accord Infrastructure Pvt. Ltd., [2011(3) ARC 488], [2011 (3) ARC 488]**

In the present case the sale deeds were executed by the brothers of the plaintiff in the year 2004. The land was thereafter declared as non-agricultural land and the building's plan were approved by the Ghaziabad Development Authority. There is no pleading or material on record to show that the plaintiff was in physical possession of the land, or had shown any crops. The plaintiff has not pleaded any such facts or produced documents to establish the use of his ownership's rights. There are no pleadings or any proof of any agricultural operations carried out by the plaintiff on the land.

Held- *“Prima facie we do not find any error in the findings of the trial court. The plaintiff was aware of the sale of two-third portion by his brothers in favour of defendants. He did not choose to get the land partitioned or exercise any proprietary rights. He has waited for six years until the defendants got the building plan sanctioned and started making constructions.”*

Vintage & Present Law in respect of Grant of Injunction against one of the co-sharers

More than a century ago, it was laid down in **Shadi v. Anup Singh 1890 ILR 12 All 436** that the Court will grant a perpetual injunction to restrain one of the other co-sharers from appropriating to himself land in which each of his co-sharers has an interest and from building upon it; and if he proceeded to build upon it the Court would grant mandatory injunction directing that the building so far as it has proceeded be pulled down.

However, in the later decisions no such broad proposition was accepted. Hon'ble Supreme Court in Sheoraj case (supra) further noted that in **Chhedi Lal v. Chhotey Lal AIR (38) 1951 All. 199.**

Justice Ghulam Hasan speaking for the Division Bench after citing Robert Watson Consolidation Officer v. Ram Chand Dutt, (18 Cal. 10 P.C.) by Sir Barues Peacock; Midnapur Zamindary Consolidation Officer. Ltd. v. Naresh Narayan Roy, AIR (11) 1924 P.C. 144; Tilok v. Ramadhin Select Case No. 270, by Mr. Spankie, ACJ; Lalla Bissambur Lal v. Rajaram 13 W.R. 337, a decision by Mahmood, J in Paras Ram v. Sherjit 9 All. 661 (1887) A.W.N. 253 and another Full Bench decision of Five-Judges by Mahmood, J in Shadi v. Anup Singh 1890 ILR 12 All 436 (1890 AWN 95) FB held as follows: -

“the question of the right of co-sharers in respect of joint land should be kept separate and distinct from the question as to what relief should be granted to a co-sharer, whose right in respect of joint land has been invaded by the other co-sharers-either by exclusively appropriating and cultivating land or by raising constructions thereon. The conflict in some of the decisions has apparently risen from the confusion of the two distinct matters. While therefore a cosharer is entitled to object to another co-sharer exclusively appropriating land to himself to the detriment of other cosharers the question as to what relief should be granted to the plaintiff in the event of the invasion of his rights will depend upon the circumstances of each case. The right to the relief for demolition and injunction will be granted or withheld by the Court according as the circumstances established in the case justify. The Court may feel persuaded to grant both the reliefs if the evidence establishes that the plaintiff cannot be adequately compensated at the time of the partition and that greater injury will result to him by the refusal of the relief than by granting it. On the contrary if material and substantial injury will be caused to the defendant by the granting of the relief, the Court will no doubt be exercising proper discretion in withholding such relief. As has been pointed out in some of the cases, each case will be decided upon its own peculiar facts and it will be left to the Court to exercise its discretion upon proof of circumstances showing which side the balance of convenience lies. That the Court in the exercise of its discretion will be guided by considerations of justice, equity and good conscience cannot be overlooked and it is not possible for the Court to lay down an inflexible rule as to the circumstances in which the relief for demolition and injunction should be granted or refused.”

In Ayyaswami Gounder vs. Munnuswami Gounder AIR 1984 SC 1789 the Hon'ble Supreme Court held that where an owner of land obstructs another co-owner from using the land even when the user causes no injury or detriment to him, an injunction can be granted against the obstructing owner. The only restriction could be on the user of land by a co-owner is that it should not be so used as to prejudicially affect or put the other co-owner to a detriment.

In Mandali Ranganna and others vs. T. Ramachandra and others (2008) 11 SCC 1 the Hon'ble Supreme Court held as follows: -

“Grant of injunction is an equitable relief. A person who had kept quiet for a long time and allowed another to deal with the properties exclusively, ordinarily would not be entitled to an order of injunction. The Court will not interfere only because the property is a very valuable one. We are not however, oblivious of the fact that grant or refusal of injunction has serious consequence depending upon the nature thereof. The Courts dealing with such matters must make all endeavours to protect the interest of the parties. For the said purpose, application of mind on the part of the Courts is imperative. Contentions raised by the parties must be determined objectively.”

The judgment in **Mandali Ranganna (supra)** was followed in **Kishorsinh Ratansinh Jadeja vs. Maruti Corporation, (2009) 11 SCC 229** and in **Narendra Kante vs. Anuradha Kante, 2010 (2) SCC 77**. In all these cases the interim injunction was refused. In **Kishorsinh Ratansinh Jadeja (supra)** the Hon'ble Supreme Court did not favour the grant of injunction, affecting rights of third parties.

Thus in **Sheoraj case (Supra)** Hon'ble Allahabad High Court finally held-

“Every co-sharer has a right to the property and to develop the property in accordance with the law, subject to the condition that such use of the property will not render the partition impossible. Either the plaintiff may file a suit for partition and injunction, or may bring such facts and circumstances to the notice of the Court that the activities carried out by the defendants will make the partition impossible. In either case the delay in filing the suit will not entitle the plaintiff to seek the relief of injunction.”

If a co-sharer is not diligent and watchful and allows a building to be erected an injunction shall not issue. If co-sharer comes to court at the earliest injunction should not be refused. **(AIR 1978 All. 178)**

Where application for temporary injunction u/o 39 r. 1 & 2 was moved and trial court disposed of said application of Plaintiff and directed parties to maintain status quo over land in suit till disposal of the suit appeal allowed by ADJ (LAC). Writ Petition was filed against the order. Hon'ble High Court held that without a suit for partition, injunction cannot be granted against the Co-owner. Admittedly there being no suit for partition, injunction could not be granted to the Plaintiff Petitioner. **Virendra Kumar vs. ADJ Kannauj & others, (2014)3 CCC 403(All)**

Injunction on Ground of Settled Possession

So far as the Indian law is concerned the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. **A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law;** he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injunctioning even a rightful owner from using force or taking law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the possession to go with the title unless rebutted. The owner of any property may prevent even by using reasonable force a trespasser from an attempted trespass, when it is in the process of being committed, or is of a flimsy character, or recurring, intermittent, stray or casual in nature, or has just been committed, while the rightful owner did not have enough time to have recourse to law. In the last of the cases, the possession of the trespasser, just entered into would not be called as one acquiesced to by the true owner. **Ram Gowda vs. M. Varadappa Naidu, 2004 All. C.J. 632(SC)FB.**

In **Puran Singh and Ors. vs. State of Punjab (1975)4 SCC 518**, the Hon'ble Court clarified that it is difficult to lay down any hard and fast rule as to when the possession of a trespasser can mature into settled possession. The 'settled possession' must be-

- **effective,**
- **undisturbed, and**

- **to the knowledge of the owner or without any attempt of concealment by the trespasser.**

The phrase 'settled possession' does not carry any special charm or magic in it; nor is it a ritualistic formula which can be confined in a strait-jacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession. The court laid down the following tests which may be adopted as a working rule for determining the attributes of 'settled possession':

1. that the trespasser must be in actual physical possession of the property over a sufficiently long period;
2. that the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of animus possedendi. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case;
3. the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and
4. that one of the usual tests to determine the quality of settled possession, in the case of colourable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession.

Maria Margadia Sequeria vs. Erasmo Jack DeSequeria (D), 2012(2) ARC 325(SC). Hon'ble Supreme Court held: -

“All these expressions, however, mean the same thing -- **ejectment from settled possession can only be had by recourse to a court of law.** Clearly, **'due process of law' or due course of law', here, simply mean that a person in settled possession cannot be ejected without a course of law having adjudicated upon his rights qua the true owner.** Now, this 'due process' or 'due course' condition is satisfied the moment the rights of the parties are adjudicated upon by a court of competent jurisdiction. It does not matter who brought the action to court. **It could be the owner in an action for enforcement of his right to eject the person in unlawful possession. It could be the person who is sought to be ejected, in an action preventing the owner from ejecting him.**”

Hon'ble Supreme Court laid down following principles of law **which emerge in this case are crystallized as under: -**

1. No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.
2. Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.
3. The Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.
4. The protection of the Court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or license agreement in his favour.
5. The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession.

Suit for declaration of matrimonial status maintainable before Family Court and not before Civil Court- A suit for declaration regarding matrimonial status of a person

as to be filed only before Family Court and not before Civil Court, be it affirmative declaration or negative declaration. It is wrong to say that negative declaration is not within the jurisdiction of the Family Court. **Balram Yadav Vs. Phulmaniya Yadav, AIR 2016 SC 2161.**

Interim injunction against transfer of immovable property can be granted- Interim injunction against transfer of immovable property can be granted by the court u/o 39, Rule 1 CPC. **Paras Nath Singh Vs Smt. Sirtaji Kunwari, 2012 (117) RD 143 (All)(LB).**

Roadside land & injunction against removal of encroachment thereon- No temporary injunction can be granted against encroachment against removal of encroachment by construction of temporary kiosks, Gumtias and shops on roadside land.

- a. **Town Area Committee, Naraini Banda vs. SSP Banda, 1998 (33) ALR 322 (All)(D.B.)**
- b. **Raj Mani vs. State of U.P., 1995 (25) ALR 281(All)(D.B.)**

Public road & injunction against removal of encroachment thereon- No temporary injunction can be granted against removal of encroachment over public road as no person has right to occupy the public roads. Public road is meant for traffic only and for no other purpose. **Footpaths, pavements, and the land in between the public road and the houses alongside such public roads** are public property and not the land for private use. Existence of dwelling on pavements is unquestionably a source of nuisance and injunction cannot be granted against removal of such encroachments are nuisances.

1. **Durga Prasad vs. State of U.P., 1999 (36) ALR 64(All)(D.B.)**
2. **Sushil Kumar Agarwal vs. Executive Engineer, PWD, Moradabad, 1998 (1) AWC 2(20) (NOC)(All)(D.B.)**
3. **Raj Mani vs. State of U.P., 1995 (25) ALR 281(All)(D.B.)**
4. **Bala Din Yadav vs. Ramdulare, AIR 1990 All19**

Public parks/play grounds & temporary injunction against conversion thereof- Interpreting the provisions of Sec. 13 of the **U.P. Urban Planning and Development Act, 1973** and Sec. 2 of the **U.P. Parks, Play Grounds and Open Spaces (Preservation and Regulation) Act, 1975**, it has been held that the development authority or even the State Government can not make any constructions upon public parks, play grounds, stadium etc. and any such illegal constructions thereon can be ordered by the court to be dismantled.

- **D.D. Vyas vs. Ghaziabad Development Authority, 1993 All. LJ 86 (All)(D.B.)**
- **Bangalore Medical Trust vs. B.S. Mudappa, AIR 1991 SC1902**
- **Arun Kumar vs. Nagar Mahapalika, Allahabad, 1987 All. LJ 1038 (D.B.)**
- **Ram Das Shenoy vs. Chief Officers, Town Municipal Council Udipi, AIR 1974 SC2177**

Declaratory suit and interim injunction: In a suit for mere declaration, no ad-interim injunction can be granted. **Mohammad Ibrahim Khan vs. Pateshwari Prasad Singh, AIR 1960 All 252(DB).**

Declaration of title along with injunction when necessary? In a suit for injunction claiming the relief of declaration of title when or when not would be necessary has been clarified by the Hon'ble Supreme Court in the case noted below as under:

- Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of

possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

- As a suit for injunction simpliciter is concerned only with possession normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.
- But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific or implied as noticed in *Annaimuthu Thevar (Supra)*]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.
- Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight forward the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatious or wrongfully makes a claim or tries to encroach upon his property. The Court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case. *Anathula Sudhakar vs. P. Buchi Reddy, 2008(2) AWC 1768 (SC)*.

Objection as to jurisdiction & Temporary Injunction- Objection as to jurisdiction to be decided by the court as a preliminary issue would not prevent the court from passing interim orders while the decision on question of jurisdiction is pending if called for in the facts and circumstances of the case. Any violation of such interim order would be punishable under Order 39, rule 2-A CPC even if later on the court holds that it had no jurisdiction to entertain the suit. **Tayabhai M. Bagasarwalla vs. Hind Rubber Industries Pvt. Ltd., (1997) 3 SCC 443.**

Non-impleadment of party: A disputant is entitled to an interim order provided he is a party thereto. If for one reason or the other, he cannot be impleaded as a party to the proceeding, the court would have no jurisdiction to pass any interim order in his favour. If the impleadment application is not maintainable, it is required to be dismissed in limine. It cannot be entertained only for pressing an interim order. Law does not contemplate exercise of such a jurisdiction by a court of law. Any such order passed is coram non iudice. **Shyamali Das vs. Illa Chowdhary, (2006) 12 SCC300.**

License by Municipal Board & injunction: No injunction regarding cancellation of licence granted by municipal board can be granted by civil court as Section 61 of the Uttar Pradesh Municipalities Act, 1916 provides for complete mechanism for redressal

of such disputes and Section 41(h) of the Specific Relief Act, 1963 bars the jurisdiction of civil courts. **Chhedilal vs. Rajaram, AIR 2008 (NOC) 334(All).**

Natural resources like forest, tanks, ponds, hillocks and mountains etc. must be protected against any sort of construction activity or encroachment or allotment etc.: Forests, tanks, ponds, hillocks and mountains etc., held, are nature's bounty. They help maintain the delicate ecological balance and need to be protected for that reason.

- **Hinch Lal Tiwari Vs. Kamla Devi & Others, (2001) 6 SCC496**
- **Susetha Vs. State of T.N. & Others, (2006) 6 SCC543**

Educational institutions & temporary injunctions in the administration of internal affairs of university: Order 39, rule 2, sub-rule 2, U.P. Amendment, Proviso, clause (h) CPC). In a matter touching either the discipline or the administration of the internal affairs of a University, Courts should be most reluctant to interfere. They should refuse to grant an injunction unless a fairly good prima facie case is made out for interference with the internal affairs of educational institutions. **Varanaseya Sanskrit Vishwavidyalaya vs. Dr. Rajkishore Tripathi, AIR 1977 SC615.**

Declaration of result of examination: Direct intervention by court in the matter of university regarding declaration of result (LL.M. Examination) may lead to serious and disastrous results and repercussions. It would be proper to leave such matters to expert wisdom of the university authorities. **Satpal Singh vs. Vice-Chancellor, Chaudhary Charan Singh University, Meerut, 1999 (1) AWC 2(17) (NOC)(All).**

Revaluation of answer books: In deciding the matters relating to orders passed by authorities of educational institutions, the Court should normally be very slow to pass orders in its jurisdiction because matters falling within the jurisdiction of educational authorities should normally be left to their decision and the Court should interfere with them only when it thinks it must do so in the interest of justice. **Bhushan Uttam Khare vs. The Dean, B.J. Medical College, AIR 1992 SC917.**

Issue of admit card or appearance in examination: Court cannot grant either interim prohibitory injunction against the authorities of the educational institution by restraining them from precluding the examinee from appearing in the examination nor can issue direction for issuing admit card. **Council for ISCE, New Delhi vs. District Judge, Agra, 1999 (35) ALR 221 (All).**

Admission in University (Or. 39, rule 2, sub-rule 2, U.P. Amendment, proviso, clause (h) CPC): In view of the alternative remedy for agitating the matter before the Chancellor u/s. 68 of the U.P. Universities Act, 1973, injunction to grant admission can not be issued. **Satyaprakash Singh vs. Vice-Chancellor, Dr. Bhimrao Ambedkar Vishwavidyalaya, Agra, AIR 1998 All 66.**

Transfer/eviction/construction/demolition by co-owner: No injunction can be granted in favour of a co-sharer and against other co-sharer of an undivided property except:

- a) against ouster or eviction of co-sharer by one or more co-sharers,
 - b) against construction or demolition of undivided property by one or more co-sharers,
 - c) against transfer or sale etc. of undivided immovable property by one or more co-sharers.
1. **Deepali Bhattacharya vs. Ramji, 1990 (16) ALR 609(All)**
 2. **Vidyamati Mandir, Ghaziabad vs. Rajindra Nath, 1991 AWC 786 (All)(D.B.)**

3. **Gangubai Vs. Sita Ram, AIR 1983 SC742**

Interim injunction against transfer of immovable property can be granted: Interim injunction against transfer of immovable property can be granted by the court u/o 39, Rule 1 CPC. **Paras Nath Singh Vs Smt. Sirtaji Kunwari, 2012 (117) RD 143 (All)(LB).**

Suit for declaration of matrimonial status maintainable before Family Court and not before Civil Court: A suit for declaration regarding matrimonial status of a person as to be filed only before Family Court and not before Civil Court, be it affirmative declaration or negative declaration. It is wrong to say that negative declaration is not within the jurisdiction of the Family Court. **Balram Yadav Vs. Phulmaniya Yadav, AIR 2016 SC 2161.**

Child marriage & injunction by judicial magistrate under the Prohibition of Child Marriage Act, 2006: The Child Marriage Restraint Act, 1929 has been repealed since 11.1.2007 and the new Act “**The Prohibition of Child Marriage Act, 2006**” has come into force since 11.01.2007. Under the 2006 Act, “child” means a person who, if a male, has not completed 21 years of age and if a female, has not completed 18 years of age. Under Section 13 of The Prohibition of Child Marriage Act, 2006, a Judicial Magistrate or Metropolitan Magistrate, on an application of the Child Marriage Prohibition Officer or on receipt of an information through a complaint or otherwise from any person is competent to issue injunction restraining the solemnization of child marriage. In case of any urgency, the Judicial Magistrate or Metropolitan Magistrate can issue an interim injunction without giving any notice to the opposite parties.

