CRIMINAL MISCELLANY

Practice & Procedure

VOLUME - 1

Published by
Bihar Judicial Academy


Estd. 2002
तमसो मा ज्योतिर्गमय
BIHAR JUDICIAL ACADEMY

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BJA INTRODUCTION

Bihar Judicial Academy has been established on the recommendations of the Shetty Commission in order to impart training, inter alia, to Judicial Officers of the State for improving judicial administration and matters incidental thereto. The Bihar Judicial Officers Training Institute, now the 'Bihar Judicial Academy', was established in the year 2003. It has since been regularly organizing and conducting various educational / training programmes to enhance the professional and judicial capability of Judicial Officers and staff attached with the Court System of this State.

The New Campus of Bihar Judicial Academy is situated in an area of about 5 acres comprising Lecture Halls, Tutorial Halls, Conference Hall, Auditorium, Library, Judges' Hostel with 155 Hostel rooms for the participants and research scholars, V.I.P. Rooms and Suits, residential block, parking space, gardens etc.

Criminal Miscellany

Practice & Procedure

(In Two Volumes)

VOLUME - 1

Published by
Bihar Judicial Academy
Gulzarbagh, Patna - 800 007

EDITORIAL BOARD

Justice
N. V. Ramana
Chief Justice of India

MESSAGE

It gives me immense pleasure to congratulate the Bihar Judicial Academy, and all its members, officers and contributors, on having published the handbook named "Criminal Miscellany".

Criminal jurisprudence has numerous areas which are nascent in India and require extensive research, comparative analysis and rigorous academic treatment to ensure stability and growth in the same. As William Arthur Ward said, " Curiosity is the wick in the candle of learning".

I encourage each and every contributor to this endeavor, in publication of such a comprehensive study on diverging topics in criminal law, especially in the middle of these trying times. I hope this flame of curiosity and learning continues, and more such enlightening and resourceful articles and publication are curated in times to come.

N. V. Ramana

(N. V. Ramana)

Justice
A. M. Khanwilkar
Judge
Supreme Court of India

MESSAGE

In these times of the ongoing pandemic, we have witnessed some unprecedented challenges. With imposition of a nationwide lockdown, daily lives of large number of citizens were affected. Judiciary was no exception to that. In its initial phase, the lockdown had led to slowing down of working of courts pan India.

As Dalai Lama once said, *"Whenever there is a challenge, there is also an opportunity to face it, to demonstrate and develop our will and determination."*.

I congratulate Bihar Judicial Academy, who took this thoughtful initiative and converted the challenge posed by the contemporary situation into an opportunity, by encouraging the Judicial Officers of Bihar to utilize the time to research and articulate their work concerning topics of Criminal Laws.

This initiative of Bihar Judicial Academy, inevitably, provided opportunity to the Judicial Officers to refresh their knowledge and enhance forensic skills. That helped in keeping them motivated in the testing times when they were unable to discharge their regular judicial work, despite willing to do so.

I applaud the sincere efforts put in by the Judicial Officers who had voluntarily taken up the task of writing well researched treatises on the selected topics, which will not only be useful for the author, but also to others as a ready reckoner, for future reference.

I also commend the efforts of the Bihar Judicial Academy in compiling the papers written by the Judicial Officers in the form of a handbook, which is bound to encourage them to continue to write on other topics.

I wish all the best to the Bihar Judicial Academy, the Chairman and the Judicial Officers of Bihar for their future endeavours.

(A. M. Khanwilkar)

Dr Justice
D. Y. Chandrachud
Judge
Supreme Court of India

MESSAGE

My Dear Colleagues at the Bench,

I am delighted to pen this message in appreciation of your commendable endeavour. In the midst of a massive public health crisis, it is a challenge to retain a semblance of normalcy and routine. It is remarkable that my brothers and sisters at the bench took this disruption in their stride and put together a compilation with their learnings on diverse areas of criminal procedure. The duty of a judge is well-served on a robust foundation of experience, not just of their own- but of the entire judicial fraternity which bolsters knowledge and institutional development through channels such as these.

In these unprecedented times, irrespective of the nature of the emergency- public health, national or financial, the judiciary always has to be alive to issues of personal liberty. It is my firm belief that every judge, at the District Court, the High Court or the Supreme Court, can maintain their independence only by demonstrating a firm commitment to the rights and liberties of a citizen, against the might of the state. For any judge to do so, a robust command over the nitty-gritties of criminal law and awareness of the breadth of their powers, are critical. Some anecdotes of habeas corpus petitions from the emergency era are particularly illuminating. A flagrant abuse of state power was noticed at the time, especially in cases of preventive detention. The fear among the citizenry was also shared by judges who were suppressed and subject to punitive transfers. Inspite of

the overwhelming pressure from the executive, judges- particularly from the High Courts, found creative ways to ensure relief to the detenus. Even if bail could not be granted, some aspects of the detenus' lives were preserved by ensuring reading material, access to home food and sufficient visitors. Granville Austin, in his scholarly works on the Indian Constitution, recounted one such example where the court set the date of hearing of two different petitioners who were married on the same day, so that they were able to meet in the Bombay High Court. These reliefs could not have been structured without adequate practical knowledge of remands and discretionary powers.

In times of peace or crisis, a judge's foremost duty is to protect the life and liberty of a person, which is subject to the gravest threat during the criminal trial. A judge must necessarily be adept at all aspects of their duty to ensure the rights of persons, even for the smallest of functions- like summoning a witness, which is a critical cog in the criminal justice machinery. I am impressed by the scope of this compilation which traverses various stages and functions of the criminal process and communicates through accessible language that is grounded in experience. In the spirit of our continuing education, I would also urge my fellow judges to reflect and pen their thoughts on their experiences with criminal justice dispensation over the virtual forums, in this last year. Integrating our pre-existing systems with technology is the future of our justice system and the rights of all stakeholders could be well preserved by critical inputs from judicial officers. I look forward to perusing future publications from the Bihar Judicial Academy,

Best Wishes

Dhananjaya Chandrachud

[Dr Justice Dhananjaya Y. Chandrachud]

Justice
Sanjay Kishan Kaul
Judge
Supreme Court of India

MESSAGE

"Laws are a dead letter without courts to expound and define their true meaning and operation."—Alexander Hamilton

The objective and independent interpretation of the law is one of the courts' foremost duties. Without such interpretation, the gap between the letter of the law and justice cannot be bridged. This exercise takes on a more challenging form in the field of criminal law. While interpreting criminal law, a judge has to maintain a very fine balance between the rights of the accused and the wellbeing of society at large. Criminal procedure is to be seen both, as a shield - to protect those victimized - and also a sword - to hold perpetrators to account. This complex task has to be undertaken with utmost care and caution, and also with the stark awareness that often these penal laws can be utilized by those in power to silence voices; or can be circumvented by those with capital.

Judges have to stand in the way of such misuse of the law, and for that they have to be well versed not only with what the law says, but how it has been interpreted - and how it has to be applied. Each judge, from the Magistrate's Court to the Supreme Court, bears the responsibility of protecting the liberty of the one accused, and providing to the one victimized.

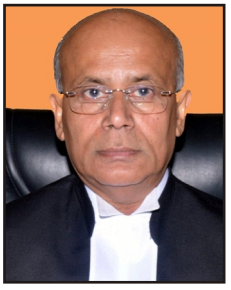
This thoughtful handbook, *Criminal Miscellany - Practice and Procedure* will be a critical instrument in the toolbox of judicial officers tasked with this herculean challenge. Unlike other textbook, it does not merely survey the sections of the

existing criminal laws, but tackles core issues that arise in the practice of criminal law from the Bench's perspective. It connects the letter of the law with precedents and with the best procedure to be adopted in order to operationalize criminal procedure in an optimum manner. I glean from this comprehensive compilation of 52 essays a set of legal and scholarly arguments and intimations.

Addressing *inter alia* the important fundamentals of remand of the accused, bail as a right versus bail on merits, production of the accused; emerging issues of assessing electronic and forensic evidence, compensation schemes for victims and in-camera trails, each section painstakingly reconstructs the legal position. Through its detailed yet concise treatment of these topics, the book will be both, a guiding light for those new to the Bench as well as a ready reference for experienced judges.

I congratulate the Bihar Judicial Academy for fostering, supporting and putting together this volume, and especially appreciate the judicial officers who, alongside grappling with the challenges of the pandemic and virtual courts, managed to put careful consideration and time into this handbook. I am certain that this will be a glowing addition to the libraries of many and set the right precedent for academic rigour in our Judicial Academies.

Sanjay Kishan Kaul
New Delhi



Justice
Navin Sinha
Judge
Supreme Court of India

MESSAGE

Dear Brother Singh,

I have glanced through the "Criminal Miscellany" prepared by the Bihar State Judicial Academy to enhance the legal skills and acumen of Judicial Officers. It is quite elaborate, informative and also provides guidance. I am very sure it will be immensely helpful to the Judicial Officers, especially the new entrants and even to refresh the thinking and doubts of the experienced.

The efforts put in by the Judicial Officers in contributing articles is indeed commendable. Such articles prepared by Judicial Officers not only are beneficial to the institution, but it also enhances the knowledge, skill, confidence and morale of the Judicial Officer himself who undoubtedly has to put in large research in preparing the article. Ultimately, it aids in dispensation of justice. It also motivates other Judicial Officers by example. Furthermore, it constitutes very good training material.