Agreement for sale and temporary injunction: Where the purchaser/ plaintiff had sought for injunction restraining the seller/defendant from alienating the property on the basis of agreement for sale, it has been held by the Hon’ble Allahabad High Court that injunction cannot be granted by court on the basis of agreement for sale in view of the provisions of Section 41(h) of the Specific Relief Act, 1963 read with Order 39, rules 1 & 2 CPC as equally efficacious relief can be obtained in suit for specific performance of contract. **Rajendra Kumar vs. Mahendra Kumar Mittal, AIR 1992 All 35(DB).**

Agreement for sale and temporary injunction to protect possession: Plaintiff claimed to be in possession of property in part performance of agreement to sell and claiming to have inducted tenant. Fact that was in possession of suit property was undisputed. Interim Injunction by trial court was granted against defendant not to evict the plaintiff without following due process of law. Single Judge of the High Court reversed the order of the Trial Court on the ground that the plaintiff had filed suit for injunction without reserving his right to sue for relief of specific performance and, therefore, the plaintiff was not entitled to injunction. The Hon’ble Supreme Court held that the said view of the single judge of the High Court was improper and that of the Trial Court was the correct view. The order of the High Court was set aside. **Lakshmi Vs E. Jayaram, AIR 2013 SC2939.**

Injunction restraining sale of property mentioned in agreement for sale: In a suit for specific performance of agreement, the owner of the property was trying to sell the property to third party. The trial court by way of interim injunction directed the parties to maintain status quo with the condition that the purchaser shall deposit the balance amount of consideration. The High Court set aside the order of status quo passed by the

trial court. But the Hon'ble Supreme Court held that the High Court was not justified in setting aside the order of status quo passed by the trial court and set aside the order of the High Court by holding the order of the trial court valid.: **N. Srinivasa vs. Kattukaran Machine Tools Ltd., AIR 2009 SC2217.**

Possession & injunction: If the plaintiff is in possession of the suit property, he can, on the strength of his possession, resist interference from defendant who has no better title than himself and get injunction restraining the defendant from disturbing his possession. **M. Kallappa Setty vs. M.V. Laxminarayana Rao, AIR 1972 SC2299**

No injunction against dispossession if plaintiff not found in possession: Injunction cannot be granted against dispossession if the party seeking injunction is not found in possession.

- i. **S.R. Batra vs. Smt. Taruna Batra, 2007 (67) ALR 175(SC).**
- ii. **Terene Traders vs. Ramesh Chandra Jamnadas, AIR 1987 SC1492**

Possession when must for injunction? As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession. **Anathula Sudhakar Vs. P. Buchi Reddy, 2008(2) AWC 1768 (SC).**

Injunction against true owner of property: Where the party was put in lawful possession of the property by Tehsildar after partition, grant of interim injunction under Order 39, rules 1 & 2 CPC against such lawful owner of the property has been held by the Supreme Court as improper. **Hanumanthappa vs. Muninarayanappa, 1997 (29) ALR 392(SC).**

Tender and temporary injunction: Where in a suit there were strong circumstances to show that the plaintiff was not competitively sound to make competitive offer, it has been held that it was a good ground for not awarding contract to him as no prima facie case was made out in favour of the plaintiff and court was justified in not granting injunction in favour of the plaintiff. **Vikura Industries vs. G.M. Ordinance Factory, Kanpur, 2000 (3) AWC 2/31 (NOC) (All).**

Damage to crops: Temporary injunction cannot be granted: Where a brick kiln was situated near a mango grove, it has been held that if the damage likely from the smoke of the brick kiln was only to the crops and not to the trees or groves, the damages being ascertainable, interim injunction under Order 39, rules 1 & 2 or u/s 151 CPC cannot be granted against running of the brick kiln. **Subhash Satya vs. Ram Narain, AIR 1994 All 120(LB).**

Eviction of tenant or lessee by landlord or lessor: Where plaintiff was a lessee holding over and was in possession of the property for long and the defendant lessor sought to evict the lessee forcibly after termination of the lease, it has been held by the Hon'ble Allahabad High Court that the plaintiff could be granted temporary injunction restraining the defendant from evicting the plaintiff otherwise than in due course of law. **Bhola Nath vs. Maharaj Raja Saheb, Bundi State, AIR 1984 All 60.**

Alteration/damage to building by tenant & injunction: If the tenant causes any damage, alters materially, demolishes or destroys any portion of the tenement, landlord cannot seek injunction against the tenant as the landlord has got an alternative remedy against the tenant u/s 41(h) of the Specific Relief Act, 1963 read with Order 39, rule 2, sub-rule 2, U.P. Amendment, proviso, clause (a) CPC for the eviction of the tenant on aforesaid grounds. **Man Singh vs. Smt. Ganga Devi, 1982 All.L.J. 634(All).**

Trademark & injunction in suit of passing off: In case of use of a trade-name with deceptive similarity under the provisions of Trade Marks Act, 1999 if once a case of passing off is made out, the general practice to grant a prompt ex-parte temporary injunction restraining the use of deceptive or identical trade-name followed by appointment of a local commissioner has been held by the Supreme Court as proper. **Luxmi Kant V. Patel vs. Chetanbhat Shah, 2002 (46) ALR 324(SC).** Where there was common field of activity between the two parties in respect of goods and trademarks sought to be used by them were also identical and both the parties had applied for registration of their respected trade u/s. 21(3) of the Trade and Merchandise Marks Act, 1958, it has been held by the Hon'ble Supreme Court that under the facts of the case grant of interim injunction in favour of one of the parties was not proper. **Uniply Industries Ltd. vs. Unicorn Plywood Pvt. Ltd., AIR 2001 SC 2083.**

No injunction to plaintiff if his name is not recorded in the revenue records over the agricultural land as its tenure holder: If the name of the plaintiff is not recorded as tenure holder of the agricultural land in the revenue records and question of declaration of title is involved, the jurisdiction of the civil court to entertain injunction suit and grant interim injunction would be barred u/s 331 of the U.P. Zamindari Abolition & Land Reforms Act, 1951 as the civil court cannot direct for the expunction or correction of the entries in revenue records and the same can be done only by the revenue courts. The remedy of the plaintiff in respect of the agricultural land under such facts and circumstances would be a suit for declaration of title before the revenue court **u/s 229-B of the UPZA & LR Act, 1951** and interim injunction can also be granted by the revenue court **u/s.229-D** of the that Act. But where the name of the plaintiff is recorded in the revenue records as tenure holder of the agricultural land and no question of declaration of title is involved, the plaintiff can institute a suit in civil court for injunction against the defendant for restraining him from transferring the land, interfering with the possession of the plaintiff or demolishing any constructions etc. on such land or cutting trees etc. standing thereon.

- **Kamla Shankar vs. IIIrd ADJ, Mirzapur, 1998(89) R.D. 484(All)**
- **Magan Lal Chaturvedi vs. District Judge, Mathura, 1998 ALJ 2323 (All)**
- **Deokinandan vs. Surajpal, 1996 ALJ 144(SC)**
- **Tej Bhan Singh vs. II ADJ, Jaunpur, 1995 ALJ 109(All)**

Election and Temporary Injunction:

U.P. Amendment, Proviso, clause (e) CPC): Once the electoral process has commenced, there can be no judicial interference by courts in it and no interim relief can be granted in relation thereto. Or. 39, rule 2, sub-rule 2, U.P. Amendment, Proviso, clause (e) *CPC* also bars grant of interim injunction restraining any election.

- **Swami Prakasananda vs. State of Kerala, 2006 (65) ALR 617(SC)**
- **Buddula Krishnaiah vs. State Election Commissioner A.P., AIR 1996 SC 1595**
- **Mohinder Singh Gill vs. Chief Election Commissioner, AIR 1978 SC 851**

Courts not to interfere in the election process during the mid of the elections: Once an election process has been set in motion, though the Hon'ble High Court may entertain or may have already entertained a writ petition under Article 226 of the Constitution, it would not be justified in interfering with the election process giving direction to the election officer to stall the proceedings or to conduct the election process afresh particularly when the election has already been held in which the voters were allegedly prevented to exercise their franchise as that dispute is covered by an election dispute and remedy is thus available at law for redressal.

- **Boddula Krishnaiah Vs. State Election Commissioner, A.P., AIR 1996 SC 1595 (Three-Judge Bench) (paras 11 & 12)**
- **Lakshmi Charan Sen Vs. A. K. M. Hassan Uzzaman, AIR 1985 SC 1233 (Five-Judge Bench) (para28)**
- **State of U. P. Vs. Pradhan Sangh Kshetra samiti, (1995) Supp (2) SCC 305 (at page331)**

Grant of interim injunction during stay of proceedings of suit: An interlocutory application or interim injunction application can be entertained and interim injunction can be granted under Order 39, rules 1 & 2 CPC or u/s 151 CPC during the period of stay (including stay of suit u/s 10 CPC) of suit if it does not affect the final decision of the suit on merits. **Rameshwar vs. V ADJ, Basti, 1999 ALJ 22(All)**

- **Indian Bank vs. Maharashtra State Co-operative Marketing Federation Ltd., AIR 1998 SC1952**
- **Radha Rani Cold Storage Pvt. Ltd. Vs. UP State Cold Storage Tribunal & Others, 2009 (27) LCD1391(All...D.B.)**
- **Daroga & Another Vs. Commissioner, Gorakhpur&Others, 1996 (14) LCD 506 (All)(D.B.)**

Grant of interim injunction u/s 151 CPC during stay of proceedings of suit: U/s 151 CPC, civil court can in exercise of its inherent powers grant interim injunction even during the period of stay of the proceedings by the superior court. **Breach Candy Swimming Bath Trust Vs. Dipesh Mehta, AIR 2016 (NOC) 167(Bombay).**

Worship of Deity and interim injunction: Where a suit was filed to restrain defendants from using land belonging to a deity by plaintiff as representing the worshippers of the deity in the temple under Order 1, rule 8 CPC after obtaining permission from court which was given after notice and contest, the suit would be maintainable at the instance of the plaintiff when the defendants failed to prove that the plaintiffs were Arya Samajists, i.e., non- believers in worship of deity and the plaintiffs were descendants of persons who had constructed the temple for the idol. Case law discussed. **Vidya Sagar Sharma Vs. Anand Swarup Dublish, AIR 1981 All106**

Civil court has jurisdiction to decide the suit if the plaintiff has not claimed any personal right in the waqf property: In the case noted below, the issue before the court was whether the disputed properties were properties of the Dargah or not and not whether the properties were the waqf properties or not. The Hon'ble Supreme Court held that as the plaintiffs were not claiming any personal right in the disputed properties but only rights of management over the properties of the Dargah, the civil court had jurisdiction to decide the suit. **Sopranrao vs. Syed Mehmood, AIR 2019 SC 3113(Three-JudgeBench).**

Invoking Bank Guarantee and Injunction: Court cannot restrain from invoking bank guarantee given under a contract of supply of goods. **The State Trading Corporation of India Ltd. Vs. Jainsons Clothing Corporation, AIR 1994 SC 2778.**

Disconnection of electricity and injunction: Where interim prohibitory injunction was sought for by the plaintiff in a suit for injunction only for restraining the electricity board from effecting disconnection without seeking declaration of non-liability of dues, it has been held by the Hon'ble Allahabad High Court that the suit was not maintainable and injunction against disconnection of supply of electricity could not be granted.:

- **M/s. Geeta Pump (P) Ltd. vs. District Judge, Saharanpur, AIR 2000 All 58**
- **M/s. Pilibhit Ispat (P) Ltd. vs. U.P. State Electricity Board, AIR 1996 All 329 (D.B.)**
- **Sir Shadi Lal Enterprises Ltd. vs. State of U.P., 1995 ALJ 1517 (All)(D.B.)**

Note: Injunction against disconnection of supply of electricity cannot be granted in view of the provision's **u/s 4 & 5 of the U.P. Government Electrical Under Taking (Dues Recovery) Act, 1958.**

Bar of Section 145 of Electricity Act, 2003 against grant of Temporary Injunction: According to Section 145 of the Electricity Act, 2003, no civil court have jurisdiction to entertain any suit or proceeding in respect of any matter which an assessing officer referred to in Section 126 or an appellate authority referred to in Section 127 or the adjudicating officer appointed under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Procedure for Vacation, Discharge, Variation or Setting Aside the Injunction Order

Order 39 Rule 4 contains the provision for discharge, variation, setting aside or vacation of the injunction order.

In case of an ex-parte injunction order, unless the court, for the reasons recorded, considers that it is not necessary to do so, the same shall be vacated by the court granting it, if a party has knowingly made a false or misleading statement in relation to a material particular. In case of an order for injunction having been passed after giving to a party an opportunity of being heard, the same can be discharged, varied or set aside, on an application made by the aggrieved party and after the court being satisfied that it is necessary in view of the change in the circumstances or the order is causing undue hardship to that party.

U.P. Act no 57 of 1976 has added a proviso clause to deprive the person, on account of his own conduct, the benefit of the injunction order. The court, on being satisfied that the party in whose favour the order of injunction exists is dilating the proceeding or is otherwise abusing the process, shall set aside the order for injunction.

Consequences of disobedience or breach of injunction order 39 Rule 2A: -

A disobedience of an injunction order is contempt of the said court, Sub rule 1 provides the power to punish for such breach and prescribes the punishment to be awarded. Two punishments are provided in this sub-rule and they are, one, the property of the person guilty of such disobedience or breach to be attached, and second, the court may also order such person to be detained in the civil prison for a term not exceeding

three months. However, the two modes of punishment prescribed are only alternative and it is not necessary that attachment should be affected before imprisonment is ordered, but the power of punishment to be exercised by the court can only be on application of the aggrieved party. In any case, while awarding the penalty the sub rule should be strictly constructed. It is settled that unless the allegation made against, such party are proved, a party cannot be held guilty for violating the order of injunction. Variance, vacation or setting aside the injunction order, subsequently, will not exempt the party from punishment. In case of breach of temporary injunction, court has power either to order detention of disobeying party or attach his property. Both steps can be resorted to or one of them alone need be chosen by court depending on facts in each case. In this case Hon'ble Supreme Court applied rule of interpretation of statute i.e. *noscitur A sociis* **Samee Khan vs. Bindu Khan, AIR 1998 SC 2765.**

Requisites to be proved u/o. 39, Rule 2-A CPC for holding the contemnor liable:

In order to hold the defendant/contemnor liable u/o. 39, Rule 2-A CPC, the following factors must be proved by the plaintiff-----

- **That there was some injunction order passed by the Court.**
- **That the injunction order was conveyed to or served on the defendant/contemnor.**
- **That the defendant/contemnor had time and means to obey the order.**
- **That the disobedience or breach was deliberate and willful.**

Liability for breach of temporary injunction when passed without jurisdiction---
A contemnor of breach of temporary injunction is liable to be punished u/o 39, r. 2-A CPC even if the suit was not maintainable and the interim injunction was passed without jurisdiction by the court or when ultimately the suit was dismissed as not maintainable for want of jurisdiction. **Tayabhai M. Bagasarwalla vs. Hind Rubber Industries Pvt. Ltd., (1997) 3 SCC 443.**

Proceedings under order 39 Rule 2A cannot be initiated or continue after disposal of injunction suit

Hon'ble Allahabad High Court in **Shiv Kumar Saxena vs. Zila Sahkari Sangh, Gonda, 1981 SCC online 699** held that after the temporary injunction has been vacated, it cannot be enforced or executed and therefore, punitive action cannot be taken after the vacation of injunction order. Therefore, the person against whom an interim injunction has been granted cannot be punished under order 39 rule 2A CPC for violation of that injunction after the said injunction has been vacated through final orders passed in the proceedings in which the order of injunction was passed. In other words, the substance of the order of injunction is a necessary condition for passing an order of punishment under order 39 rule 2A.

In this case ad-interim temporary injunction was granted by trial court but it was vacated after hearing both parties. Aggrieved by this order the plaintiff appellant preferred a misc. appeal before District Judge in which an application for grant of ad-interim injunction was moved which was allowed by the court during the pendency of appeal. Subsequently the appellant moved an application against the respondent for action for violation of the ad-interim injunction. The appeal was dismissed but the application under order 39 rule 2A remained pending which was dismissed by the District Judge on the ground that since there was no subsisting injunction against the respondents, no action can be taken against them.

Hon'ble High Court while dismissing the appeal placed reliance on **State of Bihar vs. Rani Sonabati Kumari, AIR 1961 SC 221.** It was held that though proceedings under order 39 rule 2(3) CPC have a punitive aspect, they are in substance designed to affect the enforcement or executing the order of Temporary Injunction.

Liability of state for breach of temporary injunction- Officers of the state breaching or disobeying the temporary injunction issued by court are liable to be punished u/o 39, r. 2-A CPC. **State of Bihar vs. Rani Sonabati Kumari, AIR 1961 SC 221 (Five Judges Bench).**

Appeal against an order passed u/o 39, r. 2-A CPC- An order passed by trial court u/o 39, r. 2-A CPC is appealable u/o 43, r. 1 (r) CPC. Such an appeal must be decided by the appellate court on its merits. **G. Kamala Rao vs. K. Jawahar Reddy, (2000) 9 SCC 231.**

Restoration of status quo ante- Where the defendant had demolished the construction despite interim injunction issued by the court, it has been held that the court can order for restoration of status quo ante. **Satya Prakash vs. Ist ADJ, Etawah, AIR 2002 All 198.**

Police Aid for Implementing Temporary Injunction & Duty of Court: Once the court is satisfied that interim order passed by it is disobeyed, there could be no justification for the court not to initiate proceedings for enforcement of its order. Court cannot be merely a silent spectator while the order passed by it is being violated with impunity and the party is left on the mercy of the so-called administration. It is not only an obligation but a solemn duty of the court to enforce its order by all means and to ensure that the interim order passed by it is complied with. To achieve the same, court should issue necessary instructions to the police if facts so warrant.

- 1) **Sree Ram vs. State of U.P. 2011 (2) ALJ 187(All)(DB)**
- 2) **Smt. Jagannathiya vs. State of U.P., 2006 (64) ALR 330 (All) (DB)**

Note: In the case of **Smt. Jagannathiya, noted above**, the Division Bench of the Hon'ble Allahabad High Court directed the civil court, Kaushambi to issue necessary orders to the Superintendent of Police, Kaushambi to take all measures to ensure compliance of the interim order passed by the revisional court, at the earliest.

Liability of state for breach of temporary injunction: Officers of the state breaching or disobeying the temporary injunction issued by court are liable to be punished under Order 39, rule 2-A CPC. **State of Bihar vs. Rani Sonabati Kumari, AIR 1961 SC 221 (Five-JudgeBench).**

Liability for breach of temporary injunction when passed without jurisdiction: A contemnor of breach of temporary injunction is liable to be punished under Order 39, rule 2-A CPC even if the suit was not maintainable and the interim injunction was passed without jurisdiction by the court or when ultimately the suit was dismissed as not maintainable for want of jurisdiction. **Tayabbhai M. Bagasarwalla vs. Hind Rubber Industries Pvt. Ltd., (1997) 3 SCC 443.**

Contemnor of interim injunction can be punished under Order 39, rule 2-A CPC and not under the Contempt of Courts Act, 1971: Where an injunction under Order 39, Rules 1 and 2 of the CPC is granted by a subordinate Court. It is considered a civil contempt punishable under O. 39, R. 2-A of the Code. It is outside the purview of Section 2(b) of the Contempt of Courts Act, 1971 since the scope of contempt of Court as contemplated under Order 39, R. 2-A (1) of CPC is different and is narrower than the scope of civil contempt within the meaning of Section 2(b) of the said Act, 1971. The provisions under Order. 39, R. 2-A of CPC provides an elaborate and exhaustive

provision for dealing with breach of injunction order which is a serious matter since the Civil Court is empowered to order to take away even the liberty of an individual by detention of the person in a civil prison who has violated the order. So, the power is penal in nature and the burden is heavy on the person who alleges disobedience to prove the ingredients of the offence beyond reasonable doubt since there has to be a clear proof that the order so ordered was clear, distinct, unambiguous and with full knowledge of the contemnor.

- **Mgan Lal vs. Sajid Ali Khan, AIR 2019 (NOC) 567(Allahabad).**
- **AIR 2009 SC2330.**
- **AIR 1981 All309.**
- **Tapan Pal Vs. Pronab Pal, AIR 2019 Calcutta139: AIR 1982 Karnataka182**

Order 39, rule 2-A CPC & Contempt of Courts Act, 1971: Scope and applicability:

In case of disobedience of interim injunction orders, it has been held by the Division Bench of the Hon'ble Allahabad High Court that the provision of O. 39, Rule 2-A CPC prevails over the provisions of Contempt of Courts Act, 1971.

- (i) **Smt. Jagannathiya vs. State of U.P., 2006 (64) ALR 330 (All)(DB)**
- (ii) **Dr. Alka Jaiswal Vs Fr. I. Farnandes, 1986 ALJ133(All)**
- (iii) **Anis Ahmad Khan Vs. State of UP, 1985 ALJ 30(All)**

In *Kanwar Singh Saini v. High Court of Delhi*, 2012(1) ARC 722 (SC), Hon'ble Supreme Court held that application under Order XXXIX Rule 2A CPC lies only where disobedience/breach of an injunction granted or order complained of was one, that is granted by the court under Order XXXIX Rules 1 & 2 CPC, which is naturally to enure during the pendency of the suit. However, once a suit is decreed, the interim order, if any, merges into the final order. No litigant can derive any benefit from mere pendency of case in a Court of Law, as the interim order always merges in the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. (See also: **Dr. A.R. Sircar v. State of U.P. & Ors., 1993 Suppl. (2) SCC 734; Shiv Shanker & Ors. v. Board of Directors, UPSRTC & Anr., 1995 Suppl (2) SCC 726. Hon'ble Supreme Court further held** - In case there is a grievance of non-compliance of the terms of the decree passed in the civil suit, the remedy available to the aggrieved person is to approach the execution court under Order XXI Rule 32 CPC which provides for elaborate proceedings in which the parties can adduce their evidence and can examine and cross-examine the witnesses as opposed to the proceedings in contempt which are summary in nature. Application under Order XXXIX Rule 2A CPC is not maintainable once the suit stood decreed. Law does not permit to skip the remedies available under Order XXI Rule 32 CPC and resort to the contempt proceedings for the reason that the court has to exercise its discretion under the Act 1971 when an effective and alternative remedy is not available to the person concerned. Thus, when the matter relates to the infringement of a decree or decretal order embodies rights, as between the parties, it is not expedient to invoke and exercise contempt jurisdiction, in essence, as a mode of executing the decree or merely because other remedies may take time or are more circumlocutory in character. Thus, the violation of permanent injunction can be set right in executing the proceedings and not the contempt proceedings. There is a complete fallacy in the argument that the provisions of Order XXXIX Rule 2A CPC would also include the case of violation or breach of permanent injunction granted at the time of passing of the decree. Breach of and undertaking given to the court by a party amounts to contempt of the same way as a breach of injunction and is liable to be awarded the same punishment for it.

The proceedings under Order XXXIX Rule 2A are available only during the pendency of the suit and not after conclusion of the trial of the suit. Therefore, any

undertaking given to the court during the pendency of the suit on the basis of which the suit itself has been disposed of becomes a part of the decree and breach of such undertaking is to be dealt with in execution proceedings under Order XXI Rule 32 CPC and not by means of contempt proceedings.

Extension of Already Discontinued Interim Injunction/ Stay Order

In **Ahok Kumar & ors. vs. State of Haryana, AIR 2007 SC 1411**, Hon'ble Supreme Court held that there is no warrant for the proposition as was stated by the High Court that unless an order of stay passed once even for the limited period is vacated by an express order or otherwise; the same would continue to operate.

In above case Hon'ble apex court was of the view that an interim injunction/stay order when extended to a particular date but not extended further beyond that particular date, would be presumed to have ceased from the date of non-extension.

Where interim injunction order was directed to be operative till next date, if on the date fixed case could not be taken up due to lack of time and no order could be passed on life of interim order passed in that case, interim order shall remain in force. (**Ram Abhilak vs. Cane Commissioner, 1998(1) ARC 526(All-Single Bench)**)

Time bound interim order if lapsed on account of non-resumption of work or lapse on the part of the court, court has got power to extend such interim order. No person should suffer for an inaction or fault on the part of the court. (**Mudit Verma vs. Co-operative Tribunal, 2006(63) ALR 208 All**).

Revision U/S. 115 CPC against issue of Notice (U/O. 39, R.3 CPC)

Revision u/s. 115 CPC against issue of notice by court u/o 39, r. 3 CPC is not maintainable.

1. **Ram Dhani and ors. Vs. Raja Ram and ors., 2011(4) ALJ 278(DB)**
2. **Lucknow Diocesan Trust Assn. vs. Sri B.C. Jain & others, 2006 (1) ARC 153 (All)**
3. **Col. Anil Kak (Retd.) vs. Municipal Corp., Indore, 2006 (1) ARC 39 (SC)**
4. **Bhagwati Pd. Lohar vs. State of U.P., 2005 (99) RD 333 (All)**

Note: In compliance with the order of Hon'ble Allahabad High Court passed in writ petition no. 802 (M/s) of 2007, **Lalit Mohan Srivastava vs. Distt. Judge, Ambedkar Nagar & others**, C.L. No. 18/2007, dated 11.5.2007 and the C.L. No. 15/Admin 'G' 2006, dated 3.5.2006 in compliance with the directions issued in the case of **Bhagwati Pd. Lohar vs. State of U.P., 2005 (99) RD 333 (All)** circulated amongst the judicial officers of the State of U.P. directs that revision u/s. 115 CPC against issue of notice u/o 39, r. 1, 2, 3 CPC being interlocutory is not maintainable. In **Ram Dhani case (Supra)** law on the point is settled by Division Bench of Allahabad High Court as a single judge noticing conflating decisions on the point had referred the matter for consideration before the Hon'ble Chief Justice, who constituted a division bench which laid down the law in following terms-

“A revision under Section 115 of the Code of Civil Procedure is not maintainable against an order issuing a notice to the defendant on an application for a grant of a temporary injunction filed under Order 39, Rule 1 and 2 of the Code of Civil Procedure.”

Cantonment Act, 1924 & Injunction

The land lying within area of Cantonment Board usually belongs to the ownership of defence estate and the persons occupying the same are treated as lessee under special Government Grant only for use and occupation. They are not entitled to make any alteration; modification in construction in such land are in respect of building lying thereon without permission of Containment Board.

Injunction cannot be granted to protect any encroachment on any street or structure projecting into a drain belonging to cantonment board otherwise the drains, streets and roads may soon disappear. Injunction cannot be granted against the notice issued by the cantonment board u/s. 254(2) of the Cantonment Act, 1924 for demolition of any unauthorized construction etc.

- 1. Atul Kumar Jain vs. Cantonment Board, Meerut, AIR 2007 (NOC) 1499 (All)**
- 2. Cantonment Board, Meerut vs. Narain Dass, AIR 1970 SC 105**

No Exparte Injunction Against Government Even if Notice U/S 80 (1) CPC Dispensed With

Section 80 (2) of the Code of Civil Procedure provides as under-

A suit to obtain an urgent or immediate relief against the Government (including the Government of the State of Jammu and Kashmir) or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted, with the leave of the Court, without serving any notice as required by sub-section (1); but the Court shall not grant relief in the suit, whether interim or otherwise, except after giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit :

Provided that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of sub-section (1).

Appeal

No appeal shall lie against an order of injunction passed in exercise of inherent jurisdiction under S. 151, CPC.

- **Zila Parishad, Budaun v. Brahma Rishi Sharma; AIR 1970 All 376 (FB)**
- **Firm Ishardass vs. Parkash Chand, AIR 1969 SC 938**

An order granting or rejecting prayer of temporary injunction is appealable U/o 43(1)(r) and for that reason miscellaneous appeal shall lay.

Revision is maintainable u/s. 115 C.P.C. against and order of temporary injunction in exercise of inherent power U/s 151 C.P.C. **Shiv Ram vs. Mangara, AIR 1989 All 164** and such order is not appealable. **Firm Ishardass vs. Prakesh Chand, AIR 1969 SC 938.**

An order U/o 39 Rule 3 CPC directing notice to the defendant is not appealable U/o 43 Rule 1(r) CPC. **Nisha Raj vs. Pratap, 1995 AISC 3245 (Delhi)**

Miscellaneous Appeal against ex-parte order of injunction is maintainable:

Hon'ble Supreme Court in **A. Venkatsubbiah v, S. Chellapan & Others; AIR 2000 SC 3032**, while examining the scope of Order 43, Rule-1, CPC held that – appeal against ex-parte temporary injunction is maintainable. It cannot be contended that the power to pass interim ex-parte order of injunction does not emanate from the said rule.

In fact, the said rule is repository of the power to grant orders of temporary injunction with or without notice, interim or temporary are till further order or till the disposal of the suit. A party aggrieved by ex-parte injunction order has dual remedies it can move an application for vacation, discharge or modification of such order under Order 39, Rule-4, CPC before same court which has passed the order as well as it can move the appellate court under Order 43, Rule-1(r), CPC for setting aside the order.

In case of **Akmal Ali & Others v. State of Assam; AIR 1984 Gauhati 86**, the Full Bench of Gauhati High Court held that – even an ex-parte ad-interim order rendered U/Rule 1 & 2 of Order-39 is an order falling within the purview of Order-43, Rule-1(r).

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A “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness.

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CHAPTER-23

HOW TO ADDUCE EVIDENCE IN CIVIL SUITS.

Introduction

After filing the plaint and written statement, issues are framed by the court and the trial of the case begins. In civil cases, generally parties are liable to adduce their evidences, even though in the interest of the justice Court may summon any witness or document suo-moto in exceptional circumstances.

How to adduce Evidence

In order to describe the concept of adducing evidence in civil cases, evidence may be divided as follows-

- Traditional Documentary Evidence.
- Electronic Documentary Evidence.
- Oral Evidence.

1. Traditional Documentary Evidence

It is a general principle that the entire documentary evidence shall be produced by the parties before framing the issues, admission and denial must be done by the parties at the stage of framing of the issues. But in case of cross examination of the witness's documentary evidence may be filed at latter stage also. In other case, if any document comes to the knowledge of the parties at the latter stage then it may file with the leave of the Court. It is also to be kept in the mind that if at the latter stage any party files documentary evidence with the leave of the Court then an opposite party may also file Documentary evidence in rebuttal.

2. Electronic Documentary Evidence

All necessary principles of the traditional documentary evidence shall be applicable to the Electronic documentary evidence. But it must inculcate the Certificate required u/s 65B of the Evidence Act. See the Case Laws-

- **Anwar P.B. vs P.K. Bashir, (2014) 10 SCC 473;**
- **Arjun Panditrao Khotkar vs Kailash Kishanrao, Civil Appeal No-20825/2017, Judgment dated 14.07.2020 (SC).**

3. Oral Evidence

Sec-30 to 32 and Order-16, 18 & 19 CPC deals with the Evidence. Oral Evidence are very important where documentary evidence are not available.

In respect of oral evidence parties are bound to submit their list of witnesses within fifteen days from the framing of the issues. Examination of all witnesses mentioned in the list is not necessary. If any witness is not in the list it may be examined with leave of the Court but for this party concerned would have to show proper reason.

There is a general rule that examination of the plaintiff and his witnesses would be recorded first, then after other witnesses are to be examined, but in case of urgency or for any other reason other witnesses may be examined first.

It is also a general principle that parties may produce witnesses or document without issuing summons or parties may apply for summons for the Court to examine the witnesses or produce documents. Coercive steps may be adopted by the Courts for attendance of the witness, such as it may issue a warrant, make attachment or send the

witnesses to civil imprisonment, or impose fine. Further, Court may order to examine the witnesses through commission or videoconferencing as per video conferencing Rules, 2020.

After the 2002 amendment under the CPC all examination of chief shall be filed on affidavit. With the leave of the Court affidavit of the witness not cross examined may be withdrawn by the party and a fresh affidavit of the same witness may be filed. It is also very important to mention here that if examination of chief has been filed through affidavit, his examination of chief would not be made orally except cross examination. In the case of witnesses whose examination in chief has not been filed through affidavit, he can be examined orally in the open Court.

If any amendment has been incorporated in the pleading after adducing evidence then additional evidence, oral or documentary may be filed by the parties. See the case laws-

1. **Vidhyabai and others vs Padamlatha and another, (2009) 2 SCC 409;**
2. **Mange Ram vs Brij Mohan, AIR 1983 SC 925;**
3. **Vidhyadhr vs Manikroa, AIR 1999 SC 1441.**

Conclusion

Adducing Evidence in Civil Court is a very important legal proceeding. The role of the advocates is very important because in adversarial system of justice, fate of the suit depends on the evidence adduced by the parties.

“ *This is not only Section 165 of the Evidence Act which enables the court to put any question it likes to a witness, but there are also the provisions of Order XIV, Rule 14 of CPC.*
Pratap Singh v. Rajendra Singh, AIR 1975 SC 1045 ”

CHAPTER-24

ART OF CROSS EXAMINATION IN CIVIL SUITS

Introduction

Art of the cross examination in a Civil Suit has not been defined in CPC, but in Civil Suits, cross examination of the witnesses is very important. In simple terms, the fate of the case depends on the rational cross examination of the witnesses. Quality of the cross examination depends on the experience & skill of the Advocates. The experience acquired by continuous practice and development of proper skills through observation is important. The phrase practice makes a man perfect is applicable here.

Arts of cross examination

Even though there is no hard and fast formula to explain the art and skill of cross examination of the witnesses. But based on practical knowledge, few tips are given below:

1. Know your case

For the proper cross examination, it is necessary that the Advocate should have proper knowledge of his own case. It means that if you have no proper knowledge of your own case, you cannot make a purposeful cross examination. For the proper knowledge the Advocates must read attentively and minutely pleadings and documentary evidence and consult the litigants and seniors.