The initiative taken by the Academy under your guidance has to be appreciated, and I am sure that the Academy will organise more such events and programs to bring out the hidden talents of the Judicial Officers in the Bihar Judicial Service, which is best epitomised by the logo of the Academy quoting 'Tom Hopkins". Incidentally, I may mention that the quote was my contribution as the Chairman of the Academy on the launch of the website of the Academy.

With warm regards

Your sincerely.

(Navin Sinha)

Justice
Indira Banerjee
Judge
Supreme Court of India

MESSAGE

I congratulate the Bihar Judicial Academy for bringing out, "Criminal Miscellany: Practice and Procedure", a comprehensive ready reckoner, which covers the entire gamut of the law of criminal procedure succinctly, in a simple and lucid style.

I have cursorily perused the two volume publication, covering over 50 topic, ranging from First Information Reports and Complaints to the disposal of criminal cases, including criminal trial and sentencing principles. The work exhaustively covers the nitty-gritty of criminal procedural law including remand, bail, the securing of attendance and other core issues. Unlike usual handbooks, this publication does not simply extract and paraphrase the provision of statutes. The law has been well analysed with notable precedents. The discussion on trial and recording and appreciation of oral evidence, particularly the evidence of the child witness, the deaf and dumb witness, etc., the challenges of electronic evidence, the nuances in the law relating to confessions, dying declarations, expert opinions etc. as also relatively modern issues such as DNA analysis, Narco analysis, brain mapping and the like, makes this publication unique.

The publication will be a valuable addition to any law library and be of immense use to Judges of all Courts dealing with criminal matters, be it the Court of the Judicial Magistrate, the Session Court, the High Court or the Supreme Court, as also to students of law and lawyers, not only in Bihar, but all over the country.

Kudos to the initiators, exponents and the contributories of this two-volume work for their exemplary achievement in difficult time, when all attention was focused on coping with the challenges posed by the global Covid-19 pandemic, which had gripped our country. The publication is "worth its weight in gold" for the training of newly appointed Judicial officers as well as other crusaders of equal justice, attached to the authorities constituted under the Legal Services Authorities Act, 1987, zealously striving, whether as Counsel or as Amicus Curiae, to uphold the non-negotiable Fundamental Rights to Equality, Life and Personal Liberty, amongst other, specially of the marginalized and under-privileged sections of the society. The publication will certainly help enhance judicial excellence and expedite delivery of justice, so that the guilty are within a reasonable time frame, punished and the innocent are not arbitrarily deprived of freedom, or denied fair trial.

I wish the publication a grand success.

(Indira Banerjee)

Justice
Vineet Saran
Judge
Supreme Court of India

MESSAGE

It is heartening to know that Bihar Judicial Academy is contemplating to publish a handbook on Criminal Law, titled as "Criminal Miscellany".

It is extremely noteworthy that the judicial officers of the Bihar Judicial Academy used the lockdown period and came out with a very useful and informative work, which is the best example of turning bane into boon.

I have no doubt that this handbook will be immensely helpful for legal fraternity and will surely enhance their legal acumen. I congratulate the entire team for their sincere efforts in bringing out this handbook in an impressive manner and wish them all success in their future endeavour.

(Vineet Saran)

Justice
Hemant Gupta
Judge
Supreme Court of India

MESSAGE

The initiative of the Bihar Judicial Academy in publishing a handbook of Criminal Law called "Criminal Miscellany" is laudable. Accessible literature on criminal law is necessary to create awareness in the legal fraternity and general public alike though this Hand Book is designed particularly for the Judicial Officers.

Criminal Law in India requires reading of different laws in conjunction with each other. To top it, there are numerous new laws enacted and existing laws amended. Developing a concise handbook for easy reference by the judicial officers will be instrumental in saving time. Keeping up with changes in law and even recalling many judicial pronouncements is extremely important for Judicial Officers, this is where handbooks become of vital importance. A well drafted handbook can become an important piece of literature in a lawyer's arsenal. Legal education is an everlasting process, no matter how many years one spends in this profession, every day is a day to learn something new or recall something old.

It is a matter of pride that the Bihar Judicial Academy has put in the time to collate vast information and present it in an easily accessible format. The efforts of the members of the Bihar Judicial Academy will ultimately be beneficial to the entire legal fraternity.

Initiatives such as these ensure that the knowledge of law is consistently updated and kept in line with the objective of judicial academies of encouraging excellence in legal education.

I congratulate the Bihar Judicial Academy particularly the young energetic judicial officers who have developed this Hand Book. I hope that this would be used by the Judicial Officers in the Country as problems faced by them are common. I would like to add a caveat. The Judicial Officers should continue to update their legal knowledge and this Hand Book be taken as first step to administer justice to the thousand of suffering humanity who have faith in the administration of justice in our country.

(Hemant Gupta)

Justice
Dinesh Maheshwari
Judge
Supreme Court of India

MESSAGE

The pandemic and the measures taken to deal with the challenges thrown by it have indeed brought about a host of changes in the way we are now interacting with the environment, nature and, of course, with each other. The year 2020 has already redefined several of our ways of life and, even when the current likelihood of second wave is ringing alarm bells, humanity has come together to battle this virus while finding new ways to ensure sustenance as also growth. The norms of precautions and cautions have never stopped the equations of motion; we have found and shall keep on exploring new ways to study, play, plan and work. In this very sequence, Indian Judiciary, with its avowed objective of ensuring justice to all, has been tirelessly working to evolve the means and methods so that, even when people may not be accessible, justice remains so. We have rushed to make sure that the doors of Courts remain open, even when people need to shut theirs.

When attending on any challenging task, our officers of subordinate judiciary, obviously, deserve a special mention who not only form the foundation of the entire framework but who also incessantly attend on their duties with sheer dedication and commitment.

In the given backdrop, it has been a matter of immense satisfaction to learn that, even when the initial phases of this pandemic forced several callings to hunker down, the Bihar Judicial Academy made constructive use of time and endeavoured to up-skill their Judicial Officers by encouraging them to contribute write-ups on variegated topics pertaining to criminal justice delivery system. This

initiative by the Bihar Judicial Academy has resulted in as many as fifty-two insightfully detailed and delectably presented articles and research papers which are now proposed to be published as "Criminal Miscellany" in two volumes.

Having glanced through the compilation proposed to be published, I whole-heartedly compliment the learned Judicial Officers who have enriched themselves while preparing these articles/papers on mundane as also exotic areas of their own concern; and who have shared their hard work for the benefit of the other members of fraternity. This Miscellany, carrying wide range of topics on the law of criminal procedure and significant sub-topics related with taking and appreciating evidence, I am sure, shall be of immense utility for all the role-players in criminal justice delivery system.

I would not only anticipate this publication to be a great success but would add on to wish that this Miscellany be the foundation stone for many more utility publications of the like nature by the Bihar Judicial Academy.

(Dinesh Maheshwari)

Justice
Sanjiv Khanna
Judge
Supreme Court of India

MESSAGE

At the outset, I commend the Judicial Officers of Bihar for transforming times of *adversity,* such as this pandemic, into an *opportunity* for learning and sharing their wisdom with others. One thing that COVID-19 has impressed on us is the unceasing need for the legal fraternity to adapt, reform, and re-invent—and so must our knowledge base with the transient times. It was a pleasure to learn that the Officers have sought to refresh and enrich their skill through rigorous research, and robust communication – two pivotal aspects of our profession.

In any profession, and particularly in the legal realm, learning from peers – in the form of experiential channels of conferences, seminars, and court proceedings, as well as by means of sustained academic engagement – cannot be emphasised enough. When I ponder over the importance of continued learning and, more so, of gathering insight from varied sources, I am reminded of a verse from the Mahabharata which states that a fourth of our learning comes from the teacher, a fourth gathered with our own intelligence, another quarter of knowledge is obtained from peers, and the last portion is derived from time.

A robust peer-group is a catalyst for self-improvement. The spirit of competition that it instils propels us to polish our intelligence, awareness, and skills, and also prevents a sense of complacency from taking over. It affords us an opportunity to revise and rectify our notions and practices. It gives us an insight into how others think and grapple with the quandaries of law and society, in turn, teaching us the

best practices of the profession. Needless to say, sustained learning inculcates in us a sense of humility. And lastly, it also ensures that we preserve the much-glorified dynamism of the legal profession and do not fall into the depths of stagnation.

Academic literature of such value is a reflection of the traditions of Nalanda and Vikramshila, and this publication would further illuminate the same. I congratulate the Bihar Judicial Academy for taking the initiative to publish this handbook. I am certain it will encourage our judicial officers to further contribute to legal scholarship, and contribute in the development of a more erudite, zealous and humble professional community.

(Sanjiv Khanna)

Justice
Surya Kant
Judge
Supreme Court of India

MESSAGE

I am delighted to know about the proposed hand book - *"Criminal Miscellany"*, comprising articles authored by as many as fifty two Judicial officers of the State of Bihar. This comprehensive project in the middle of a devastating global pandemic, is an apt embodiment of the need of continuing legal education and the importance of good legal writing.

The hand book appears to be an absorbing work which collates both the existing jurisprudence surrounding various procedural aspects of criminal law and hopefully also explores the contemporary debates surrounding the rising role of electronic evidence and medical testimony.