2. Know the case of your opponent

Even though it is very important to know one's own case, knowledge of opponent's case is also very important because without knowing the case of your opponent, you cannot put the proper question in the cross examination of the witnesses.

3. Prepare the Questions parawise

For the proper cross examination of the witness questions should be prepared parawise. Here parawise means pleadings of both parties, documents and affidavit of the witness concerned.

4. Background of the witness

The background of the witness should always be kept in mind. The witness may be male, female, literate, rustic, child, old etc. For the sake of proper cross examination, knowledge about the psychology of the witness is very important; if the Advocate has proper understanding in this regard then through emotional questions he can testify the worthiness of the witness.

5. Make suggestions

For the proper cross examination of the witness, it is necessary for the Advocates to put proper suggestions as the opponent's case can be rebutted through these suggestions. Due to lack of experience of Advocate, proper suggestions in most of the cases are not put in the cross examination.

6. Knowledge of Legal pronouncement and Enactments

For the proper cross examination, the law and the recent pronouncement must be kept in mind. It means that questions in the cross examination should be put in the light of the law and recent legal pronouncement. It helps the Court during the appreciation of the evidence and the party who put such kind of questions will be benefited by the same.

Conclusion

The idea discussed above is only illustrative as may be put to use in the ordinary course. Every case before the court of law has got its unique features and therefore in special circumstances the acumen of a lawyer in handling the situation does play a very important role. One should be open to new ideas and keeping in mind the background of every case should be on the heels to tackle any situation that may emerge. Cross-examination should be conducted without compromising on the question of respect and dignity of women. Women witnesses and witnesses from other disadvantaged sections of the society, need to be given special care with an understanding of their peculiar condition. (*Aparna Bhat v. State of M.P., AIR 2021 SC 1492*)

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In the absence of any cross examination of material point, the testimony of witness could be rejected.
Yashwant v. State of Maharashtra,
AIR 1973 SC 337

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CHAPTER-25

INHERENT POWERS OF CIVIL COURT

Inherent Power: Meaning & Scope

A code, however wisely framed cannot make express provisions against all the cases that may possibly happen and mete out every contingency that may arise in future. The propose of law is secure ends of justice. The laws are not ending in themselves but are only a means for securing the justice. Hon'ble Supreme Court in **K.K. Veluswamy vs. N. Pallanisami (2011) 11 SCC 275** held that the inherent powers are inherent in court itself and have not been conferred by the code. It merely makes statutory recognition of the inherent powers of the court to do certain things *ex debito justitiae*.

Section 151 CPC preserves inherent powers of civil courts to serve the end of justice and to prevent abuse of process of court **whereas Section 482 Cr.P.C.** safes inherent powers of the Hon'ble High Court to make such orders as may be necessary to effect to any order under the code, are otherwise to secure the ends of justice.

Section 151 CPC provides as under:

Saving of inherent powers of Court- Nothing in this Code shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the needs of justice or to prevent abuse of the process of the Court.

The word 'Inherent' is very wide in itself. According to the dictionary meaning, "inherent" means "natural", "existing and inseparable from something", "a permanent attribute or quality" "an essential element, something intrinsic, essential, vested in or attached to a person or office as a right or privilege (**Concise Oxford Dictionary, (1995), 698; 20th Century Dictionary, (1992), 647; Webster's Encyclopedic Unabridged Dictory, (1994), 732**).

Inherent powers are thus powers which may be exercised by a court to do full and complete justice between the parties before it.

General

Every court of law is constituted for the purpose of administering justice between the parties and, therefore, must be deemed to possess, as a necessary corollary, all such powers as may be necessary to do the right and undo the wrong in the course of administration of justice. (**Manohar Lal v. Seth Hiralal, AIR 1962 Sc 527 (534): 1982 Supp (1) SCR 450; State of Punjab v. Shanilal Murari, (1976) 1 scc 719 (722): AIR 1977 sc 1177 (1179); Raj Narain v. Sint Indira Gandhi, (1972) 3 scc 850 (858): AIR 1972 SC 1302 (1307); Jaipur Mineral Development Syndicate v. CIT., (1977) 1 scc 508 (510-I1): AIR 1977 SC 1348 (1350): Mulraj v. Raghunathji Maharaj, AIR 1967 SC 1386 (1390): (1967) 2 SCR 63**).

The Code of Civil Procedure is a procedural or adjective law and the provisions of the Code must be liberally construed to advance the cause of justice and further its ends. Inherent powers of the court are complementary to those powers and the court is free to exercise them for the ends of justice or to prevent the abuse of the process of the court (**Padrein Sen v. State of U.P., AIR 1961 SC 218 (219): (1961) 1 SCR 884 (887); Manohar Lal v. Seth Hiralal, AIR 1962**

SC 527 (533, 537): 1962 Supp (1) SCR 450; Ram Chand v. Kanhaiyalal, AIR 1966 SC 1899 (1900): (1966) 3 SCR 856; Jaipur Mineral Development Syndicate v. CIT., (1977) 1 SCC 508: AIR 1977 SC 1348). The reason is obvious. The provisions of the Code are not exhaustive for the simple reason that the Legislature is incapable of contemplating all the possible eventualities which may arise in future litigation (**Manohar Lal v. Seth Hiralal, AIR 1962 SC 527: 1962 Supp 1) (I) SCR 450**). Inherent powers come to the rescue in such unforeseen circumstances. They can be exercised *ex debito justitiae* (to act as justice demand) i.e. A principle founded on a recognition of a debt that the justice delivery system owes to a litigant to correct an error in justice dispensation on. i.e. what is due to justice which the wronged person is entitled to get. (as a matter of right); in the absence of express provisions in the Code (**Mahendra v. Sushila, AIR 1965 SC 364 (399): (1964) 7 SCR 267; Manohar Lal v. Seth Hiralal, AIR 1962 SC 527 (537): 1962 Supp (1) SCR 450**). "The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it"(Manohar Lal v. Seth Hiralal, AIR 1962 SC 527: 1962 Supp (1) SCR 450 (Per Raghubar Dayal, J.)). Thus, this power is necessary in the interests of justice. The inherent power has its roots in necessity and its breadth is coextensive with the necessity (**Newabganj Sugar Mills Co. Ltd. v. Union of India, (1976) 1 SCC 120 (123): AIR 1976 SC 1152 (1155)**).

Inherent powers: Scheme

Section 148 to 153-B of the Code deal with inherent powers of courts. The scheme, however, is not based on intelligible pattern. Sections 148 and 149 provide for grant and enlargement of time while Section 151 preserves inherent powers of courts. Sections 152, 153 and 153-A deal with amendments in judgments, decrees, orders and-in other proceedings. Section 153-B declares a place of trial to be an open court. Section 150, however, provides for transfer of business. This section could have been placed along with Sections 22-25 dealing with transfer of cases. Likewise, Section 148-A (lodging of caveat) could have been taken either with Sections 26-32 dealing with institution of suits or before Section 148 or after Section 153-B.

Leading Cases:

Padam Sen v. State of U.P. (AIR 1961 SC 218: (1961) 1 SCR 884) was the first leading decision of the Hon'ble Supreme Court on the point. In that case, an order of appointment of a Commissioner to seize books of accounts in the possession of A was passed by the trial court. It was contended by A that the order was not made for any of the purposes mentioned in Section 75 of the Code and as such it was without jurisdiction. On behalf of the State it was urged that the court had such power under Section 151 of the Code.

Holding that the court had no inherent power to appoint a Commissioner for seizing the account books of plaintiff on the application of defendant the Court stated:

The inherent powers of the courts are in addition to the powers specifically conferred on the court by the Code. They are complementary to those powers and therefore it must be held that **the Court is free to exercise them for the purposes mentioned in Section 151 of the Code when the exercise of those**

powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. It is also well recognized that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code."(**Padam Sen v. State of UP., AIR 1961 SC 218 at 219**)

In **B.V. Patankar v. C.G. Sastry (AIR 1961 SC 272: (1961) 1 SCR 591)**, ignoring the provisions of the Mysore House Rent and Accommodation Control Order, 1948 the executing court passed an order and delivered possession of property to the owner. An application was made by the opposite party for redelivery of possession contending that an order for delivery of possession passed by the executing court was without jurisdiction. The Hon'ble Supreme Court held that possession can be restored to the tenant in exercise of inherent powers under Section 151 of the Code.

In **Manohar Lal v. Seth Hiralal (AIR 1962 SC 527: 1962 Supp (1) SCR 450)**, it was observed that the inherent powers of the court are **in addition to the powers specifically conferred on the court by the Code. They are complementary to those powers** and, therefore, must be held that the court is free to exercise them for the purposes mentioned in Section 151 (for the ends of justice or to prevent the abuse of process of the court) when the exercise of these powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. It is also well recognized that the inherent power cannot be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code.

The Court further stated: Temporary Injunction may be granted in exercise of powers U/s. 151 CPC in cases which are not covered by the provisions of Order 39 CPC.

"The section itself (Section 151) says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it." (**Manohar Lal v. Seth Hiralal, AIR 1962 SC 527 (533-34): 1962 Supp (1) SCR 450**)

(emphasis supplied)

The Court also stated that no one has a right to insist on the court exercising that jurisdiction and the court exercises its inherent jurisdiction only when it considers it absolutely necessary for the ends of justice. [**Id. At 533(AIR)**]

In **Shivdev Singh v. State of Punjab (AIR 1963 SC 1909)**, the Hon'ble Supreme Court held that every court of plenary jurisdiction has inherent power to prevent miscarriage of justice or to correct grave and palpable errors committed by it.

Dealing with the provision of Article 226 of the Constitution, the Court stated that there is nothing in the said provision to preclude a High Court from exercising that power and to review its own order in the interest of justice.

In **Martin Burn Ltd. v. R.N. Banerjee (AIR 1958 SC 79: 1958 SCR 514)**, the Hon'ble Supreme Court held that a Tribunal constituted under the Industrial Disputes (Appellate Tribunal) Act, 1950 has inherent powers similar to powers that may be exercised by a civil court under Section 151 of the Code.

In **Arjan Singh v. Mohindra Kunjar (AIR 1964 SC 993: (1964) 5 SCR 946)**, an application filed by the defendant under Order 9, Rule 13 of the Code for setting aside an ex parte decree was dismissed by the court on the ground that it was barred by res judicata due to reason that the previous application u/o 9 R-7 CPC had been rejected by the same court. But the prayer was sought to be supported by relying on Section 151 of the Code. Held that no bar of res-judicata shall operate in the case and application u/o 9 R-13 CPC was finally remanded by Hon'ble Supreme Court to trial court for disposal of on merits.

Holding that inherent powers cannot override express provisions of the Code, the Hon'ble Apex Court stated: "It is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words, if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter, the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates." (**Id. at 1003 (AIR); see also P.A. Ahmed Ibrahim v. Food Corporation of India, (1999) 7 SCC 39: AIR 1999 SC 3033**)

In **Raja Soap Factory v. Santharaj (AIR 1965 SC 1449: (1965) 2 SCR 800)**, it was posited by the Hon'ble Supreme Court that Section 151 of the Code preserves inherent power of the court as may be necessary for the ends of justice or to prevent abuse of the process of the court. That power may be exercised where there is a lawful proceeding before the court. It, however, does not authorise the court to invest itself with jurisdiction where it is not conferred on it by law.

In that case, the plaintiff instituted a suit in an action of passing off against the defendant in the High Court of Mysore though the suit could have been entertained by the District Court alone. The ground which weighed with the High Court was that the summer vacation had commenced and no Judge was functioning as a District Court. Temporary injunction was, therefore, granted.

Setting aside the order, the Hon'ble Supreme Court observed that **the High Court was not competent to assume to itself jurisdiction which it did not otherwise possess**; "its jurisdiction cannot be enlarged because what the Learned Judge calls an extraordinary situation 'requires' the court to exercise it" (**Raja Soap Factory v. Santharaj, AIR 1965 SC 1449 at 1451**)

In **M/s. Ram Chand & Sons Sugar Mills v. Kanhaiyalal Bhargav & others, AIR 1966 SC 1899: (1966) 3 SCR 856** while interpreting the phrase "any director" in Order 29, Rule 3 of the Code as not the same director who had signed and verified pleading or who had been served with a summons, but any director who would be in a position to answer material questions relating to the suit, the Hon'ble Supreme Court stated:

"The scope of the inherent power of a Court under Section 151 of the Code may be defined thus: The inherent power of a Court is in addition to and complementary to the powers expressly conferred under the Code. But that power will not be exercised if its exercise is inconsistent with, or comes into conflict with, any of the powers expressly or by necessary implication conferred by the other provisions of the Code. If there are express provisions exhaustively covering a particular topic, they give rise to a necessary implication that no power shall be exercised in respect of the said topic otherwise than in the manner prescribed by

the said provisions. Whatever limitations are imposed by construction on the provisions of Section 151 of the Code, they do not control the undoubted power of the Court conferred under Section 151 of the Code to make a suitable order to prevent the abuse of the process of the Court. (**Id. At 1902 (AIR) (Per Subba Rao, J.)**)

In **Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1: (1966) 3 SCR 744**, the Hon'ble Supreme Court held that the High Court has power to hold a trial in camera. The primary function of the judiciary is to do justice. It is, therefore, difficult to accede to the proposition that there can be no exception to the rule that all cases must be tried in open court. If the court is satisfied that the ends of justice required that the trial should be conducted in camera, no objection can be raised against such an action. "What would meet the ends of justice will always depend upon the facts of each case and the requirements of justice." **Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1 (10): (1966) 3 SCR 744. (Per Gajendragadkar, J.)**

In **Nain Singh v. Koonwarjee, (1970) 1 SCC 732: AIR 1970 SC 997** in exercise of powers under Order 41, Rule 23 of the Code, the appellate court remanded the suit to the trial court for deciding issues left undecided by it. No appeal was filed against the said order. The trial court then decided all issues and decreed the suit. The decree was confirmed in appeal. In second appeal, the High Court felt that in previous proceedings, the appellate court should not have remanded the matter and it was open to the High Court to consider the correctness of the order of remand in its inherent power. It accordingly allowed the appeal and set aside the decrees of both the courts. The aggrieved plaintiff approached the Hon'ble Supreme Court.

Allowing the appeal and setting aside the order of the High Court, the Hon'ble Supreme Court stated: "The High Court, in our opinion, erred in holding that the correctness of the remand order was open to review by it. The order in question was made under Rule 23, Order 41, Civil Procedure Code. That order was appealable under Order 43 of that Code. As the same was not appealed against, its correctness was no more open to examination in view of Section 105 (2) of the Code which lays down that where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom he shall thereafter be precluded from disputing its correctness. The High Court has misconceived the scope of its inherent powers. Under the inherent power of Courts recognized by Section 151, CPC, a Court has no power to do that which is prohibited by the Code. Inherent jurisdiction of the Court must be exercised subject to the rule that if the Code does not contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other words, **the Court cannot make use of the special provisions of Section 151 of the Code where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same. Further power under Section 151 of the Code cannot be exercised as an appellate power.**" (**Id. at 734-35 (SCC): 998 (AIR) (Per Hegde, J.); see also Ramkarandas v. Bhagwandas, AIR 1965 SC 1144: (1965) 2 SCR 186; Mahendra Manual v. Sushila Mahendra, AIR 1965 SC 364: (1964) 7 SCR 267**)

In **Shikharchand Jain v. Digambar Jain Praband Karini Sabha (1974) 1 SCC 675: AIR 1974 SC 1178: (1974) 3 SCR 1**, the Hon'ble Apex Court held that it is open to any court to take notice of subsequent events after the institution of the suit and to grant relief to the parties where it is shown that:

- (i) the relief claimed originally has by reasons of subsequent change of circumstances become inappropriate; or
- (ii) it is necessary to take notice of subsequent events in order to shorten litigation; or
- (iii) it is necessary to do so in order to do complete justice between the parties.

In **Newabganj Sugar Mills Co. Ltd. v. Union of India ((1976) 1 SCC 120: AIR 1976 SC 1152: (1976) 1 SCR 803)**, under the court's order, sugar-mill owners recovered excess amount from the sale of sugar. Ultimately, however, control price was upheld by the court. During the intervening period, however, crores of rupees were 'funneled into the millers' tills' by 'judicial sanction'. The mill owners were undoubtedly not entitled to the amount.

Quoting Jim Carrigan ("**Theoretical Basis of Inherent Powers Doctrine**") and invoking inherent powers, the Hon'ble Supreme Court issued certain directions in the interest of consumers who had paid the amount as also in the interest of general public.

In **Superintendent of Taxes v. Onkarmal Nathmal Trust ((1976) 1 SCC 766: AIR 1975 SC 2065: 1075 Supp SCR 365)**, the authorities could not issue notice requiring assessee to submit return by reason of stay granted by the court. After the injunction was vacated, notice was issued but, by the time, it was barred by limitation. It was, therefore, submitted that the act of the court granting injunction should not adversely affect the interest of the State.

The majority (**Ray, C.J. and Chandrachud, J.; Beg, J. concurring (Khanna & Mathew, JJ.) (dissenting) in Onkarinal Nathmal Trust case**) did not uphold the contention of the State. Finding fault with the State, it observed that at no stage, the State asked for variation or modification of the order of injunction.

The majority proceeded to state: "It is well known that if it is brought to the notice of a court that proceedings are likely to be barred by time by reason of any order of injunction or stay the court passes such suitable or appropriate orders as will protect the interests of the parties and will not prejudice either party.... The State did not take steps at the appropriate time." (**Id. 775 (SCC)**)

The majority further proceeded to observe:

"The State cannot take advantage of its own wrong and lack of diligence.... The State cannot contend that it was impossible to issue any notice within the period mentioned in Section 7(2) of the new Act. The State did not endeavour to obtain appropriate orders to surmount the difficulties by reason of the injunction against taking steps within the time contemplated in Section 7(2) of the new Act. The State is guilty of default. The State had remedies open to take steps by asking for modification of the order. The State had to assert the right that the State was entitled to demand taxes and the respondent was liable to pay the same. The State followed the policy of inactivity. Inactivity is not impossibility. The order of injunction is not to be equated with an act of God or an action of the enemy of the State or a general strike. (**Superintendent of Taxes v. Onkarinal Nathmal Trust, (1976) 1 SCC 766 (775): AIR 1975 SC 2065: 1975 Supp SCR 365 (Per Ray, C.J.)**)

In **Cotton Corporation of India Ltd. v. United Industrial Bank Ltd., (1983) 4SCC 625**; the Hon'ble Supreme Court held that when the court has no jurisdiction to grant interim injunction restraining a person from instituting legal proceedings, no such order can be passed in the exercise of inherent powers.

Venkatachalliah, C.J. stated: "The instant case may not strictly fall within the terms of Section 144; but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every court." [Id. At 391 (SCC)] Section 144 incorporates only a part of the General Law of restitution. It is not exhaustive.

Courts duty to do justice in all cases, whether provided for or not, carries with it the necessary power to do justice in the absence of express provision. (Per **Justice Raghuvardayal in Manohar Chopra Vs. Seth Hiralal, AIR 1962 SC 527**) This power is referred to as the inherent power possessed by the court, though not conferred. Sec 151 (Sec 151 of Civil Procedure Code states: "Nothing in this code, shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court") of the Civil Procedure Code deals with the inherent powers. This provision being a part of procedural law requires a liberal interpretation to advance the cause of justice and further its ends or to effect enforcement of substantive rights. (**Shreenath Vs. Rajesh AIR 1998 SC 1192**) The inherent powers are considered necessary to do the right and undo the wrong in the course of administration of justice (**State of UP Vs. Roshan Singh AIR 2008 SC 1190**) and to be regarded as 'supplementary to specially conferred powers. (**Mulraj Vs. Murti Raghunath Ji Maharaj AIR 1967 SC 1386**) Inherent powers have roots in necessity and they are co-extensive with necessity in order to do complete justice. (**Newab Ganj Sugar Mills Vs. Union of India, AIR 1976 SC 1152**).

The law relating to inherent powers is contained in Sec 148 to Sec 153A of the Civil Procedure Code, which visualizes the exercise of powers in different circumstances. These provisions deal as follows: -

- i) Sec 148 and Sec 149 deal with grant or enlargement of time;
- ii) Sec 150 deals with transfer of business;
- iii) Sec 151 preserves the inherent powers of the courts
- iv) Sec 152, 153 and Sec 153A deal with amendments in Judgments, decrees or orders or in other proceedings.

Sec 151 provides that the inherent power can be exercised to secure the ends of justice (**All Bengal Excise License's association Vs. K. Raghavendra Singh, AIR 2007 SC 1386**) or to prevent abuse of process of court.

The scope and ambit of the exercise of powers under Sec 151 of CPC can be illustrated by a few cases as follows: -

- i) The court may recall its orders and correct mistakes; (**Keshardeo Vs. Radha Kisaan, AIR 1953 SC 23**)
- ii) Issuance of temporary injunctions when the case is not covered by order 39 (**Mohanlal Chopra Vs. Seth Hiralal, AIR 1963 SC 527**) or to set aside an 'ex- parte' order (**Martin Burn Ltd., Vs. R.N. Banerjee, AIR 1958 SC 83**);
- iii) Illegal orders or orders passed without jurisdiction can be set-aside; (**Mulraj Vs. Murti Raghunathji Maharaj, AIR 1967 SC 1386**)
- iv) Subsequent events in the case can be taken note of by the court; (**Nair Service Society Ltd., Vs. K.C. Alexander, AIR 1968 SC 1165**)
- v) Court's power to hold trial 'in camera' or prohibit publication of its proceedings; (**Naresh Sridhar Vs. State of Maharashtra, AIR 1967 SC 31**)
- vi) Court can expunge remarks made against a Judge (**State of Assam Vs. Ranga Muhammed, AIR 1967 SC 907**) and

- vii) Court can restore the suit and rehear on merits (**Lachi Tiwari Vs. Director of Land Records, AIR 1984 SC 41**) and also to review its order; (**Shivdeo Singh Vs. State of Punjab, AIR 1963 SC 1911**)
- viii) Trial Court has jurisdiction to set aside a consent decree under Section 151 CPC where it is established that there was lack of consent of the applicant **Dadu Dayal Mahasabha vs. Sukdeo Arya, 1990 (1) SCC 189.**
- ix) Court can order maintenance of *status quo ante* and obedience at temporary injunction in exercise of powers u/s 151 CPC. (**Smt. Jaganathya vs. State of U.P., 2006(64) ALR 330-DB.**)
- x) Court can order police assistance for restoration of possession in execution of decree. (**Bijiga Papa Rao vs. J. Srinivas Rao (AP) judgment dated 7.11.2014.** However Supreme Court in **Om Prakesh and another vs. Amar Singh, C.A. 8175/20219** Held that the executive authorities were completely unjustified in their enthusiasm with asking for proper court orders regarding police assistance despite the fact that there were fully aware that the possession was to be delivered in pursuance of court orders.

Court has ample power to correct its error and prevent abuse of process of Court by entertaining and application u/s 151 CPC and setting aside an order passed on account of commission of fraud by a party. **Friends Missionary Prayer v. Shashi Kant; Misc. Single No. 1333 of 2019; Alld. High Court on 18.1.2019.**

Sec 151 of the CPC provides for exercise of inherent powers to prevent the abuse of the process of court. The abuse of the power may be at the instance of a party or at the instance of the court itself. Abuse of the powers of the court which results in injustice to a party needs to be remedied on the ground that the act of a court shall not prejudice anyone. (**Forasal Vs. ONGC, AIR 1984 SC 241**) When a party practices fraud on the court (**Baidyanath Dubey's Case 1968 SCD 275**) or on a party to a proceeding, (**Dadu Dayal's Case (1990)1 SCC 189**) the remedies have to be provided on the basis of inherent powers. Circumventing statutory proceedings (**See Note 23.**) or resorting to multiplicity of proceedings (**See Note 19.**) or by instituting vexations, obstructive or dilatory tactics (**Mula Vs. Balu Ram AIR 1960 ALL 573**) have to be prevented by use of inherent powers. Similarly, trying to secure an undue advantage over the opposite party (**Director of Inspection Vs. Vindo Kumar, AIR 1987 SC 1260.**) or introducing scandalous or objectionable matter in the proceedings have to be prevented (**Shanker Lal Vs. Ramniklal, AIR 1951 Kant 23.**) to ensure that the process of the court is not abused.

Sec 152, 153 and 153A of CPC relates to the use of inherent power for effecting amendments of Judgments, decrees, orders or other records.

Sec 152 provides that clerical or arithmetical mistakes in Judgments, decrees or orders arising from any accidental slip or omission may at any time be corrected by the court either on its own motion or on the application of any of the parties. The Hon'ble Apex Court elucidated that Sec 152 is based on two principles: - (**T. Sugar Cp. Ltd., Case AIR 1970 SC 76 and also Samarendranath vs. Kishore Kumar, AIR 1967 SC 1443.**)

- i) the act of the court shall not prejudice any one; and
- ii) Duty of the court to ensure that its records are true and represent the correct state of affairs.

Sec 152 and 153 of the CPC makes it clear that the court may set right any mistake in their records at any time. (**Janakiraman vs. P.M. Neelakanta Iyer,**

AIR 1962 SC 632.) While Sec 152 is confined to amendments of Judgments, orders or decrees, Sec 153 confers a general power on the court to amend defects or errors in any proceeding in a suit. Necessary amendments can be done in order to determine the real issues between the parties. (**Jai Jai Ram Manohar Vs. National Building Material Supply, AIR 1969 SC 1267.**)

The exercise of inherent powers carries with it certain limitations such as:

- (i) They can be exercised only in the absence of express provisions in the code; (**Arjun Singh Vs. Mohindra Kumar, AIR 1964 SC 993.**)
- (ii) They cannot be exercised in conflict with what has been expressly provided in the code; (**Ram Chand & Sons Vs. Kanhayalal Bhargava, AIR 1966 SC 1890.**)
- (iii) They can be exercised in exceptional cases; (**Ram Karan Das Vs. Bhagwandas, AIR 1965 SC 1144.**)
- (iv) While exercising the powers, the court has to follow the procedure prescribed by the legislature; (**Mohan Lal Chopra's case (Supra)**)
- (v) Courts cannot exercise jurisdiction not vested in them by law; (**State of W.B. Vs. Indira Devi (1977) 3 SCC 559.**)
- (vi) To abide by the doctrine of Res Judicata i.e., not to open the issues which have already been decided finally; (**Union of India Vs. Ram Charan, AIR 1964 SC 218.**)
- (vii) To direct an arbitrator to make an award afresh; (**Rikhalidas Vs. Bullabhidas, AIR 1962 SC 554**)
- (viii) Substantive rights of the parties shall not be taken away; (**Mohan Lal Chopras (Note 37)**)
- (ix) To restrain a party from taking proceedings in a court of law; (**Ibid.**) and
- (x) To set aside an order which was right at the time of its issuance. (**A.C. Estates Vs. Serajuddin, AIR 1960 SC 939.**)

A summary of Sec 148 to Sec 153 B reveal that the powers of the court are quite wide and extensive for the purpose of: -

- a) minimizing litigation;
- b) avoid multiplicity of proceedings and
- c) to render full and complete justice between the parties.

Remedy against an order passed under Section 151 CPC lies in revision u/s 115 CPC and not is appeal in view of provisions under Section 104 CPC Order 43 Rule 1 CPC and Section 105 CPC. (**Krishandev vs. Radha Kishan, AIR 1953 SC 13, Mod. Akbar vs. Amar, AIR 1931 Lah 789, Gulmahammd vs. Vineyabai, AIR 1963 MP 9**)

If there is no specific provision which prohibits grant of relief sought in an application, courts have all necessary powers under Section 151, CPC to make a suitable order to prevent abuse of process of court.

Shipping Corporation of India Ltd. v. Machado Brothers and others, (2004) 11 SCC 168

CHAPTER-26

ADR MECHANISM: IMPORTANCE, NEED AND ROLE OF ADVOCATES

“Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser- fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.”

– Abraham Lincoln

Dispute Resolution

Dispute resolution is a term that refers to several processes that can be used to resolve a conflict, dispute or claim. It may also be referred to as alternative dispute resolution (ADR). They are alternatives to a court, used to resolve civil, corporate, commercial, labour, matrimonial, and family disputes, employment, business, housing, personal injury, consumer, and environmental disputes. In some countries, the ADR tool is also applicable in criminal matters. In India, the plea-bargaining provisions under CrPC seem to be a sort of alternative dispute resolution under criminal law.

Dispute resolution processes have several advantages. For instance, they are cheaper and faster than the traditional court's process. Parties can involve themselves with greater participation in reaching a solution and control over the outcome of the dispute. Also, they are less formal and more flexible in rules, languages, time and venue. The factors for opting for any particular dispute resolution forum predominantly include cost, access, confidentiality and speedy disposal.

ADR refers to all the processes related to resolving the dispute outside the courtroom litigation. The prominent feature of ADR processes is that it, unlike litigation, draws its legitimacy and efficacy from the consensus. The main ADR processes include Arbitration, Conciliation, Mediation, Lok Adalat, Negotiation, Judicial Settlement, pre-mediation and other hybrids.

The alternative dispute resolution procedures can be broadly classified into two groups:

- (1) Adjudicative and Adversarial, example- arbitration; and
- (2) Consensual and non-adversarial, for example- mediation, conciliation.

The most common types of ADR for civil cases are Arbitration, Conciliation, Mediation, Judicial Settlement and Lok Adalat. In India, the Parliament has amended the Civil Procedure Code by inserting Section 89 and Order 10 Rule 1-A to 1-C. Section 89 of the Civil Procedure Code provides for the settlement of disputes outside the Court. The provision states that when the court believes, that there exists an element of settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations. After receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for:

- arbitration;
- conciliation;
- judicial settlement

- settlement through Lok Adalat; or
- mediation.

Types of ADR

Arbitration

It is one of the methods for resolving disputes outside the courts. It is the only method of alternative dispute resolution which is adjudicatory in nature. It is governed by the Arbitration and Conciliation Act, 1996. In this method of dispute resolution, the parties to a dispute refer one or more persons to act as arbitrators. In case, the parties do not get a consensus on the name of the arbitrator, the aggrieved party may get an order from the competent court.

The award passed by the arbitrator is legally binding on the parties and enforceable through a court of law. The process involves filing a claim statement, defence statement, counterclaims, and rejoinders (if any) by the parties. After completion of pleadings, the parties lead evidence in a manner as mutually decided by the parties and recorded so by the arbitrator. Mostly, the parties rely on the affidavits especially, where the evidence is all documented. After that, the arbitrator hears the arguments, and finally passes the arbitration award based on a review of the documents in evidence and the argument advanced by the respective parties to the list. There is a right to appeal against the award passed by the arbitrator however, the grounds are limited and specifically provided in the Arbitration and Conciliation Act, 1996.

The adjudicatory process is less cumbersome than the process of courts. The parties through mutual consultation decide the process of adjudication in their matter. The arbitration mechanism gives the flexibility of time, place, and expenses, giving speedy justice.

Arbitration can be either voluntary or mandatory. The contractual arbitration clauses or statutory arbitration clauses are examples of mandatory arbitration. ADR has become a preferable option for various matters in dispute such as commercial, contractual, financial, matrimonial, family, consumer, and real estate.

In brief, the benefits of arbitration mode for resolution over litigation in court include faster decision; flexible and less expensive; arbitrator's options for calling experts in the technical matter, choice of language, venue and time; and limited grounds for appeal.

Every system has some drawback so is the case with arbitration. There is the possibility of putting pressure on the favourable award by the influential and powerful parties. Mandatory arbitrations essentially bar the parties' right to access the court. Also, one of the major disadvantages is that in most of the cases, the parties have to bear arbitrators' fees and other clerk age expenses, which add an additional financial burden, especially in small cases such as consumer cases.

Conciliation

In conciliation, the parties to a disputed approach a conciliator. The method is governed by the Arbitration and Conciliation Act, 1996. The conciliator meets with the parties separately. The aim and objective of the conciliation process are to resolve their differences by bringing the parties to the negotiation table. The conciliators make efforts to lower the tensions between the parties,

interpret issues, provide technical assistance, improve communications, and explore potential solutions to bring about a negotiated settlement.

It is a voluntary mode of dispute resolution. The parties are free to negotiate on any lawful and legally acceptable terms and manner they want. The process is flexible in terms of time, structure and method. The process is adopted mostly based on the interest of the parties. The outcome of the proceedings is hardly made public. While proposing a settlement, the conciliator appreciates various factors such as parties' legal positions, financial, commercial, and personal interests, if any. The conciliator aims to explore workable, justifiable and equitable resolutions. It is focused on the existing issues involved in the dispute and how to create options for a settlement that would be acceptable to all. The conciliator doesn't decide, he endeavours for generating options to reach a compatible solution for the parties. The process is not binding on the parties unless they reached a settlement. In case of settling, the duly signed settlement agreement shall have the effect of an arbitration award, and hence, it would be enforceable in law.

In most contractual and commercial disputes, the parties choose conciliation over arbitration unless the parties want or the situation requires, at least some sort of adjudication. In many contracts, the parties agreed to avail first, the conciliation process and in case of failure to reach any settlement, the arbitration is invoked as a second preference. In other words, if no consensus could be arrived at between the parties, the conciliation proceedings fail, however, the parties can resort to arbitration.

The whole process is given in the hands of a trained and well qualified person who preside as a conciliator. The areas or sectors exploring this mode of dispute resolution are similar to that of arbitration. However, the conciliation process has been widely adopted for settling disputes in myriad matters such as labour disputes, service matters, consumer protection, taxation, and excise.

The proceedings under conciliation are deemed to be initiated with an invitation for resolution from one party being served upon the other one. And, on its acceptance by the other party, the conciliation proceedings are commenced. In case of non-acceptance of invitation, there would be no conciliation proceedings. It is to be noted that there is no bar on having more than one conciliator; however, mutual consent is required. In the case of three conciliators, the appointment of the third conciliator would be by mutual consent of both sides. Unlike arbitration, the third conciliator remains as par with others; he is not termed as presiding conciliator as we see in arbitration proceedings. If the parties fail to agree mutually on the name of the conciliator, they can approach any international or national institution for the appointment of a conciliator. The rules of procedure and evidence do not bind the conciliator neither he gives any award or order. The conciliator simply tries to reconcile.

After the conciliation proceedings get over, a conciliator may act as arbitrator if the parties expressly agreed upon. The conciliation proceedings are confidential in nature.

The parties shall not rely on or introduce as evidence in the arbitration or judicial proceedings, any admission made, proposals or counter-proposals are given, or any evidence or admission of any material facts. Also, the conciliator shall not be produced as a witness in any such arbitral or judicial proceedings.