Though the articles compiled in this hand book might be predominantly based upon the procedure and practice prevailing within the State of Bihar, yet the lessons gleaned in this compendium would no doubt be of tremendous use for the practitioners and students of law alike, throughout India.

This is the most opportune time to motivate the writers on the importance of art of legal writing. Of all the stakeholders within the legal system, legal writing is most critical for the judges. Unlike advocates and parties - who can rely upon oral advocacy, writing is the sole method of public communication for adjudicators. Words which might sound appropriate when spoken or mentally visualised often appear very different when penned down. Besides, a reader is a far more

intimidating critique than a listener, as he can read, re-read and analyse the written words with a toothcomb.

The language of the law, and particularly of judgements - must be accessible to litigants, and should communicate the point effectively. Judges must be consistent, holistic, and balanced in their writing - even at the cost of being monotonous.

The extensive efforts gone into the writing of this miscellany will surely enhance predictability, discipline and order. The present project would thus go a long way in nurturing the research and critical thinking capabilities of our judges, and must rightly be lauded.

(Surya Kant)

Justice
Aniruddha Bose
Judge
Supreme Court of India

MESSAGE

The publication of the handbook on Criminal Law by the Bihar Judicial Academy is a welcome step and I am sure this would be of great help to the Judicial Officers not only of the State of Bihar, but of other States and Union territories of our country as well. The handbook has been structured well and covers the procedural aspects of criminal jurisprudence exhaustively. The individual contributors of this volume and the Academy as the institution who have produced the same deserve commendation for this unique and innovative work. I hope there would be more works of this nature covering other areas of law from the Academy.

(Aniruddha Bose)

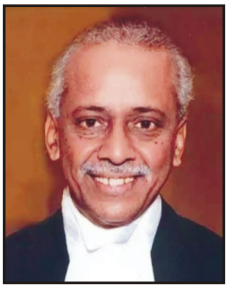
Justice
S. Ravindra Bhat
Judge
Supreme Court of India

MESSAGE

I have briefly glanced at the "Criminal Miscellany Practice and Procedure" published by the Bihar Judicial Academy. The title " Criminal Miscellany", to my mind, is misleading because the contents are completely comprehensive of the sheer breadth of the book's content. I notice that the work covers 52 distinct topic–comprehending almost all subjects of Criminal Procedure which are of common material significance to Judge entrusted with jurisdiction over the subject matter. Apart from the entire life cycle of a criminal proceeding–starting with the lodging of the FIR and ending with the judgement, other useful topics, such as procedure for electronic evidence, expert evidence, narco analysis, DNA tests, significance of expert evidence, evidentiary value with respect to the deposition of child witnesses, Court's powers under Section 165 Evidence Act, sentencing principles and other topics of special interest are dealt with.

I am confident that this two volume work will be of immense use to Judges and lawyers not only in Bihar but all over the country and would be a readily available reference material. I would wish the publication all the success.

(S. Ravindra Bhat)



Justice
V. Ramasubramanian
Judge
Supreme Court of India

MESSAGE

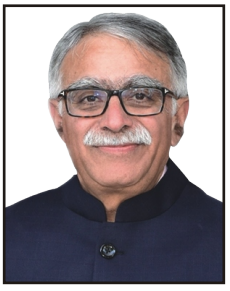
I am happy to see that the Judicial Officers of Bihar and the Bihar Judicial Academy have made good use of the lockdown to come up with the handbook ***"Criminal Miscellany"***. A look at the variety of topics on which the Judicial Officers have contributed articles and the contents of these articles show the prowess of the Judicial Officers and their academic bent of mind.

Life is a continuous process of learning. As Will Durant put it, *"education is the progressive discovery of one's own ignorance."* Such a realisation is a must for everyone and more particularly for Judicial Officers.

I am happy that under the stewardship of the Chief Justice Mr. Sanjay Karol and the Chairman of the Board of Governors of the Bihar Judicial Academy, a fruitful exercise was undertaken by the Judicial Officers under the able guidance of the Hon'ble Judges of the High Court.

I congratulate everyone of them for this great endeavour.

(V. Ramasubramanian)



सत्यमेव जयते

Justice
Sanjay Karol
Chief Justice
Patna High Court

MESSAGE

Knowledge is not a cloistered virtue; its object and beauty lie in its spread. It gives me immense pleasure to pen down this message to publish "Criminal Miscellany: Practice and Procedure" by the Bihar Judicial Academy, Patna. My compliments and accolades to Brother Justice Ashwani Kumar Singh, the sole architect of this enterprise.

Non-compliance with substantive and procedural laws has failed justice more often than not. The justice delivery system contemplated under India's Constitution and, more specifically, Article 39-A, should be not only just, fair, transparent but totally in accordance and in compliance with the rule of law. There are copious amounts of literature about the relationship between the rule of law and its relationship with substantive and procedural law. Still, as noted jurist Jeremy Waldron puts it, it is distressing how little attention is paid to the 'procedural aspects' of the rule of law instead of its substantive nature.

In the pursuit of justice, a common man is often left dazed and confused by the need to successfully navigate the various procedures laid down, before the aims and object expressed in the substantive law are achieved. The picture is no less good, even with the persons associated with the justice delivery system. It is with this attempt to simplify and explain with clarity, in a step by step manner, a big endeavour in the right direction stands taken by Brother Justice Ashwani Kumar

Singh, currently holding a dual charge of the Bihar Judicial Academy and the Juvenile Justice Secretariat of the Patna High Court.

The previous year on account of Pandemic COVID-19 has posed challenges and restrictions on one and all. To put this document together while dealing with the unique challenges that we have been facing is commendable. The Criminal Miscellany-Practice and Procedure is a document that may be used as a blue print for other laws and make access to justice a reality for all, as provided for in our Constitution. Only when we will take continued strides towards legal awareness will we be able to fully embrace the spirit of our founding document.

The Bihar Judicial Academy and the Juvenile Justice Secretariat to the Patna High Court have my heartiest congratulations for completing this mammoth task.

(Sanjay Karol)

Justice
Ashwani Kumar Singh
Judge
Patna High Court-cum-
Executive Chairman
Bihar State Legal Services Authority
Budh Marg, Patna

FOREWORD

The outbreak of the COVID-19 pandemic has shaken the entire globe with uncertainty looming large and has begotten unforeseen challenges and disquitening disturbances hugely disrupting our daily lives. It has led to a huge loss of human life worldwide and has presented an unprecedented challenge to the humanity.

The judiciary could not be an exception. Since the announcement of the national lockdown, the number of functional courts in our country was reduced to a minimum to deal with only urgent matters. Needless to say, the cascading effect caused by the pandemic and the consequent lockdown posed an arduous challenge to the judicial officers of the Bihar Judiciary as they were compelled to part with their daily routine of dispensing justice from the courtrooms. However, it also provided an opportunity to the judicial system to equip itself with modern tools and techniques and use them for rendering justice as far as it was practicable.

Albert Einstein rightly said, “In the middle of every difficulty lies opportunity”.The 'Criminal Miscellany – Practice & Procedure' in two volumes is a befitting example to vindicate what Einstein had said decades ago.

This pandemic has taught us all that mass hysteria, distress, loneliness and anxiety promote negativity, paranoia and fear, which could potentially be even more detrimental in the long run than the virus itself. In order to positively channelise these emotional reactions an idea had come in my mind of engaging judicial

officers in academic activities in addition to their daily court work so that they could worry less about things that were out of their control and shift their energies to what they could collectively create. In this regard, I also discussed with two judicial officers posted in the Patna High Court Registry namely Mr. Arun Kumar Jha, Registrar(Appointment) and Mr. Suvash Chandra Sharma, Additional Registrar, Juvenile Justice Secretariat, Patna High Court.

It was decided to invite articles from judicial officers willing to conduct in-depth research on various issues related to criminal law. Within a week, the topics were finalized and both these officers of registry had started interacting with the judicial officers posted in different judgeships for submissions of the articles on the topics assigned to them. Accordingly, all the topics were distributed amongst the willing judicial officers of different cadres posted at various places. This is how the journey of this 'Criminal Miscellany- Practice & Procedure' started. The judicial officers who took up the task of authoring submitted the articles in June 2020 and July 2020. The articles so submitted were noticed to be of immense utility in day to day functioning of not only the judicial officers but also to the lawyers, law students and litigants. Hence, an informal decision was taken to publish these articles in the form of a book that would serve as a guide and be of interest to all the stakeholders including the students of law.

Thereafter, a suggestion came from Mr. Suvash Chandra Sharma to get these articles scanned for plagiarism to ensure that they were original works before proceeding for its publication and offering it for public consumption. Accepting his suggestion, I requested the then Chairman of the Bihar Judicial Academy, Brother Justice Shivaji Pandey to utilize the facility available with the academy for obtaining a license of an authenticated plagiarism checker. As usual, his Lordship responded promptly by directing the Academy to immediately procure the software to verify the originality of the submissions. The articles were scanned for plagiarism and, thereafter, the reports were shared with the respective authors to cite appropriate references in their work, wherever required. By the end of January 2021, we had received the final drafts of the articles which were again reviewed.