From the reading of section 65 of the Arbitration Act, 1996 read with sec. 89 of the Code of Civil Procedure, the conciliator may request each party to submit a brief written statement. The Act clearly says that the conciliator shall be

guided by principles of objectivity, fairness and justice. He gives consideration, among other things, to the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

Mediation

Settlement of dispute through mediation is globally recognised. It is a voluntary and informal process of resolution of disputes. The process is voluntary and party-centric and unlike conciliation; it is a structured negotiation process. The mediator is a neutral third person like conciliator. The mediation aims to resolve the disputes amicably. The mediator assists the parties through his mediating skills and the process is controlled by the parties themselves. In essence, the mediator only acts as a facilitator in helping the parties to amicably reach a settlement of their dispute. The settlement between the parties should be a lawful one. So the mediators are usually qualified advocates having sufficient experience. The Hon'ble Allahabad High Court has framed the UP Civil Procedure Mediation Rules 2009 for the subordinated courts of UP.

Like the conciliator, the mediator also does not decide. Cases like property matters, commercial matters, family matters-matrimonial disputes, child custody, landlord-tenant issues, compoundable offences cases, Negotiable Instruments Act cases etc. should be encouraged to be decided by mediation.

In mediation, there are no formal rules. The session starts with describing the problem and the desire for resolution by each party. Then, the mediator separates them into private rooms, and takes separate meeting and again thereafter joint meetings with the parties. The purpose is to bring settlement amicably. The mediator cannot dictate the terms, he can only assist and suggest.

The primary advantages of the mediation include the following- the parties themselves agree; it is a quick resolution mode, without much stress and financial burden; confidentiality is maintained.

Judicial Settlement

Section 89 of the Civil Procedure Code refers to the judicial settlement as one of the modes of alternative dispute resolution. There are no specified rules that have been framed in this regard. However, as per the provision, when there is a Judicial Settlement, the provisions of the Legal Services Authorities Act, 1987 will apply. Therefore, in this mode of recourse the concerned Judge shall try to settle the dispute between the parties amicably. The amicable settlement through judicial settlement process is deemed to be decree within the meaning of the Legal Services Authorities Act, 1987. Section 21 of the Act provides that every award of the Lok Adalat shall be deemed to be a decree of the Civil Court.

Lok Adalat

Lok Adalat or people's court objective is to settle the disputes through conciliation and compromise through systematic negotiations. It is a judicial institution and a dispute settlement agency. Section 89 of the Civil Procedure Code also refers pending civil disputes to the Lok Adalat.

Section 19 of the Legal Services Authorities Act, 1987 empowers State Authority, District Authority, Supreme Court Legal Services Committee High

Courts Legal Services Committee and Taluka Legal Services Committee to organise Lok Adalats at such intervals and places as they think fit.

The members of the Lok Adalat consist of experienced and qualified persons including serving or retired judicial officers. In the Lok Adalat, the parties can also directly interact with the presiding officer.

It shall have jurisdiction over any case pending before it or any matter which is falling within the jurisdiction of, and is not brought before any court for which the Lok Adalat is organised. However, the Lok Adalat shall have no jurisdiction over case or matter relating to non-compoundable offences under any law or in the matter of bail or grant of divorce.

No court fee is required to be paid for resolution in Lok Adalats and in case the fee is already paid, the same is refunded if the matter gets settled through Lok Adalat. Hence, it shows one of the objectives of its establishment is to deliver justice to the financially vulnerable classes or disadvantaged sections.

Regarding procedures, the Lok Adalat does not strictly bound by rules of procedure like ordinary courts. It follows the procedures which are easy to understand even by the illiterates. Every award passed in Lok Adalat is a decree or order (as the case may be) of a civil court. The same shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award. However, the pre-condition of the Lok Adalat is that both parties in dispute have to settle and arrive at a settlement mutually.

Under Section 22B, which has created the permanent Lok Adalat, for certain specific subject matters, they also have adjudicatory powers. It is noteworthy, that in certain situations, permanent Lok Adalat can pass an award on merits, even without parties' consent. Such an award is final and binding.

Matters related to money suits, recovery suits, damages cases, partition suits, and matrimonial cases are seen to be effectively settled before a Lok Adalat.

Lok Adalat basically supplements the regular existing courts.

Negotiation

Negotiation involves direct discussions or communication between the parties to resolve the issues. In most cases, the parties in dispute try to explore the chances of resolving the dispute themselves through direct negotiation. Negotiations usually fail for want of skills and knowledge for resolving the dispute. The lawyers regularly negotiate on behalf of their clients.

Role of a Lawyer's in ADR

Lawyers play a pivotal role in the administration of justice; thus, they cannot be afforded to stand aloof or merely pay lip service to it. The public at large still are not aware of the alternative redressal mechanisms and they live with the notion that litigation is the main process and ADR is secondary to litigation.

ADR processes are useful before, during and sometimes even after litigation. If ADR mechanisms can be used to settle a case before, during or even after litigation, then the better view is to see ADR as being complementary rather than secondary or inferior to litigation.

The responsibility of an advocate concerning ADR is towards his client, the Court, the institution and the legal profession in promoting a better and more efficient justice delivery system. In fact, it is the advocate's duty to explain to his clients about alternative methods of dispute resolution and further explore the

most appropriate mechanism for his clients. However, the role of an advocate in ADR processes depends on the redressal mechanism adopted in a particular case. A client has trust in his advocate more than he has in others.

The role of an advocate in ADR processes includes:

Adjudicative and Adversarial:

- (i) Advise the client on the nature and usefulness of ADR
- (ii) Drafting, perusing and advising the client on the arbitration clause or agreement to arbitrate.
- (iii) Guiding the client about various stages and when to invoke arbitration and take other preliminary steps towards the commencement of the arbitration.
- (iv) Guiding the client in the choice of arbitrator(s).
- (v) Representing the client as counsel in the arbitration
- (vi) Advising the client on the possibility of settling the dispute by negotiation, conciliation or mediation and final termination of the arbitral proceedings.
- (vii) Advising the client on the execution of or challenging the arbitration award, as the case may be.
- (viii) As a general role of an advocate, he may help or explain to the client about the workings of the system and guide him on how to protect the best interest out of it.
- (ix) A lawyer may also play the role of a conciliator, mediator, neutral negotiator, or arbitrator. However, in such cases, the advocate cannot represent the party in that matter.

Consensual and Non-Adversarial:

- 1) Advise his client about which alternative recourse would be better in the case's given facts and circumstances.
- 2) Help the client in exploring his underlying interest in the case before, during and after the proceedings.
- 3) Negotiate on behalf of the client.
- 4) Guide the client about deciding when to agree and when to refuse the offer or settlement and further exploring other options.
- 5) Ensuring the client's best interest by examining the documents before final settlement to avoid any legal impediment in performance of the same in future time.
- 6) Drafting, perusing and vetting the final agreement.
- 7) Advising the client on any issues that may arise in the course of implementation of the agreement.

An advocate should give due consideration and support to the courts' suggestions, orders, and directives for an amicable settlement or the referral of ongoing matters to ADR. It is correct that ideally, ADR processes, particularly non-adversarial, do not require an advocate for appearance or participation. However, as a general practice, advocates do appear and participate in the proceedings whenever a court refers the case to a dispute resolution process. The role of an advocate in a dispute resolution process varies. It primarily depends upon the nature of the dispute and the type of dispute resolution process.

For a complete and better understanding of the ADR mechanism and the interpretation of the provision as laid down under Section 89 CPC, the landmark judgment of the Hon'ble Supreme Court in **AFCONS Infrastructure Ltd. v. Cherian Varkey Construction Co. Pvt. Ltd.**, (2010) 8 SCC 24 is a must read.

“The courts of this country [India] should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.”

Sandra Day O'Connor

“

It is unfortunate that delays, high costs, frequent and sometimes unwarranted judicial interruptions at different stages are seriously hampering the growth of arbitration as an effective dispute resolution process. Delay and high costs are two areas where the arbitrators by self-regulation can bring about marked improvement.

*Union of India v. Singh Builders Syndicate, (2009)
4 SCC 523*

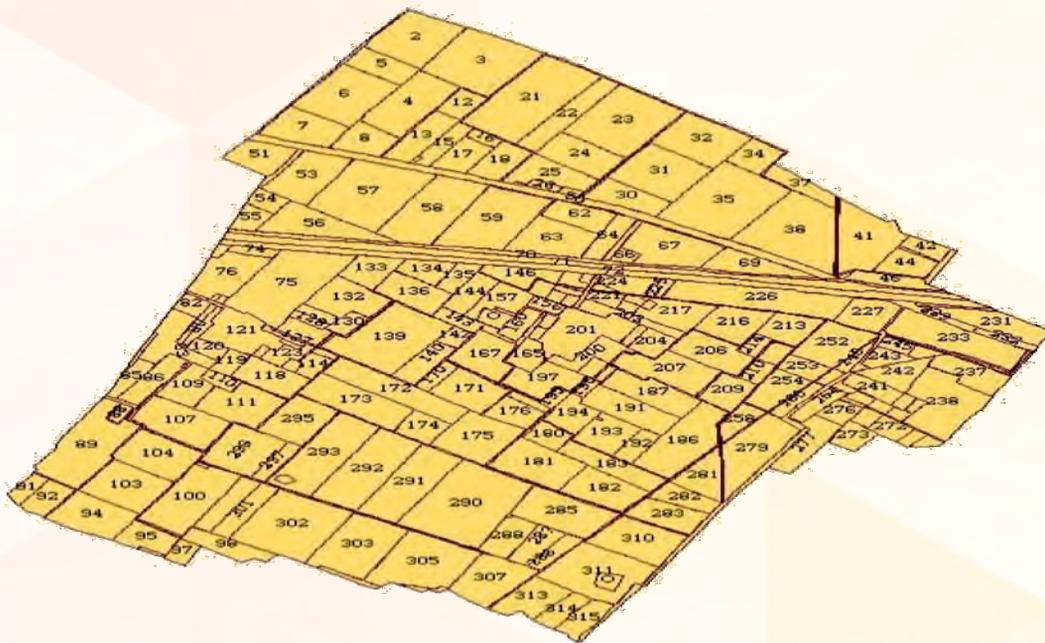
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CHAPTER-27

TYPES OF REVENUE RECORDS AND THEIR IMPORTANCE

Types of Revenue Records:

1. **Map or Shajra:** - This is a map of a village where each plot or survey number is demarcated by a specific scale-based boundary. This map for each village is prepared and maintained under section 30 of revenue code and as per rules provided under chapter 5 and 5A of U.P. Land Record manual. A picture of such village map may look like as follows-



The maps prepared during survey operations are kept by the lekhpal and he is required to mark in it the changes as they occur from year to year in red. The maps are corrected under chapter 5 of the land records manual UP and various other officers of the revenue department are required to check these corrections. In the case of **Jogendra Nath Roy versus Secretary of State of India, ILR 30 Cal 291**, Hon'ble Calcutta High Court has held that these maps prepared during survey operations are official records prepared by officers well versed in survey and form valuable evidence although they are not conclusive. This map forms the basis for decision of the boundary disputes.

In civil suits for injunctions etc. these maps become the basis of establishing the exact situation of disputed property. It is the duty of the Collector to maintain village maps correctly. Functions of Collector under this section are not to be performed by the Collector in person but can be performed through such officials including the kanungo and the Lekhpal as are designated under the rules. Duty is also cast upon the sub-divisional officer under the rules given in the land record manual UP, to see that the village maps in his sub-division are kept up to date.

2. Field Book (khasra): This field book for each village is prepared and maintained under section 30 of Revenue Code and as per rules provided under chapter 5 and 5A of U.P. Land Record manual. The field book (*A Persian term, Khasra*) is a record of each *plot or survey number given to a particular piece of land in villages*. The collector as well as the sub-divisional officer and the Tahsildar can order correction of khasra entries. Field book is merely the khasara of the Lekhpal, and in that there must be entered any changes that take place from time to time in the boundaries of the fields as well as the facts required for purpose of the register of all cultivators (the khatauni). According to Para 123 of the Land Records Manual the khasra is prepared by the Lekhpal on the spot. The entry in the field book (khasra) relates to the map and whatever the Lekhpal finds on the spot. It may entail in the end a correction of cultivators in the annual register.

As per Rule 25 of U.P. Land Revenue Rules 2016, for every village, the Collector shall cause to be prepared and maintained a Field book(Khasra) in R.C. Form-4 and also a map (showing the boundaries of survey number) wherein the changes referred to in section 30 shall be recorded.

Following particulars are caused to be entered in the field book (Khasra):-

1. Number of field
2. Area
3. Number of khatauni khata,
4. Name of tenure holder as classified in part I in khatauni,
5. Name of tenure holder as classified in part II in khatauni,
6. Method of irrigation,
7. Crop,
8. Kharif area crop irrigated or unirrigated,
9. Ravi area crop irrigated or unirrigated,
10. Zaid area crop irrigated or an unirrigated,
11. Dofasli irrigated or unirrigated,
12. Details of un-cropped land to agree with columns of area statement,
13. Kind and numbers of full grown trees on each plot,
14. Remarks.

Above details are entered in the field book after partial (inspection) means after actual physical verification of the particular land. Khasra provide every detail pertaining to all the lands and their areas, measurement, details of owners and cultivators, type of crops and soil, trees etc. **Khasra** is basically part of another document named Shajra, which carries the entire map of a village.

After amendment in in UP Land Revenue Act, by the UPZA&LR Act khasra became a supplementary record of rights to the extent of the column meant for that purpose which has to be maintained in conformity with the khatauni (**Kartar Singh versus Hukum Singh 1958 RD 18 BR**).

In the case of **Ballabh Das Vs. Noor Mohammad AIR 1936 PC 83**, The privy council has held that in case where there is no deed creating a title, the settlement khasara, which embodied the right was to be treated as an instrument of title or otherwise foundation of the right and not nearly 'historical material'.

3. Record of rights:-A record of rights is a register giving the nature of the rights over the land of cultivators or persons otherwise occupying land and the terms

under which the tenure holders hold the land. This is the most important register among the village record.

Before the U.P. Zamindari Abolition and Land Reforms Act, 1950 came into operation, there used to be two-records-of-rights for each village, viz., 1. Khewat and 2. Khatauni.

Since the khewat was a register of proprietorship, so it has now been dropped with effect from date of vesting. The khewat defined the rights and interest of proprietors, superior or inferior, in a mahal, and of mortgagees and lessees of such rights and interests. Unlike other records it is a quadrennial record, and a fresh khewat was prepared every fourth year. The mutation proceeding in a khewat was the same as it is now for khatauni. Khewats were of three sorts:

1. Proprietary khewat,
2. Sub-settlement khewat, and
3. Under-proprietary khewat.

There were 9 columns in Proprietary khewat, but the other two khewats consisted of 16 columns each. The later two khewats were prepared and maintained in Avadh Province only in addition to the Proprietary khewat.

Khatauni was a register of all persons cultivating or otherwise occupying land and recorded as tenure holder.

These registers were described in clause (a) to (d) of the original section 32 of Revenue Act 1901. With the abolition of zamindari Khewat in the original Sections became unnecessary and now there is only one record of rights for each village that is Khatauni.

Khatauni: - The word "khatauni" occurs nowhere in the U.P. Land Revenue Act. But the "Annual Register" mentioned under Section 33 of the Revenue Act is no other but the khatauni. Now in Section 31 of the Revenue Code 2006, the word Khatauni is used for record of right. Whenever there is any change in the possession of the land whether by succession or transfer or otherwise, the change is recorded in the khatauni by way of "mutation proceedings." The new khatauni shall be prepared from the previous khatauni.

As per Rule 27. (1) of U.P. Land Revenue Rules 2016, For every village, the Collector shall cause to be prepared and maintained a Record of Rights (Khatauni) in [Section 31(1)] R.C. Form-7 which shall contain: -

- a) The particulars specified in clauses (a) to (d) of the said section;
- b) Details of the declaration and cancelation referred to in section 83;
- c) Such other particulars as may from time to time be directed by the Board.

According to Section 31 of Revenue Act khatauni for each village, shall contain the following particulars, namely-

- a. The names of all tenure holders together with survey numbers or plot numbers held by them and their areas;
- b. The nature or extent of the respective interests including shares of such persons and the conditions or liabilities, if any, attaching thereto;
- c. The rent or revenue, if any, payable by or to any such person;
- d. Particulars of all land (other than holdings) belonging to or vested in the State Government, Central Government, Gram Panchayat or a local authority;
- e. Such other particulars as may be prescribed.

In this Record of rights (Khatauni) mutation in cases of succession or transfer is done as per law provided under section 33 to 35 of the Revenue Code, 2006.

The **Khatauni** is an important tool, to check the status of land ownership, especially in rural parts of India. At the time of sale and purchase of land in India, the Khatauni plays a crucial role, as it carries all the important information regarding the land.

According to Section 40 of the Revenue Code, all entries in the record of rights (Khatauni) prepared in accordance with the provisions of this Code shall be presumed to be true, until the contrary is proved.

The presumption under section 40 is only limited to the entry of Khatauni and it can not be extended to Presumption of Title. In the case of "**Smt. Bhimbai Mahadeo Kambekar vs. Arthur Import & Export Company & Ors.** 2019 0 (Supreme) SC 99" considering the issues involved in the matter, the Hon'ble Supreme Court held that the legal value of a mutation entry in deciding the rights of the parties is well settled on the basis of a series of precedents. The Hon'ble Supreme Court observed that it has been consistently held that the mutation entries of land in the revenue records does not create or extinguish the title over any land nor does such an entry have any presumptive value on the title of such land. Such an entry only enables the person in whose favour the mutation is ordered to pay the land revenue in question.