With the change of time, I came to be nominated as Chairman of the Academy when I had the opportunity to discuss these developments with Hon'ble the Chief Justice, Mr. Sanjay Karol, for his guidance. His Lordship displayed keen interest,

encouraged the entire exercise and suggested posting of notice on the website of the Bihar Judicial Academy calling the judicial officers to submit articles on any of the shortlisted topics. Accordingly, the same was done and positively responded by two young probationer judicial officers. Subsequently, the issue of publication of the articles in the form of book was placed before the Board of Governors of the Bihar Judicial Academy, where it was unanimously approved. I pause here to express my deep gratitude to Hon'ble the Chief Justice who was kind enough to immediately approve the idea of publication of these articles in the form of a handbook and this 'Criminal Miscellany- Practice & Procedure' was sent for publication.

The contents of this handbook are under fifty-two heads relating to criminal trial and other incidental practice and procedure related to it. Under criminal law, the criminal proceedings are set in motion either by the institution of a First Information Report before police or by filing a criminal complaint case before a judicial magistrate. The topics were therefore selected starting from the summoning of an accused, their appearance, remand, bail, connotations of proper search and seizure, the release of property, sanction for prosecution, cognizance, dying declaration, test identification parade, confessions, the relevance of inquest and post-mortem report, framing of charge & discharge, disposal of cases without a full trial, methods of recording evidence, the conception of legal evidence, the jurisprudence of circumstantial evidence, expert's evidence, ocular evidence, sufficiency and quality of evidence, electronic evidence and its mode of proof, appreciation of evidence, the relevance of conduct of an accused during trial, non-examination of important witnesses and its consequences, presumptions in a criminal trial, aspects relating to 311 Cr. P.C and 319 of Cr. P.C., issues relating to criminal assault against women, scheme of compensation, sentencing policy etc.

When the book took its final shape, we perceived that there are still some untouched topics in criminal law that can be supplemented here. Therefore, we will use our best endeavours in the future to introduce the third volume of this 'Criminal Miscellany', wherein we will try to include those topics which could not be included in these two volumes.

During the preparation of both the volumes of this 'Criminal Miscellany- Practice & Procedure' the officers of Registry namely Mr. Arun Kumar Jha, Registrar

(Appointment); Mr. Suvash Chandra Sharma, Additional Registrar, Juvenile Justice Secretariat, Patna High Court and the Officers on Special Duty (OSDs) posted in the High Court namely Mr. Akshay Kumar Singh, Mr. Md. Rustam, Ms. Namita Singh and Mr. Saurabh Singh, Research Officer, Juvenile Justice Secretariat have extended their unwavering support. Besides them, the Officers of the Directorate of the Bihar Judicial Academy namely Mr. Jitendra Kumar, Former Director and Presently District & Sessions Judge, Gaya; Mr. Ankur Gupta, Deputy Director, Ms. Seema Kumari, Assistant Director (Research & Training) and Ms. Saba Alam, Assistant Director (Research & Training) have also co-operated to their best, especially for proofreading these articles. I am thankful to all these officers for bringing the idea of this handbook into a reality. My special thanks to all the judicial officers who submitted their articles during the lockdown period with minimum resources, giving their best to this project.

I firmly believe that this effort of the judicial officers of Bihar will facilitate peer to peer knowledge sharing and motivate them in future to take up assignments that would allow them to address complex legal issues and academic debates existing on such issues while enhancing their legal understanding.

Thank You!

Ashwani Kumar Singh

Justice
Vikash Jain
Judge
Patna High Court-cum-
Chairman
Bihar Judicial Academy

MESSAGE

"The life of the law has not been logic: it has been experience."

- Oliver Wendell Holmes, Jr., Justice of the United States Supreme Court

These words of wisdom by Justice Holmes spoken nearly a century and a half ago, ring true even today, in fact more so than ever before, due to the unprecedented situation of the pandemic we are faced with now. The law, as we know, is constantly evolving and adapting to the changes over time, and, as its guardians, we must not be restricted by cold logic alone, rather we must use our lived experience to ensure justice is delivered to all who seek it. The judiciary must fulfil its role as one of the pillars of democracy. This mandate has been given to the institution by the "Paramount Parchment", as Justice Krishna Iyer famously referred to our Constitution.

Changes in the law evolving from the experiences of no less than 52 judicial officers from various District Courts in Bihar have been encapsulated in this two-volume set entitled "Criminal Miscellany" running into over 1600 pages. This set of tomes is not just a random collection of articles, but one which enshrines knowledge gleaned over years of study, debate and learning. The thoughtful and well-curated selection touches upon almost all the aspects of criminal law, with special emphasis on criminal trial and ancillary proceedings. The process of criminal trials, beginning with the filing of a First Information Report or a criminal complaint, and leading up to the final disposal of the matter including sentencing

and compensation, has been duly incorporated. Having gone through the Criminal Miscellany the reader will emerge with a sense of deep fulfilment at having gained valuable knowledge and would come away much the wiser.

This comprehensive work will have great practical impact, serving as a beacon to guide judicial officers in discharge of their duty of dispensing justice. It will also, without doubt, serve as an indispensable ready reckoner for information about the stages of criminal trial, and as such, an invaluable resource for all those interested in the niceties of criminal procedural jurisprudence. Thus, it is bound to appeal to a large cross-section of the legal fraternity including judges, judicial officers, lawyers, academicians, researchers and law students alike. The compendium shall surely create a tremendous impact in the field of criminal jurisprudence.

All credit for conceptualising and bringing out the Criminal Miscellany unreservedly goes to Brother Justice Ashwani Kumar Singh, my predecessor as Chairman of the Judicial Academy and the driving force behind this project. His single minded determination and flawless execution of this vision has made this endeavour a grand success. The Judicial Officers who have eagerly contributed the articles, putting complete mind and soul into their work, deserve praise.

In conclusion, I quote the words of Lord Denning, "A country can put up with laws that are harsh or unfair so long as they are administered by just judges who can mitigate their harshness or alleviate their unfairness : but a country cannot long tolerate a legal system which does not give a fair trial". I do believe that not only are the laws fair and the judges just in our country, but also that our legal system gives a fair trial. The Criminal Miscellany goes a long way in strengthening this belief.

(Justice Vikash Jain)

Justice
A. P. Sahi
Director
National Judicial Academy

MESSAGE

Encouraging people to express themselves is to provide an opportunity to them to engage in a dialogue. The inevitable result is the shaping of ideas and shaving off of prejudices which is a step towards excellence and improvement of the quality of human life. The attempts made through this method in the manifestation of this "Criminal Miscellany" is an illustration of how success can be strengthened through improvisations and a better understanding of the system. It is said that there are too many slips between the trial lip and the appellate cup arising out of the shortfalls in investigations, the gap between direct evidence and oral testimony, the unwanted contradictions, the missing links and the tardy rigmaroles posed as obstructions by the members of the legal profession and then finally the conclusions drawn by the court amidst such diversions. Lack of infrastructure, expertise, adequate training and improper assessment are also attributes that delay the dispensation of justice. Non-cooperation of witnesses and a lethargic casual approach diminishes effectiveness qualitatively. On the other hand alert minds at all levels reduce the burden of procedural hiccups and the practical cognitive approach smoothens the process. A realistic outlook assists the power of reasoning to adopt a pragmatic view to realize the goal of justice.

This understanding of the system from different point of view helps in shedding off pretense, prejudices and ignorance because of the unique methodology deployed by obtaining independent opinion from across the judiciary on a voluntary willing basis. The consolidated views individually expresses a rainbow with many commonalities but with different impacts and reactions. Some of the suggestions

are rare and some are revolutionary. The system of getting together food for thought is unique as it will go a long way to keep one abreast of contemporary views for a better visionary approach for the future. It is the droplets that fill the urn. Even small ideas change civilization. The tool of imagination, coupled with experience can display a canvas of original ideas and that is what is evident from this beautiful anthology of practical legalistic thoughts.

The learning and experience of the Judicial Officers from the entire State Judiciary represented through 52 topics are illustrative of the qualitative contents thereof and also reflect the keen legal acumen of some of the best officers of the State. The meticulously detailed deliberations are a wonderful almanac for Judges and Lawyers alike so that none of them miss the finer points of trials covering criminal trials as proceedings involving civil disputes with criminal implication. It also boosts the confidence of officers engaged in this onerous job.

When I came to know of this unconventional method of collecting and collating views, I was also reminded of the importance of the procedure of trials and its impact on the proceedings, but more importantly the need to get feed-backs through staff meetings and meaningful inspections. An illustration of immaculate trial procedure is the case of Ajmal Kasab, that was complimented by the apex court reported in 2012(9) scc Page 1.

I take this opportunity to congratulate Justice Ashwani Kumar Singh and his entire team who mooted this idea and motivated young Judges of the subordinate judiciary to share their views so elaborately covering some substantial areas of procedure and short comings to be remedied through suggested ways.

I hope that this monumental compilation will be a source of judicial strength for all officers and the work shall be well received by all concerned to be preserved for posterity.

(Justice A. P. Sahi)

Jitendra Kumar
District & Sessions Judge,
Gaya
Former Director,
Bihar Judicial Academy

MESSAGE

District Judiciary is the backbone of our judicial system. The edifice of the administration of justice rests upon the shoulders of the district courts as most of the cases stand closed at their level with only few people affording to move higher and appellate courts.

Here it would be pertinent to quote legendary Justice V. R. Krishna Iyer who said, "The vast masses of the people cannot reach the highest court nor have easy access to the legislators. It is the court, the trial court, into which the common man can walk and seek justice. It is the trial court which dispenses justice to the little Indian and so, in the administration of justice, functionally speaking, pragmatic importance rests with the trial court. . ."

As such, there is onerous responsibility upon the District Judiciary to provide justice to the teeming millions by protecting their life, liberty, property and all other rights as granted and guaranteed by our constitution and the law of the land and such responsibility can get discharged only when the cases are not only "disposed of" but "decided" timely and qualitatively despite challenges of huge pendency of the cases.

The present handbook on Criminal Trial, namely, "Criminal Miscellany : Practice & Procedure", is a humble effort to provide timely and quality justice to the people. It is a compilation of the write-ups contributed by judicial officers of the state covering various facets of criminal trial with in-depth analysis of the statutory provisions and citation of various relevant case laws. I hope the handbook would contribute to the robust functioning of the district courts and prove to be an efficacious tool into the hands of the judicial officers to deliver timely and quality justice to the needy.

All the articles of the book have been written during the lockdown period arising out of the Covid-19 Pandemic. Hon'ble Mr. Justice Ashwani Kumar Singh, Judge of Patna High Court and Former Chairman of the Academy mooted the idea of the book for private circulation to utilize the time of the judicial officers and strengthen the district judiciary. His lordship kept the willing judicial officers motivating, inspiring and guiding throughout the period to complete their articles with quality and substance. The idea of the book was fully supported by Hon'ble the Chief Justice, Mr. Justice Sanjay Karol and all other Hon'ble judges of Patna High Court including Hon'ble Mr. Justice Vikash jain, Judge of Patna High Court and presently Chairman of the Academy in the interest of district judiciary. My sincere gratitude to their lordships.

With regards.

Jitendra Kumar

(Jitendra Kumar)

Alok Kumar Pandey
Director
Bihar Judicial Academy
Gaighat, Patna

MESSAGE

धीरज, धर्म, मित्र अरु नारी। आपद काल परखिए चारी।

The Covid-19 pandemic put to test the resilience of our Judicial system. When the life of the people was hit by Covid -19 pandemic, our Judicial system quickly adapted itself to ensure that the pandemic does not deprive the people of access to Justice. *Criminal Miscellany: Practice and Procedure* was one of the ways by which Bihar Judicial Academy, under the guidance of Hon'ble Patna High Court, tapped the potential of judicial officers of the state by inviting them to research on 52 topics covering diverse aspects of criminal trial.

The Academy is a melting pot where ideas converge and experiences are shared. In this process the seminal contributions of distinguished authors which were curated in *Criminal Miscellany : Practice and Procedure* will forever act as pole star for travelers in pursuit of knowledge.The seminal contributions are embodiment of erudition, experience and energy.

I am reminded of Gurudev Rabindranath Tagore's quote “Faith is the bird that fills the light and sings when dawn is still dark.” The pandemic which stirred unbearable pain from plain to plateau could not deter the Pen, human courage and indomitable will of mankind. The active participation of judicial officers in preparing criminal miscellany during Covid period is a classical example of this indomitable spirit.

Once Pablo Picasso said, "I am always doing that which I cannot do, in order that I may learn how to do it." A director of an Academic institution is always duty bound to learn the ropes, and in the process he becomes a weaver, a charioteer. This handbook presented me with an opportunity to play this role to the best of my

capabilities for which I am thankful to all the officers who have contributed their write-ups for the book. The comprehensively discussed topics will immensely benefit all judicial officers in their discharge of duty.

The last spurt in a sprint is the most vital. I will be forever indebted to Hon'ble Mr. Justice Vikash Jain, Judge Patna High Court cum Chairman Bihar Judicial Academy for graciously taking forward the task of giving final shape to the book and for guiding me in its publication.

I would also like to express my sincere gratitude to Hon'ble Mr. Justice Ashwani Kumar Singh, Judge, Patna High Court cum Former Chairman, Bihar Judicial Academy who conceptualized the idea of the book and motivated the officers to contribute to this seminal work. His Lordship was gracious enough to recommend that the Handbook be made available to all the stakeholders, be it Judicial officers, Advocate or common man. His Lordship personally guided everyone involved in the publication of the book at every step for which we will be eternally grateful.

This endeavour could not have been made a reality without the constant support and blessings of Hon'ble Mr. Justice Sanjay Karol, Chief Justice Patna High Court cum patron in Chief, Bihar Judicial Academy. We were also blessed with guidance of all the Hon'ble Judges of Patna High Court in publication of this book for which we are indebted to Their Lordships.

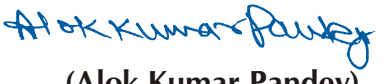
We have been privileged enough that our humble endeavour was blessed by the thoughtful message of Hon'ble Mr. Justice NV Ramana, The Chief Justice of India. His Lordship's message has turned this book into a legacy to be cherished forever.

We are highly obliged to Hon'ble judges of Supreme Court-, Hon'ble. Mr. Justice A. M. Khanwilkar, Hon'ble Mr. Justice DY Chandrachud, Hon'ble Mr. Justice Sanjay Kishan Kaul, Hon'ble Mr. Justice Navin Sinha, Hon'ble Justice Ms. Indira Banerjee, Hon'ble Mr. Justice Vineet Saran, Hon'ble Mr. Justice Hemant Gupta, Hon'ble Mr. Justice Dinesh Maheshwari, Hon'ble Mr. Justice Sanjiv Khanna, Hon'ble Mr. Justice Surya Kant, Hon'ble Mr. Justice Aniruddha Bose, Hon'ble Mr. Justice S. Ravindra Bhat and Hon'ble Mr. Justice V. Ramasubramanian for their precious messages. I am also thankful to Hon'ble Mr. Justice Sanjay Karol, the Chief Justice, Patna High Court, for blessing us with his encouraging message. I also extend my gratitude to Hon'ble Mr. Justice Ashwani Kumar Singh for his enlightening foreword, covering the journey of Criminal Miscellany from inception to publication. I also extend my regards and gratitude to Hon'ble the

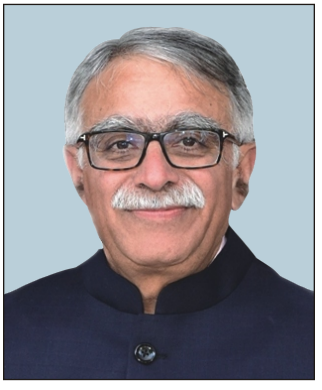
Chairman of Bihar Judicial Academy, Hon'ble Mr. Justice Vikash Jain for His Lordship's magnanimous words in the form of message. Hon'ble former Director of National Judicial Academy, Hon'ble Mr. Justice Amreshwar Pratap Sahi, former Chief Justice of Patna High Court and Madras High Court has also blessed us by his Lordships's message. The messages and forewords of Their Lordships would go a long way to motivate and inspire the Bihar Judicial Academy and Judicial Officers of the state to come up with further works of similar nature. The messages and the foreword are an invaluable addition to the book and I am sure they would be cherished by the readers for their illuminating and enlightening content.

My sincere thanks also goes to my predecessor Shri Jitendra Kumar, District Judge Gaya and former director of Bihar Judicial academy. My sincere and special thanks also goes to all the judicial officers who have written their articles to the benefits of their fellow judicial officers and the people at large. The editorial board specially constituted for publication of the Handbook also deserves thanks and appreciation for editing and proofreading the articles. I also thank the staff of the Academy for their contribution in their own way.

Thanks & Regards



(Alok Kumar Pandey)



Hon'ble Mr. Justice
Sanjay Karol
Chief Justice, Patna High Court

Hon'ble Mr. Justice
Ashwani Kumar Singh
Judge, Patna High Court

Hon'ble Mr. Justice
Vikash Jain
Judge, Patna High Court

Hon'ble Mr. Justice
Ahsanuddin Amanullah
Judge, Patna High Court

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Rajendra Kumar Mishra
Judge, Patna High Court

Hon'ble Mr. Justice
Chakradhari Sharan Singh
Judge, Patna High Court

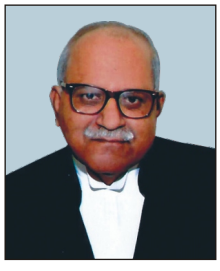
Hon'ble Mr. Justice
Prabhat Kumar Jha
Judge, Patna High Court

Hon'ble Mr. Justice
Ashutosh Kumar
Judge, Patna High Court

Hon'ble Mr. Justice
Sudhir Singh
Judge, Patna High Court

Hon'ble Mr. Justice
Birendra Kumar
Judge, Patna High Court

Hon'ble Mr. Justice
Arvind Srivastava
Judge, Patna High Court

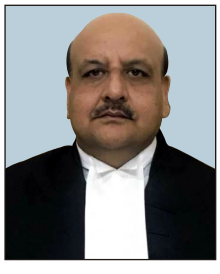


Hon'ble Mr. Justice
Anil Kumar Upadhyay
Judge, Patna High Court

Hon'ble Mr. Justice
Rajeev Ranjan Prasad
Judge, Patna High Court

Hon'ble Mr. Justice
Sanjay Kumar
Judge, Patna High Court

Hon'ble Mr. Justice
Madhuresh Prasad
Judge, Patna High Court



Hon'ble Mr. Justice
Mohit Kumar Shah
Judge, Patna High Court

Hon'ble Mr. Justice
Anjani Kumar Sharan
Judge, Patna High Court

Hon'ble Mr. Justice
Anil Kumar Sinha
Judge, Patna High Court

Hon'ble Mr. Justice
Prabhat Kumar Singh
Judge, Patna High Court

Hon'ble Mr. Justice
Partha Sarthy
Judge, Patna High Court

Knowledge is Supreme treasure among all wealths

न चोरहार्यम् न च राजहार्यम्,
न भ्रातृभाज्यम् न च भारकारि।
व्यये कृते वर्धते एव नित्यम्,
विद्याधनं सर्वधन प्रधानम् ।।

सुभाषितानी

Neither thief can steal supreme bliss i.e knowledge,
Nor Sovereign power can confiscate the same.
Neither it is divisible, nor same is burdensome.
It gets augmented regularly with sharing.
Knowledge is supreme treasure among all wealths.