Reiterating the above settled position of law, the Hon'ble Supreme Court relied upon the following judgments:

- In **Sawarni (Smt.) Vs. Inder Kaur (1996) 6 SCC 223**, the Hon'ble Supreme Court held that the mutation of a property in the revenue record does not create or extinguish title nor does it have any presumptive value on the title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question.
- In **Balwant Singh & Anr. Vs. Daulat Singh (dead) by L.Rs. & Ors. (1997) 7 SCC 137**, similar observations were made by the Hon'ble Supreme Court, where it was held that a party is not divested of his title in the suit property as a result of mutation entry.
- **Narasamma & Ors. Vs. State of Karnataka & Ors. (2009) 5 SCC 591**, the Hon'ble Supreme Court reiterated the above position.

Now the question may arise that if these records of rights are not a title documents then what is their importance? Hon'ble Supreme Court in the above case of **Narasamma & Ors. Vs. State of Karnataka & Ors. (2009) 5 SCC 591** observed that *It is true that the entries in the revenue record cannot create any title in respect of the land in dispute, but it certainly reflects as to who was in possession of the land in dispute on the date the name of that person had been entered in the revenue record.*

In view thereof, the position as regards the legal value of the mutation entries in the revenue records is a fairly well-settled position of law.

Difference between Khasra and Khatauni

While a particular piece of land is known through its Khasra number, the details of all the Khasras of a particular person or family is known as Khatauni. That way, a Khasra number is just a unit while a Khatauni is a record of several units.

Khatauni is a record of rights but Khasra itself is not a record-of-rights it is the foundation of the record-of-rights and the source of all agricultural statistics. It

contains all agricultural facts, such as crops, irrigation, etc. and also all facts required for the preparation of the khatauni, such as, names of tenure-holders.

Para A-55 of the Land Records Manual provides that "in order to maintain the map and khasra, the lekhpal shall make three field inspections of every village in his halka", but the new khatauni is prepared from the previous khatauni.

4. Jamabandi: -

Jamabandi is a legal document comprising the "Records of Rights" related to land and property holders. This document also contains entries related to the ownership details, cultivation information and the various rights granted to the property-holders or landowners of the estate. This legal framework was earlier prepared by an officially appointed Government officer known as Patwari and was later attested by the Revenue Officer designated to a particular village or district. However, with time, the Jamabandi process has also undergone evolution and since then provisions are made to prepare this legal document online.

Earlier, two copies of the Jamabandi was received from the land record's department. One was kept in the Government Office whereas the other with the Patwari. This was further revised and edited every five years. Getting hold of the Record of Rights was a very hectic procedure for landowners as it required going from desk to desk, seeking permission from various Government officials. Only then they were able to access information.

However, the online portal has eased the procedure as well as freed landowners from going through a hectic journey for accessing the Jamabandi documents. By simply following certain steps, landowners can now easily access the copy of the Record of Rights or the Jamabandi Nakal online.

5. Kisan Bahi: Kisan Bahi is a consolidated pass-book for all the holdings held by a tenure-holder in the district. Section 41 of Revenue Code and Rules 37 to 39 of Revenue Code Rules provide for preparation and distribution of Kisan Bahi to the tenure holders. Every Kisan Bahi referred to in section 41 shall contain (a) Name of the tenure-holder (with parentage and address) (b) If minor, age, his and guardian's name. (c) Details of all holdings held by the tenure-holder (with area and land revenue payable) (d) Whether the tenure-holder belongs to SC/ST/OBC. (e) Whether exempt from payment of land revenue.

A photograph of the tenure holder shall be pasted and attested by the issuing officer on the Kisan Bahi which shall be signed and dated by such officer. The Kisan Bahi shall also bear the thumb impression or signature of the tenure holder concerned.

Every person holding Kisan Bahi shall, from time to time, be entitled, without any extra payment, to get the amendments made in the record of rights (Khatauni) incorporated in his Kisan Bahi.

Whenever a bank or other public financial institution advances loan to a tenure holder on the basis of a representation of the tenure holder that he is a holder of the holdings recorded in the Kisan Bahi, it shall endorse the details of the loan so advanced in the Kisan Bahi.

The tenure holder shall also submit to such bank or other financial institution an affidavit declaring that he has not taken any other loan (which remains wholly or partly unpaid) on the security of the holdings comprised in the Kisan Bahi nor has he transferred the holding or any share therein to any person in any other manner whatsoever. Any tenure holder who in such an affidavit

makes any statement which is false and which he either knows or believes to be false or does not believe to be true, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

Such bank or other financial institution shall also endorse the final repayment of the loan on the Kisan Bahi.

Digitization of Revenue Records: -

Before the “Digital Land” initiative, all the revenue records were maintained manually. The manual records gave rise to data manipulations, for corrupt purposes, and led to lack of transparency in the whole process. It was difficult not only for a land holder but also for Advocates to get a certified and genuine copy of any revenue record.

“Digital Land” is a project conceived and implemented by the Government of Uttar Pradesh for Digitization of Land Records, with technical support of NIC UP State Centre, presenting a model of a paradigm shift from department centric closed approach to citizen centric open approach and a process-oriented system to a service-oriented system. It is an integrated and interoperable solution for extending e-Services related to rural land of Uttar Pradesh. It comprises of online web applications of Land Records, Revenue Court Cases, Bhu-Naksha (Digitized Cadastral Maps), Khasra (Field book with Crop details), Online Mutation (for recording Succession or Varasat) and Anti-Bhu-Mafia Portal (for action against land grabbers). All these applications have been integrated on a single platform and further integrated with/being utilized by applications of other departments like Registration (for sale/purchase of Land), Food and Civil Supplies (for Food grains Procurement), Agriculture (for Farmers' Loan Waiver Scheme, Soil testing, Agriculture Survey and Pradhan Mantri Kisan Samman Nidhi Yojna), Forest (for creating Land Bank and Compensatory forestation), CM Office (for review of public grievances - Jan Sunwai), e-District (for issue of solvency, income, domicile and caste certificates) and Banks/Financial Institutions (for recording mortgage etc.) through web services/user-login.

This huge and inter connected data generated in the applications of Digital Land project and the information based on this data is being made available online to the common public and other stakeholders through several points of online services including more than 85000 Common Service Centers and Lokvani Kendras. Apart from bringing transparency in the system, reduction in corruption and harassment of public, the “Digital Land” project is generating revenue of crores of rupees for the service providers as well as the Department through the distribution of digitally signed Khatauni (Record of Rights or RoRs). About one crore users are being benefitted with this e-Gov initiative every day. The project indeed has not only modernized the management and upkeep of Land Records but also had significant impact on litigation, disputes and related crimes and violence emanating from these land disputes.

In order to bring further transparency in respect of the Land Records, information about mortgage of land by Banks or Financial Institutions has also been put into public domain. As a result, any prospective buyer can also find out whether or not the land he proposes to purchase is mortgaged or not. As part of the “Digital land” project, the village maps have also been digitised and linked with the Khatauni (Record of Rights). Thus, on one click of mouse, a person can

see the exact location of any plot, find out its shape, area, ownership, category of land and also the details of the neighbouring plot owners, etc.

As the software of the Stamp and Registration department has been interlinked with the Bhulekh portal of “Digital Land”, it is now possible to block the fraudulent sale of lands belonging to non-transferable categories, e.g. Gaon Sabha land, patta land, ponds, pasture land, forest land or other public utility lands at the sale-purchase level itself. This has not only secured the precious public land but also curtailed future litigation and disputes. Many a times there used to be cases where fraudsters used to sell the same plot of land to more than one person and run away, while the various purchasers used to fight and litigate endlessly. Now that the Registration software has been interlinked with Bhulekh portal under “Digital Land” project, it is now possible to check online whether a particular plot of land has been sold/transferred previously and if so, then on which date, to whom and through which Registered document.

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Every entry in revenue record does not confer title on a person whose name appears in record of rights. Entries in the revenue record or Jamabandi have only fiscal purpose that is payment of land revenue, no ownership is conferred on the basis of such entries.

Suraj Bhan and others v. Financial Commissioners and others, (2007) 6 SCC 186

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CHAPTER-28

COMMISSION: OBJECTIVE, INSPECTION OF SITES AND PREPARATION OF REPORTS

The purpose of issuing commission by the court is to impart complete justice to the parties to the suit. The power of issuing commission rests totally in the discretion of the judges [Padam Sen v. State of UP, AIR 1961 SC 218]. By issuing a commission in a particular case, the Court performs an in - depth investigation where the Court deems necessary.

Issuing of Commission can be made by the Court if it gets an application from the parties, stating the necessity for the same or suo – moto. [**Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802**]

Sections 75 to 78 of the Code of Civil Procedure, 1908 speaks about the discretionary power of Civil Courts, Order 18 and Order 26 about procedure to issue commission for the furtherance of complete justice. According to Section 75 of the Code of Civil Procedure, 1908, the court may issue a commission for any of the following purposes:

- Examination of witnesses
- Perform a local investigation
- For adjustment of accounts
- To do a partition
- To hold investigation
- For conducting a sale
- For the performance of a ministerial act.

1. Examination of witnesses

Issuing of commission for the purpose of examination of witnesses is guided by Sections 76 to 78, Order 18 Rule 4 and by Rules 1 – 8 & Rule 16-18 of Order 26. Generally, the examination of witnesses is done in an open court. The evidence of the witnesses is recorded by cross - examination and recorded in the presence of all. However sometimes it may happen where the witness may not be able to come and appear in the court. The reasons for the inability to come to the Court must be reasonable.

The Court relaxes the rule of attendance in the Court and issues commission only if the Court finds that the reason for non - attending the court is justified. The reasons for non - attendance of the witnesses may be on the grounds of illness, or if the witness resides beyond the local limits of the jurisdiction of the Court or any other reasons as the Court may find sufficient. In the case of **Paramhansa Ramkrishna v. Trimbak Rajaram AIR 1978 Bom 176**, the court had issued a commission to record the evidence of the witness who was a Parmahansa. Parmahansa are people who practice various religious rituals and practices and due to which they remain and roam around naked.

Similarly in the case of **Vinayak Trading Co. v. Sham Sunder & Co. AIR 1987 AP 236** , the court had issued a commission for the recording of the statement of the witness, as the court had apprehended danger to the life of the witness if he is compelled to come to court.

Here it is also important to mention that the court can order to record statement of witness simultaneously by audio visual mode. In the case of Salem

Advocates Bar Association, T.N. v. Union of India (2003) 1 SCC 49, Hon'ble Supreme Court said that- "we may refer to Order 18 Rule 4(3), which provides that the evidence may be recorded either in writing or mechanically in the presence of the Judge or the Commissioner. The use of the word 'mechanically' indicates that the evidence can be recorded even with the help of the electronic media, audio or audio-visual, and in fact whenever the evidence is recorded by the Commissioner it will be advisable that there should be simultaneously at least an audio recording of the statement of the witnesses so as to obviate any controversy at a later stage."

However new advancement of science and technology permit officials of the Court, in the city where video conferencing is to take place, to record the evidence. Thus where a witness is willing to give evidence an official of the Court can be deputed to record evidence on commission by way of video-conferencing. State of Maharashtra v. Dr. Praful B. Desai, 2003 Supreme Court Cases (Cri) 815 = 2003 CRI.L.J.2033,

It is pertinent to mention here that Vide Noti. No. 1256/VII-Nyaya-2-2018-93G-2018, dated 14th August, 2018 Rule 35B has been inserted in General Rule (Civil) which provides that the Court may in the interest of Justice or for the expeditious disposal of the case or for any other reason which shall be recorded, in appropriate case may be record the statement of a person, party or witness, whose presence cannot easily be ensured into the Court or who is in the service of the Government, who cannot in the opinion of the Court attend, without detriment to the public service through video recording.

Procedure and Power of the commissioner for recording of evidence as provided in CPC are as follows-

O-18 Rule 4 (1)

(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court, shall be taken either by the Court or by the Commissioner appointed by it:

Provided that the Court may, while appointing a commission under this sub-rule, consider considering such relevant factors as it thinks fit.

(3) The Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.

(4) The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination:

Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments.

(5) The report of the Commissioner shall be submitted to the Court appointing the commission within sixty days from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this rule.

(7) The Court may by general or special order fix the amount to be paid as remuneration for the services of the Commissioner.

(8) The provisions of rules 16, 16A, 17 and 18 of Order XXVI, in so far as they are applicable, shall apply to the issue, execution and return of such commission under this rule.

ORDER XXVI Rule 1 to 8 and Rules 16 to 18 provides for examination of witness and power of the commissioner which are as follows: -

1. Cases in which Court may issue commission to examine witness.

Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it:

Provided that a commission for examination on interrogatories shall not be issued unless the Court, for reasons to be recorded, thinks it necessary so to do.

Explanation. —The Court may, for the purpose of this rule, accept a certificate purporting to be signed by a registered medical practitioner as evidence of the sickness or infirmity of any person, without calling the medical practitioner as a witness.

2. Order for commission.

An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

3. Where witness resides within Court's jurisdiction.

A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute it.

4. Persons for whose examination commission may issue.

(1) Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of—

(a) Any person resident beyond the local limits of its jurisdiction;

(b) Any person who is about to leave such limits before the date on which he is required to be examined in Court; and

(c) Any person in the service of the Government who cannot in the opinion of the Court, attend without detriment to the public service:

Provided that where, under Rule 19 of Order XVI, a person cannot be ordered to attend a Court in person, a commission shall be issued for his examination if his evidence is considered necessary in the interests of justice:

Provided further that a commission for examination of such person on interrogatories shall not be issued unless the Court, for reasons to be recorded, thinks it necessary so to do.

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

4A. Commission for examination of any person resident within the local limits of the jurisdiction of the Court. —Notwithstanding anything contained in these rules, any court may, in the interest of justice or for the expeditious disposal of the case or for any other reason, issue commission in any suit for the examination, on interrogatories or otherwise, of any person resident within the local limits of its jurisdiction, and the evidence so recorded shall be read in evidence.

5. Commission or request to examine witness not within India. —Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

6. Court to examine witness pursuant to Commission. —Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

7. Return of commission with depositions of witnesses. —Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the evidence taken under it shall subject to the provisions of rule 8 from part of the record of the suit.

8. When depositions may be read in evidence. —Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless—

- a. the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend, to be personally examined, or exempted from personal appearance in Court, or is a person in the service of the Government] who cannot, in the opinion of the Court, attend without detriment to the public service, or
- b. the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a) and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

16. Powers of commissioners.

Any commissioner appointed under this Order may, unless otherwise directed by the order of appointment, —

- a. examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;
- b. call for and examine documents and other things relevant to the subject of inquiry;
- c. at any reasonable time enter upon or into any land or building mentioned in the order.

16A. Questions objected to before the Commissioner. —(1) Where any question put to a witness is objected to by a party or his pleader in proceedings before a Commissioner appointed under this Order, the Commissioner shall take down the question, the answer, the objections and the name of the party or, as the case may be, the pleader so objecting :

Provided that the Commissioner shall not take down the answer to a question which is objected to on the ground of privilege but may continue with the examination of the witness, leaving the party to get the question of privilege decided by the Court, and, where the Court decides that there is no question of privilege, the witness may be recalled by the Commissioner and examined by him or the witness may be examined by the Court with regard to the question which was objected to on the ground of privilege.

(2) No answer taken down under sub-rule (1) shall be read as evidence in the suit except by the order of the Court.

17. Attendance and examination of witnesses before Commissioner.—(1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this Order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of India, and **for the purposes of this rule the Commissioner shall be deemed to be a Civil Court:**

[Provided that when the Commissioner is not a Judge of a Civil Court, he shall not be competent to impose penalties; but such penalties may be imposed on the application of such Commissioner by the Court by which the commission was issued.]

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits or whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.

18. Parties to appear before Commissioner. — (1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence.

2. Perform a local investigation

This is covered by Rules 9 and 10 of Order 26 of the Code of Civil Procedure. Courts can issue commission where it finds that there is a need to:

- To get a proper clarity regarding a matter in dispute; &
- To get a proper valuation of the property in dispute if any, or if any damages or mesne profits is involved in the claim of a suit, then finding the exact amount for the same.

The main reason to conduct a local investigation by issuing a commission is to find out the facts which would bring clarity and help the court in determining the case. The investigation is performed where the evidences are peculiar in nature and which can only be ascertained by visiting and investigating at the spot. In the case of **Southern Command Military Engg. Services Employees Coop. Credit Society v. V.K.K. Nambiar AIR 1988 SC 2126**, the court had to issue a commission to find out whether the tenants had really occupied the premises in dispute of the suit. This was a peculiar situation which can only be ascertained by visiting the place and conducting investigation.

Local investigation is most important because in most of the cases a commission for local investigation is issued. Rule 9 and 10 of Order 26 are exclusively devoted for local investigation and Rule 16 talks about power of Commissioner in this regard. Local investigation can be divided in two parts for better understanding.

1. Commission for simple measurement and status of disputed property.
2. Survey Commission

Commission for simple measurement and status of disputed property are often issued in Civil suits, but Survey Commission is issued for identification of land, boundaries and actual situation of disputed property by applying a scale of match between certified land revenue map (bandobasti naksha) and actual measurement of disputed property with the help of an expert survey commissioner. Rule 9 & 10 are being reproduced hereinafter-

“9. Commissions to make local investigations. —In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any manse profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

10. Procedure of Commissioner. — (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and depositions to be evidence in suit. Commissioner may be examined in person. —The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the

matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

Why the Survey Commission is required?

1. In a suit where identity of disputed property or land is in dispute, survey commission can help to identify the property.
2. In a suit where parties are claiming that the disputed property is situated in a land of their ownership, survey commission could be the best tool to find out the correct position of that property.
3. Where in any suit there is a dispute regarding boundaries of the land in dispute, this can only be solved by survey of their land.

When a serious dispute of identifying the land was involved, upholding the decree without properly identifying the disputed land by survey of commissioner was not proper. *Shreepat vs. Rajendra Prasad, 2000 (40) ALR 534 (SC)*.

What is necessary to mention in the Order for Local investigation?

Rule 68 of General Rule (Civil) provides that, when issuing a commission for making a local investigation under O. XXVI, r. 9 the Court shall define the points on which the Commissioner has to report. No point which can conveniently and ought to be substantiated by the parties by evidence at the trial shall be referred to the Commissioner.

It is pertinent to mention here the various circular Orders of Hon'ble High Court regarding Order for Commission for local investigation, which are as follows: -

1. C.L. No. 22/VIII h-13 dated 18th March, 1949

Immediately after the issues have been struck the presiding officer should consider, may be on an application by a party, if the preparation of a site plan or enquiry after local inspection at the spot is necessary for the proper decision of the case. The commission should as far as possible, be issued on that very day with clear and detailed directions to be recorded in the Judge's notes, as to what the commissioner is required to show in the plan and on what points he is required to make a specific report. If any witness is to be examined on commission the court may consider the issue of a commission, then and not postpone it till after the recording of the entire oral evidence.

2.C.L. No. 35/VIII-b-23 dated 15 March, 1971

Presiding Officers should mention the name of the commissioner at the time of passing order of issuing commission.

3. Adjustment of accounts

Rules 11 and 12 of Order 26 of the Code of Civil Procedure, 1908 guide the action of investigating by the Court by issuing a commission to examine and for the adjustment of accounts. The Court gives necessary instructions to the

commissioner and the reports provided by the Commissioner shall then be deemed to be evidence in the Court.

4. For Partition

This is guided by Rules 13 and 14 of Order 26 of Code of Civil Procedure, 1908. In this case, the Court issues a Commission when a preliminary decree of partition of an immovable property has been passed by the Court. The duty of the Commission is to make the partition according to the guidelines provided by the decree. The Commissioner then divides the property into the required number of parts and then allots the shares to the parties. After partitioning and allotting the parts of the property to the rightful owners, the Commissioner prepares a report and provides it to the Court. After allotting, if any party objects or is unsatisfied of something, the Court hears their objections and passes a final allotment decree. [Tushar Kanti v. Savitri Devi, AIR 1996 SC 2752]

5. To hold Investigation

Rule 10 - A of Order 26 of the Code of Civil Procedure, 1908 guides this cause of issuing a commission. When the Court finds that the issue of a case deals with any peculiar dispute which requires a scientific investigation and which cannot be successfully conducted in the Court premises, the Court issues a commission to investigate into the matter and inquires into the matter. This scientific investigation may include the opinion of hand writing expert or finger print expert.

6. To Sell the Property

This is guided by Rule 10 - C of Order 26 of the Code of Civil Procedure, 1908. The Court issues a commission when the Court requires selling a movable property on which the Court has custody and on which a case is pending. The selling of the property becomes necessary if the property cannot be properly preserved or if the court deems the selling necessary in the interest of justice. The Commissioner is directed to sell off the property and submit the report of the sale to the Court.

7. For the performance of a ministerial act

The statute guiding this is Rule 10-B of the Code of Civil Procedure, 1908. The Court issues a Commission when a requirement of the performance of a ministerial act comes. Ministerial Acts constitutes works like accounting, calculation and works of the same nature. The ministerial acts do not require the application of judicial mind and if done by the Court, it would lead to wastage of Court's precious time. The Court issues a commission who would perform all the ministerial acts as required and after completion the Commissioner shall provide the report to the Court. **Jagatbhai Punjabbhai Palkhiwala v. Vikrambhai Punjabbhai Palkiwala, AIR 1885 Guj. 34** The Commissioner does not perform any judicial acts and does only the ministerial acts for which the Commission had been issued by the Court.

Who may be appointed as Commissioner?

Rule 65 to 66 of General Rules (Civil) provides guidelines for appointing a commissioner for a particular purpose and other relevant rules regarding preparation of list and procedure thereof which are as follows: -

65. Commissions to be issued to whom.

1. A commission for the examination of any person including one or the administration of a special oath shall ordinarily be issued to a legal practitioner practising either before the Court issuing the commission or before the Court within whose jurisdiction the person resides. Such commissions may, if it is considered desirable, also be issued to a Court (not being a High Court) within the local limits of whose jurisdiction the person resides.
2. A commission for making a local investigation necessitating the taking of evidence shall ordinarily be issued to a legal practitioner, and in cases requiring some special and technical knowledge to a person possessing the necessary technical and special knowledge. A commission for local investigation not necessitating the taking of evidence may be issued to a legal practitioner or an Amin.
3. A commission to examine accounts may be issued to any person (including a legal practitioner) who is a competent accountant.
4. A commission for preparation of a map or to make partition shall ordinarily be issued to a Civil Court Amin. When it is impracticable, in consequence of temporary pressure of business or for some other good and sufficient reason, to have it executed by the Civil Court Amin, a commission may be issued to a qualified commissioner on the list of commissioners framed by the District Judge under Rule 66, G.R. (Civil).
5. A commission for ascertaining the sufficiency of any security or the means of a person seeking permission to sue as an indigent person **shall be issued to a Civil Court Amin, and only in exceptional cases to a legal practitioner on the list of Commissioners.**
6. A commission for conducting sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit **shall ordinarily be issued to a Civil Court Amin, and only in exceptional circumstances it shall be issued to an Advocate Commissioner.**
7. A commission to perform any ministerial act may be issued to an Advocate Commissioner.

C.L. No. 102/411-h-3 dated 2nd December, 1968

Strict compliance of Rule 65(4), General Rules (Civil) may be impressed upon the presiding officers so that commissions for preparation of a map or for making partition are ordinarily issued to Amins only in the first instance.

In the case of **Sarala Jain and ors. vs. Sangu Gangadhar and ors. 2016 (3) ALD 197**, Hon'ble High Court has held that, "to appoint an advocate commissioner, Court has to keep in mind the following:

1. Total pleadings of both parties;
2. Relief claimed in suit;
3. Appointment of advocate commissioner for specific purpose at interlocutory stage shall not amount to grant pre-trial decree; and
4. Necessity to appoint advocate commissioner to decide real controversy between parties.”

66. List of Commissioners

(1) Every District Judge shall maintain a separate list of legal practitioners for each revenue district and outlying Munsifi, authorized to execute commissions. The list shall be prepared by the District Judge in consultation with the Judicial Officers of each revenue district or outlying Munisifi, as the case may be. The list may be sub-divided into five parts, namely, (i) for accounts, (ii) for survey, (iii) for simple measurements where no survey is necessary, (iv) for service of injunction orders, stay orders or other notices, and (v) for recording of evidence and all other purposes. The number of Commissioners in each part shall be fixed by the District Judge.

Care should be taken to include in the list of Commissioners for accounts and survey only those lawyers who are well conversant with and experienced in such work but for commission in matters referred to in items (iii) and (iv) above, the names of junior lawyers should be included. For matters referred to in item (v) above, the names of lawyers with a minimum standing of two years and having fairly good experience of working in Courts (but not very senior lawyers) should be included in the list. In exceptional circumstances, however, and for reasons to be recorded even very senior lawyers may be appointed as Commissioners for recording evidence thought not included in list.

The list of Commissioners shall be maintained in the office of the District Judge at the headquarters and of the senior most Judicial Officer at other places, and all commissions issued shall be entered in it. Commissions shall be issued in strict order of rotation in respect of each part unless there are reasons to the contrary. No commission shall be issued to any person whose name is not entered in these lists except for special reasons. The lists shall be revised once a year.

(2) No commission shall issue to a Collector or to any officer subordinate to a Collector unless the consent of the Collector has been obtained previously. Munsarims, Nazirs, Copyists, Ahlmads, Pleaders' clerks and Petition-writers shall not be employed as Commissioners.

(3) The Court shall ordinarily require the party asking for the issue of a commission to deposit a fee (to be fixed by the Court) before the issue of the commission. The fee shall be fixed with due regard to the circumstances of the case and the status of the Commissioner.

Provided that for the services of an Amin to whom a commission for local investigation not necessitating the taking of evidence or for preparation of a map is issued, the Court shall require the party applying to pay a fee of Rs. 10 for each process in addition to the fee of Rs. 10 to cover traveling allowance of the Amin and his peon.

In the case of protracted investigation, which extends beyond the time originally calculated, the Court may suspend the commission until a further sum sufficient to cover the additional expense is paid into Court.

(4) For the remuneration of a legal practitioner to whom a Commission to examine a witness is issued, the Court should require the party applying to pay a

fee which shall be Rs. 30 for the first witness and Rs. 20 for each subsequent witnesses to be examined. If payment of higher fee than the above is necessary, the reasons thereof shall be recorded by the Presiding Officer of the Court issuing the Commission.

(5) Where a commission cannot be executed for reasons beyond the control of the Commissioner, the Court may order payment of such fees as may appear to be reasonable, with due regard to the time spent by the Commissioner.

G.L. No. 4386/89, dated 4th December, 1922

It is most important that District Judges should ascertain periodically the number of commissions issued by each court subordinate to them and see that there is a fair distribution of such work.

C.L. No. 52 dated 5th May, 1972

Names of only those persons should be entered in the list of survey commissioners under rule 66(1) General Rules (Civil) who possess a good knowledge of survey work and can make measurements properly. There should be no hesitation on the part of the presiding officers in recommending the removal of the name of a survey commission satisfactorily. In case survey cannot be done by the advocates or the Amins, there should be no hesitation in issuing the commission to a qualified person even though his name is not on the list.

C. L. No.58/2007Admin (D): Dated: 13.12.2007

Rule 66(1) of the General Rules (Civil) provides that every District Judge shall maintain a list of legal practitioners for each revenue District and outlying Munsifi, authorized to execute commission and such list shall be prepared by him in consultation with Judicial Officers of each revenue district and outlying Munsifi as the case may be. Such List may be Sub divided in 5 parts including that of Survey matter. An earlier issued C.L.No.52 dated 5th May 1972 provides that names of only such persons should be entered in the list of Survey Commissioners Under Rule 66(1) G.R.(Civil) who possess a good knowledge of Survey work and can make measurements properly. A need is felt by the Hon'ble Court that in more complicated cases involving survey work, the same should be performed by Qualified Engineers may be appointed who can be engaged by the party concerned. If an adequate fee is provided for the same. Qualified engineers for conducting survey work, with cost (here the fees of the Surveyor) to be borne by the party seeking relief of appointment of such surveyor.

Commissioner's responsibilities: -

According to Rule 71 of General Rules (Civil), a Commissioner shall in his report always give reasons or data on which he bases his opinion.

A Commissioner shall not issue copy of any map or report prepared by him or of evidence taken by him or of any portion thereof to any party.

Site Inspection and Preparation of Reports

For inspection of site it is essential for the commissioner, that as and when the commissioner reaches to the site, he will have to mark the place of action. It is necessary to mention which party is present on the occasion, who is absent and which party deliberately did not participate in the commission execution despite the information and at what time the commission of proceedings started? Identification of the disputed land by the parties and if the position of the disputed site is clear from the pleadings, then it should also be matched whether there is symmetry between the two or what is the difference between the two. After writing the action of commission it is essential to get the Signatures of the parties present or authorized advocates. It is necessary to take all the proceedings on the site. At the conclusion of the proceedings, it is more preferable to write a note below mentioning that the proceedings ended in the presence of the parties at such a time, facts are noted down as directed by the court, and facts referred by the parties or the allegation or things referred by the parties, Original rough copy of proceeding and field-book prepared on the site. It is better if signatures of the parties are taken again.

Before preparing a final field book it is always advisable that a raw field book should be prepared at the site and all measurements taken at the site and all proceedings must be entered in the raw field book and on the basis of this raw field book the final field book should be prepared.

Preparation of Site Map: The preparation of the map should be done by the commissioner carefully and clearly. The following things must be kept in mind by the commissioner while preparing the map -

1. The map should be clear and visible.
2. The map should be on a scale and the scale is mentioned at the bottom or part of the map.
3. As far as possible, only Conventional Signs should be used in the map.
4. The disputed land is clearly visible from a distance in the total map, for this it is necessary that even if there is no direction of the court, it should be displayed in red colour and after partition etc., the colours of all the parts should be done separately in the map.
5. It is necessary to have the symbol or index used in the map in the left part of the map.
6. The sign of four directions (north south east west) must be marked on the upper but right side of the map, so that it can be clear which direction is on which side? Mainly, the upper part of the map should be displayed from the north direction.
7. It is also necessary to mention the name of the court, the name of the parties and the number of case and the date of the action on commission in the map.
8. It must be written in the report that the attached map is a part of the report, only then that map can be read conveniently along with the report.
9. At the end of the map, the signature of the commissioner, the date of submission of the report should be mentioned.

After preparing the site map the commissioner shall proceed to prepare the final field book and report of commission proceeding done. Every report shall mention each and every point on which the court expected the report. It shall also include the statements of the parties present at the site and the analysis of the site-map and finding of the commissioner. After preparing the report the same shall be

submitted before the court well within the time fixed by the Court for commission report.

Timely execution of commissions:

1. Rule 69 of General Rules (Civil) provides that a reasonable time shall be fixed for execution of every commission and the Court shall see that it is executed within such time unless the Court for sufficient reason extends the time.
2. Hon'ble High Court issued a circular C.L. No. 110/VIII b-28 dated 24th October 1952, which says that-
“Presiding officers should be strict in demanding execution of commissions in time and in case a commissioner is found to be dilatory or his work is generally found to be unsatisfactory the question of omitting his name from the next year's list should be considered.”

Second Commission: -

G.L. No. 19/67 dated 1st May, 1929

A second commission should not be issued until good reasons are given for not accepting the first commission report. Once a second commission is issued the first commission goes out of the evidence entirely. No reference can afterwards be made to that first commission. If second commission is also found to be unsatisfactory, reasons should be given and that commission should also be taken out of the evidence. (Relevant passages from I.L.R. XLV Mad. 79, Judgment in S.A. no 671 of 1919 between K.K.M., Thottama and C.S. Subramanian)

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The object of local investigation under Order 26, Rule 9, C.P.C. is not so much to collect evidence which can be taken in court but to obtain evidence which from its very peculiar nature can only be had at the spot. Order 26, Rule 9. C.P.C. invests the court with a discretion in passing an order for the issue of a commission and does not provide for the presence of both parties when an order for the issue of commission is passed. There may be cases where the object of the issue of commission itself will be lost by ordering notice to the defendant before passing the order for the issue of commission. In emergent cases it is necessary for the court to pass an order issuing commission without ordering notice.

Amulya Kumar v. AnnadaCharan, AIR 1933 Cal 475

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Judicial Training and Research Institute, U.P., Lucknow



The Institute was established by the Government of Uttar Pradesh in pursuance of a decision taken at All India Conference of the Chief Justices of High Courts in August/September, 1985 in New Delhi. The institute has been established with the overall vision of ensuring ceaseless upgradation of skills and appropriate attitudinal reorientation through induction level and in-service training in consonance with the imperatives of national and global environment.

Judicial reasoning, indeed, is both an art and a science to be cultivated by every judge through study, reflection and hard work. The institute has a beautiful and big library housed into two spacious air-conditioned halls in the 'Training Wing' with one being dedicated to law books, law digest, encyclopedia, commentaries and general books including classics, biographies, fictions (Hindi and English both) memoirs, letters, speeches, words and phrases, books of philosophy, religion, history, politics, computer, management, personality development etc. and the other wing is exclusively meant for storing Journals. This centre of knowledge has more than **25000 books**. The institute has been subscribing **15 Law Journals** of varied nature, **seven newspapers** and **four magazines**. The library has All England Law Reports from 1936 to 2014, Halsbury's Laws of India from 2004 to 2008, Halsbury's Laws of England from 1973 to 1987 and Corpus Juris Secundum from Vol. 1 to 101A, Canadian Law reports, American Law Reports Annotated and Law Commission of India Reports. The institute is working on to develop e-knowledge hub and e-library in near future.

Keeping in view that in a healthy mind rests a healthy body, the institute has established and developed a gymnasium with latest equipments and machines. The physical training is compulsory part of the training programmes organized by the institute. The facilities of gym have been made available to the trainee officers as well as faculty members.

The Institute believes in continuous involvement of officers in sports activities to relieve the stress and keep them healthy. Besides Volley Ball and Carom, the hostel is also having Badminton Court as well as Table-tennis facilities. The hostel is fully furnished and equipped with the best house-keeping and hospitality facilities. The institute has a big air-conditioned Dining Hall with a dining capacity of about 150 persons at a time. The dining Hall is housed with the officers' hostel in one and the same building.