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Topic No. – 01

Summoning of the Accused in Complaint Cases: Principle, Practice & Precautions.

By

Sri Pranaw Shankar,

Bihar Superior Judicial Services

Secretary, District Legal Services Authority

Aurangabad.

Sri Pranaw Shankar,

Secretary, District Legal Services Authority, Aurangabad.

Topic : Summoning of the Accused in a Complaint Cases: Principle, Practice & Precautions.

TABLE OF CONTENT

SUMMONING OF THE ACCUSED IN COMPLAINT CASES: PRINCIPLE, PRACTICE, & PRECAUTIONS.

Introduction

The criminal trial is central to the institutional framework of criminal justice. It provides the procedural link between crime and punishment, and is the forum in which both guilt and innocence and sentence are determined.* Directing a person to face the trial is an infraction of his liberty of the highest order. Reputation of a person, wrongly summoned to face criminal trial in court of law, is marred beyond repair. Being wrongfully accused of criminal offences can lead to serious negative consequences to those wrongfully accused and their families. False cases may lead to ruined careers, damage to their families, and experience of a mental trauma outlasting their sometimes brief encounters with the criminal justice system. So the courts must tread with great caution when asking a person to face trial. But at the same time, the court must also ensure that the caution is not carried too far and the guilty are spared the rod of criminal trial.

Code of criminal procedure, 1973 (CrPC) provides wide discretion to the court either to summon or not an accused. The CrPC along-with Criminal Court Rules of the High Court of Judicature at Patna [GRCO (Cri.)] lays down the statutory provision governing the procedural aspect of summoning an accused in a complaint case in the state of Bihar. Apart from these general statutory provisions, there are special laws that regulate the proceeding as respect their area of operation of law.

If we go through the CrPC, we find that broadly there are 3 different stages in the trial of a criminal case, first, when the accused is summoned under section 204 of the CrPC, second is at the stage of framing of charge, and third is at the stage when the evidence has been recorded and the guilt or not of the accused is to be decided.

The standard of assessing the material and the evidence against the accused at different stages of criminal trial is different. The difference can be perceived from the language of the sections. Also, the constitutional courts have highlighted the differences from time to time. Our criminal Justice system envisages three modes of initiation of criminal proceedings. First, by filing of a police case, second, by lodging a complaint before the magistrate, and third, suo moto initiation of proceedings by the magistrate on his own knowledge.

Before we enter into the detailed discussion of the laws involved in the summoning of the accused in complaint cases, and its related principles, its essential to understand few key words and concepts relating to them.

Some Important Terms

The word, complaint, is used here in contradistinction to police case or the other mode of

* The Trial on Trial, Vol. 1, Truth and Due Process. Hat Publication, 2004 ed.

initiation of criminal case. The term "complaint" is defined in section 2(d) of the Code of criminal Procedure (CrPC) as: S. 2(d) *"complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.*

***Explanation.**—A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;*

Thus the word complaint means any allegation, whether oral or written, preferred before the magistrate for the purpose of trial or further proceeding as per the law. The explanation expands the meaning of the term "complaint" to include such cases also, which after investigation, is found to contain material that is non-cognizable. There is no particular format of a complaint. A petition addressed to the magistrate containing an allegation that an offence has been committed, and ending with a prayer that the culprits be suitably dealt with, as in the instant case, is a complaint.i

We then come across the term "Summon" or "summoning". The terms summon has been elaborated by the Supreme Court in **Bhushan Kumar v. State (NCT of Delhi), (2012) 5 SCC 424** where it was observed in para-12:—

> *"12. A "summons" is a process issued by a court calling upon a person to appear before a Magistrate. It is used for the purpose of notifying an individual of his legal obligation to appear before the Magistrate as a response to violation of law. In other words, the summons will announce to the person to whom it is directed that a legal proceeding has been started against that person and the date and time on which the person must appear in court. A person who is summoned is legally bound to appear before the court on the given date and time. Wilful disobedience is liable to be punished under Section 174 IPC. It is a ground for contempt of court."*

With the vital terms used in this article defined, now we can move to core of the article

Stages of Complaint, and Options on filing of complaint:

Generally, when a complaint is filed before the magistrate, the magistrate has 3 options available with him. After going through the contents of the complaint, either oral or in writing, the magistrate may adopt either of these three options:

Private Complaint	1	Send the complaint to the Police U/s 156(3) CrPC
	2	Take Cognizance, and proceed for inquiry U/s 200 Cr.P.C.
	3	If the complaint discloses no offence then dismiss the complaint before taking Cognizance. **[As per Para-21 of Mehmood Ul Rahman Vs. Khizur Md. Tunda (2015) 12 SCC 420]**

Of the three options mentioned above, we will deal with the second option, in detail, i.e. when the court decides to take cognizance and decides to proceed under chapter XV of the

CrPC. Dealing with the issue, the Supreme Court in **Tula Ram v. Kishore Singh, (1977) 4 SCC 459** and later in **Madhao v. State of Maharashtra, (2013) 5 SCC 615** held that in case where a Magistrate chooses to take cognizance he can adopt any of the following alternatives:—

(a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightaway issue process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.

(b) The Magistrate can postpone the issue of process and direct an enquiry by himself.

(c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police.

In the coming stage, we will look into the purpose of the inquiry, the methods to be adopted during inquiry, and also the standards to be adopted while summoning the accused or dismissing the complaint. Before we proceed to the heart or the core of subject matter of the article, it is imperative that we discuss the statutory provisions and the general guiding principles governing the inquiry of complaint cases.

PRACTICE PREVALENT IN BIHAR

Complaint cases constitute a major part of the criminal cases pending and filed in the criminal courts. Roughly about 30% of the criminal case is filed by that method. The practice prevalent here in the state of Bihar is that the complaint are filed centrally in the office of the CJM. Upon filing, the details of the complaint are entered in the complaint register and a number is supplied to it. Nowadays CIS number is also added. Thereafter, the complaint is sent to the concerned magistrate who is empowered to take cognizance. There the magistrate goes through the content of the complaint to decide whether to proceed under chapter XV of the CrPC or to send it to the police under section 156(3) of the CrPC. If the court proceeds under chapter XV then normally a date is fixed for the S/A of the complainant, and thereafter the other witnesses of the complainant are examined. In some cases, the court also directs investigation by the police and in few cases, also by other authorities. After enquiry, the court decides on the summoning of the accused.

The standards for summoning while being the same, there is difference between different courts on the interpretation of the expression, 'sufficiency of material'. Some courts construe the word liberally and summon accused while others scrutinies the material with greater caution.

Having seen the general practice as adopted in the state of Bihar, we will now advert to the law of summoning the accused, in a complaint case. While doing so, I will also look at the related matter, for a complete view of the subject.

Difference between taking of cognizance and summoning of an accused in a complaint case.

When dealing with complaint cases, often the term *cognizance* and *summoning* are used

interchangeably. But are these terms same or are they different? For this we will look at the provision relating to the cognizance of complaint case. Criminal trials start after cognizance of an offence. Though the word "Cognizance" is much used term but it is equally the most misunderstood word. In its simplest meaning, cognizance means "taking of judicial notice".

As per section 190 of the CrPC, the court of Magistrate can take cognizance in three ways:

1. Receiving a Complaint, either written or oral constituting an offence [S. 190(1)(a)];
2. On Police Report [S. 190(1)(b)];
3. On his own knowledge or upon information received by person other than police [S. 190(1)(c)].

Here, we are concerned with the first variant, i.e. Private Complaint, mentioned under section 190(1)(a) of the CrPC. The other two modes are not within the scope of this article.

Here, we can also go through the provisions of section 200 of the CrPC, for our benefit, which reads: "S. 200 – *Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, . . .*"

So, a bare reading of the section 190(1)(a), section 200 and 202 of the CrPC shows that after taking of cognizance, the court needs to examine the complainant, and its witnesses, except under 2 conditions, mentioned in the section.

In the case of **Bhushan Kumar v. State (NCT of Delhi), (2012) 5 SCC 424,** the Hon'ble Supreme Court quoted with approval the following observation:—

> *"11. In Chief Enforcement Officer v. Videocon International Ltd., (2008) 2 SCC 492 : (SCC p. 499, para 19) the expression "cognizance" was explained by this Court as "it merely means 'become aware of' and when used with reference to a court or a Judge, it connotes 'to take notice of judicially'. It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone.' It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons. Under Section 190 of the Code, it is the application of judicial mind to the averments in the complaint that constitutes cognizance. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. If there is sufficient ground for proceeding then the Magistrate is empowered for issuance of process under Section 204 of the Code."*

The Supreme court in **Sunil Bharti Mittal v. CBI, (2015) 4 SCC 609** differentiated

between taking of cognizance and proceeding further. While marking the difference, the court held:—

> *"49. Cognizance of an offence and prosecution of an offender are two different things. Section 190 of the Code empowered taking cognizance of an offence and not to deal with offenders. Therefore, cognizance can be taken even if offender is not known or named when the complaint is filed or FIR registered. Their names may transpire during investigation or afterwards."*

So a conspectus of the case-laws discussed above leads to an irrefutable conclusion that taking of cognizance in a complaint case is totally different from summoning an accused. Also the taking of cognizance in an offence depends upon the offences alleged, and also the provisions in chapter XIV of the CrPC. It is also clear that the standards for taking cognizance and summoning an accused are also different. And that there must be no confusion between the two.

The purpose of inquiry under Chapter-XV of CrPC:

The proceedings under chapter XV of the code of criminal procedure, titled "complaints to magistrates", extend from section 200 to 203. The chapter deals with the inquiry of complaint filed before the court of magistrate. A look at the section 200, 202, and 203 of the CrPC appears essential before we plunge into the discussion. It is so because, the inquiry and all further actions in relation to complaint will be governed by these sections.

Section 200. Examination of complainant.—A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate: Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or- purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re- examine them.

Section 202 Postponement of issue of process.—(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,-- (a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub- section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath: Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub- section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer- in-charge of a police station except the power to arrest without warrant.

203. Dismissal of complaint.—If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

The basic purpose of the inquiry is to ascertain and find out from the material submitted before the court whether there is sufficient material to summon the accused. The purpose of the inquiry is also to ensure that the liberty of an individual is not lightly interfered and that the innocents are not harassed unnecessarily. The examination of the complainant and his witnesses, and also the provision to make an inquiry by other authority is a tool in the hand of the magistrate to ensure that false and vexatious proceedings are not carried any further. A look at the relevant case-laws would buttress the point.

In the celebrated case of **Chandra Deo Singh vs. Prokash Chandra Bose AIR 1963 SC 1430,** the Supreme Court discussed the scope of enquiry under section 202 of the CrPC as follows:—

> *". . . No doubt, one of the objects behind the provisions of s. 202, Cr.P.C. is to enable the Magistrate to scrutinise carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an obviously frivolous complaint. But there is also another object behind this provision and it is to find out what material there is to support the allegations made in the complaint. It is the bounden duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made. . . "*

Re-iterating the thoughts as put in the case of **Chandra Prakash Bose case** *(supra)*, the

Supreme Court in **Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi (1976) 3 SCC 736,** laid down the following dictum on the scope of enquiry under section 200 CrPC:—

> *"4. It would thus be clear from the two decisions of this Courtiii that the scope of the inquiry under Sections 202 of the Codes of Criminal Procedure is extremely limited--limited only to the ascertainment of the truth or falsehood, of the allegations made in the complaint on the materials placed by the complaint before the Court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. .."*

The Hon'ble Supreme Court in **Birla Corporation Limited vs. Adventz Investments and Holdings Limited (2019) 16 SCC 610** while explaining the purpose of inquiry under chapter XV of the Code held as follows:—

> *"27. The scope of enquiry under this Section is extremely restricted only to finding out the truth or otherwise of the allegations made in the complaint in order to determine whether process should be issued or not Under Section 204 Code of Criminal Procedure or whether the complaint should be dismissed by resorting to Section 203 Code of Criminal Procedure on the footing that there is no sufficient ground for proceeding on the basis of the statements of the Complainant and of his witnesses, if any. . ." [See also Para 12 of* ***Mohinder Singh vs. Gulwant Singh (1992) 2 SCC 213]***

In **National Bank of Oman v. Barakara Abdul Aziz: (2013) 2 SCC 488,** the Supreme Court explained the scope of enquiry, in detail, and held as under:—

> *"9. . . .The scope of enquiry under this Section is restricted only to find out the truth or otherwise of the allegations made in the complaint in order to determine whether process has to be issued or not. Investigation Under Section 202 Code of Criminal Procedure is different from the investigation contemplated in Section 156 as it is only for holding the Magistrate to decide whether or not there is sufficient ground for him to proceed further. The scope of enquiry Under Section 202 Code of Criminal Procedure is, therefore, limited to the ascertainment of truth or falsehood of the allegations made in the complaint:*
>
> *(i) on the materials placed by the Complainant before the court;*
>
> *(ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and*
>
> *(iii) for deciding the question purely from the point of view of the Complainant without at all adverting to any defence that the Accused may have."*

A perusal of the above case-laws, along-with a long line of decided cases suggests that the

judicial view on the purpose of the enquiry as stipulated under section 200 and 202 of the CrPC is almost crytallised. And the view is that the enquiry u/s 202 of the CrPC is for the limited purpose to find the truthfulness or otherwise of the allegations made in the complaint, either, oral or written. The enquiry can never partake the character of full fledged trial.

LOCUS OF THE ACCUSED TO PARTICIPATE IN THE ENQUIRY:

A related but important question often comes before the court, as to the right of the accused named in the complaint to participate in the enquiry under section 200 or 202 of the CrPC. Enquiry under chapter XV of the code is conducted by the courts on the complaint made by the complainant.

The question that whether an accused has right to participate in the enquiry under section 200 or 202 of the CrPC arose in the leading case of **Chandra Deo Singh vs. Prokash Chandra Bose, AIR 1963 SC 1430.** A 4-Judge bench of the Supreme Court considered the question, in detail, and held as follows:—

- An accused may remain present, either in person or through a counsel or agent, with a view to be informed of what is going on. But he has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so.

- The Magistrate cannot put any question to the complainant's witnesses at the instance of the person named as accused but against whom process has not been issued; nor can the magistrate examine any witnesses at the instance of such a person.

In **Nagawwa vs. Veeranna Shivalingappa Konjalgi (1976) 3 SCC 736,** the Supreme Court held as follows:—

> *"In fact it is well settled that in proceedings under Sections 202 the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not."*

Since the judgment of Supreme Court in Prakash Chandra Bose case, the view of the Hon'ble Court is consistent that the accused does not have right to participate in the enquiry proceedings.[v] At the best, the accused can be permitted to watch the proceedings. Further, the court conducting the enquiry cannot rely on the material supplied by the proposed accused, nor can the court ask questions on the prodding of the accused. If the court does that then the enquiry will be vitiated.

Manner and Mode of Conducting Enquiry:

Once we are aware of the purpose of Enquiry, it is important to know as to how can the courts conducting the enquiry attain that purpose. What should be the form of enquiry? What are

the tools available to the court to find the truthfulness and falsehood of the allegations? To answer these queries, we will first see the statutory guidelines, the rules, and then go through the gloss added to the statutes and the rules by the Hon'ble Constitutional courts through their pronouncements.

Coming to the statutory provisions, Section 200, and 202 of the CrPC lays down the procedure to be adopted in conducting enquiry. Here it is equally pertinent to mention rules 31 and 32 of the Criminal Court Rules of High Court of Judicature at Patna.[vi] While the CrPC lays down the skeletal framework, the rules add the muscle and sinews to the process.

A bare reading of section 200 of the CrPC shows that the court conducting the enquiry will record the statement of the complainant, and his witnesses. The requirement of dispensing with the enquiry is available only under 2 circumstances, first, in a complaint by a person in official capacity, and second when the case is made over u/s 192(1) of the code to the magistrate. Where the complainant is a public servant or court, clause (a) of the proviso to Section 200 of the Code raises an implied statutory presumption that the complaint has been made responsibly and bona fide and not falsely or vexatiously. On account of such implied presumption, where the complainant is a public servant, the statute exempts examination of the complainant and the witnesses, before issuing process.[vii] **In Associated Cement Co. Ltd. v. Keshvanand [(1998) 1 SCC 687]** the Supreme Court held as follows: (SCC pp. 694-95, paras 22-23)

> *"22. Chapter XV of the new Code contains provisions for lodging complaints with Magistrates. Section 200 as the starting provision of that Chapter enjoins on the Magistrate, who takes cognizance of an offence on a complaint, to examine the complainant on oath. Such examination is mandatory as can be discerned from the words 'shall examine on oath the complainant …'. The Magistrate is further required to reduce the substance of such examination to writing and it 'shall be signed by the complainant'. Under Section 203 the Magistrate is to dismiss the complaint if he is of opinion that there is no sufficient ground for proceeding after considering the said statement on oath.*

Now the question is what should be the mode of recording the statement of the complainant and its witnesses. In this regard, it would be of great help if we go through Rule 31 of the GRCO (Criminal). Rule 31 says:—

> *Rule 31. The examination of the complainant and the witnesses present, if any, is not to be a mere form, but an intelligent enquiry into the subject-matter of the complaint carried far enough to enable the Magistrate to exercise his judgment as to whether there is or is not sufficient ground for proceeding.*
>
> ***Note**—Statement of complainant and the witnesses present, if any, should ordinarily be recorded on the back of the petition.*

So the statement has to be recorded, in writing, and has to be signed by both, the magistrate and the complainant/witness.

The option with the magistrate that the summons be not issued automatically upon the receipt of the complaint shows that the legislature envisaged that the magistrate undertake inquiry to check the veracity of the complaint filed before him. The court is required to examine the complainant, and its witnesses. But the examination of the complainant should not only be of form but of substance.

It is often seen that if the magistrate conducts the inquiry with due diligence, then the false and frivolous complaints are detected at the outset, and this saves the system from wastage of judicial energy and time. A detailed study of the averments made in the complaint, and subsequent intelligent questioning helps the court reach truth. It can be said with quite certainty that few extra minutes spent at the stage of enquiry has the potential to save days of judicial time later.

Using the Police or "Such Other Person" during Enquiry:

Apart from examining the complainant and its witnesses, the court can also take help of the police or by any authority which the court feels proper.[viii] As regards the use of the phrase, "by such other person as he thinks fit" in section 202(1) of the CrPC, means that the magistrate conducting enquiry has got latitude to take use of any authority that would best help him in ascertaining the veracity and truthfulness of the allegations as mentioned in the complaint.

The provision u/s 202(1) of the CrPC may seem to ease the burden of the magistrate but before sending the complaint for enuiry, the magistrates must always keep the guidelines as laid down in rule 32 of the GRCO (Cri.). Rule 32 says: **Rule 32.** *Magistrates are cautioned against the indiscriminate use of police agency for the purpose of ascertaining matters as to which a Magistrate is bound to form his own opinion upon evidence given in his presence. This caution is especially needful in respect of all cases regarding offences not cognizable by the police.*

Thus, the magistrates may take help of the police but only when it appears essential and necessary. It should not be resorted to as a matter of routine. Also, drawing an analogy from rule 32, the court should take help of the other person, as envisaged under section 202(1) of the code in rare cases, only when it is imperative.

Principles for summoning the Accused in complaint case:

The term "sufficient grounds for proceeding" is one of the most vexatious and litigated term in the criminal jurisprudence. While one court may dismiss the complaint on one set of facts at the same time the other court may summon the accused to face trial under grievous offences. Coming to the process, while some courts take the process of inquiry seriously and examine the witness with much seriousness while some other courts may treat inquiry casually and decide the summoning of accused lightly.

In such diverse facts and circumstances, can we conclude that the courts are at liberty to perceive or construe the phrase: "sufficient grounds for proceeding" as per its own notion, or is there any set standard? We will look into the question, using the statutory provisions and the gloss added to the statutory provision by the interpretation by various courts. In the coming paragraph, we will discuss certain fact situation also where the court held the facts to be prima facie sufficient or insufficient to summon an accused.

Upon completion of enquiry, the court has all the material before it to decide whether or not to summon the accused. The question before the courts are:

I. Are there any statutory guidelines to summon an accused or are the courts independent to use their discretion to summon an accused in a case?

II. Also, what are the material that the court should rely upon while deciding to summon an accused or to dismiss the complaint?

III. Are we to summon the accused in all cases, where the complainant has presented few witnesses for examination before the court.

IV. Is it necessary to examine all the witnesses named in complaint alleging sessions triable offences?

In this section of the article we will go through the relevant statutory provisions to discuss on the questions raised above, and also look at the evolution of the laws through decided cases. Before we enter into the core questions, a look at the related and vexatious issues are also important.

STANDARDS OF SUMMONING : SOME PERTINENT QUESTIONS

I. Are there any statutory guidelines to summon an accused or are the courts independent to use their discretion to summon an accused in a case?

The inquiry is done for the purpose of deciding whether the allegation as levelled in the complaint petition is correct or not, and if the allegations are correct, whether the allegation/s are sufficient to summon the accused, to face trial.

Statutory guidelines to summon an accused

Chapter XV of the CrPC, while dealing with the enquiry also lays down standards for summoning the accused. Section 202(1) of the CrPC reads as:—

*"Section 202.- **Postponement of issue of process.**—(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the*

issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, ***for the purpose of deciding whether or not there is sufficient ground for proceeding:*** *. . ."* *(emphasis supplied)*

We also need to go through the provision regarding the summoning of an accused, i.e. section 204 of the CrPC:—

204. **Issue of process.**—(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

(a) a summons- case, he shall issue his summons for the attendance of the accused, or

(b) a warrant- case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

. . .

The key word for our purpose is, whether or not there is sufficient ground for proceeding. So the exercise of the enquiry as done under section 200 and 202 of the CrPC is for deciding whether the material collected during enquiry is sufficient to proceed. But the word, sufficient ground for proceeding, does not provide much guidance. The expression is highly subjective. To get a full import of the expression, we need to go through the series of decided cases. A bare reading of section 204 of the CrPC also shows that the court will issue process of summon or warrant against an accused only when the court finds that there is there is sufficient ground for proceeding. So we find that the expression there is sufficient ground for proceeding is common to both section 202 and 204 of the CrPC.

Guidelines Evolved by the Supreme Court for summoning the accused:

So, having gone through the statutory standard, we will now see the meaning assigned to the term sufficient ground for proceeding by the Hon'ble constitutional courts. Here, we would like to point out that the meaning of the expression would also depend on the subject matter of the complaint under inquiry.

In **D.N. Bhattacharjee v. State of W.B., (1972) 3 SCC 414,** the Supreme Court while observed that after inquiry the magistrate can go into the merit of the evidence collected to determine whether there are sufficient grounds for proceeding. The Supreme Court observed:—

7. . .It is true that the Magistrate is not debarred, at this stage, from going into the merits of the evidence produced by the complainant. But, the object of such consideration of the merits of the case, at this stage, could only be to determine whether there are

sufficient grounds for proceeding further or not. The mere existence of some grounds which would be material in deciding whether the accused should be convicted or acquitted does not generally indicate that the case must necessarily fail. . .”

In **Hareram Satpathy vs. Tikaram Agarwala, (1978) 4 SCC 58,** the Supreme Court while dealing with the scope of the expression, sufficient grounds for proceeding, said that the Magistrate was restricted to finding out whether there was a *prima facie* case or not for proceeding against the accused and could not enter into a detailed discussion of the merits or demerits of the case.

In **Devendra Kishanlal Dagalia v. Dwarkesh Diamonds (P) Ltd., (2014) 2 SCC 246,** while dealing with the same issue held as follows:—

10. The aforesaid provisions make it clear that the Magistrate is required to issue summons for attendance of the accused only on examination of the complaint and on satisfaction that there is sufficient ground for taking cognizance of the offence and that he is competent to take such cognizance of offence.

In **Sunil Bharti Mittal v. Central Bureau of Investigation (2015) 4 SCC 609** (3-Judges Bench) the Apex Court interpreting the expression, “sufficient grounds for proceeding”, held that there should be sufficiency of material against the accused before proceeding. The court held as follows:

"47. However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect.

Discussing the standards to be adopted while summoning the accused, the Supreme Court in J**agadish Ram vs State of Rajasthan: (2004) 4 SCC 432,** restated the law in the following way, holding that at the stage of issuing process to the accused, the Magistrate is not required to record reasons. However, he has to be satisfied that there is sufficient ground for proceeding and such satisfaction is not whether there is sufficient ground for conviction :—

"10.... The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be

determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons."

In a celebrated judgment covering the subject, **Pepsi food Pvt. Ltd. Vs. Spl. J.M. , (1998) 5 SCC 749**, the Supreme Court laid down the gold standard for summoning the accused. This oft quoted judgment has laid down that the court should treat the summoning of the accused as a serious matter involving interference with life and liberty of a person. ***The following dictum of the Apex Court should serve as an ideal for all the courts, who exercise powers under chapter XV of the CrPC, and needs to be quoted in full.***

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

Speaking on the same lines, the Supreme Court, almost 2 decades later, in **Mehmood ul Rahman Vs. Khazir Mohd. Tunda , (2015) 12 SCC 420,** observed again, in detail, the duty cast upon the magistracy, while dealing with complaint cases. Reasons for summoning has to be assigned to show application of mind (Para-20, and 23)

"Para-22 The steps taken by the Magistrate under Section 190(1)(a) CrPC followed by Section 204 CrPC should reflect that the Magistrate has applied his mind to the facts and the statements and he is satisfied that there is ground for proceeding further in the matter by asking the person against whom the violation of law is alleged, to appear before the court. ..

The Apex Court, while further detailing the analysis of the expression, grounds for proceeding went on further to observe in the same judgment i.e. Mehmood ul Rahman case that:—

". . .The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, prima facie, make the accused answerable before the

court . . . In other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 CrPC, if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 CrPC, by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction. . . To be called to appear before the criminal court as an accused is serious matter affecting one's dignity, self-respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment."

In **Pooja Ravindra Devidasari Vs. State of Mahrashtra (2014) 16 SCC 1)** the Apex Court observed that a trend is seen in the complaint petition that the complainant reproduces the language of the section defining any particular offence verbatim. But is this sufficient to summon an accused? The Court answered this query by quoting the observation made in para-28 of Pepsi Food Case[ix]. that merely quoting the language of the section wasn't the be all and end of the matter.

The Supreme Court and also the High Courts have evolved elaborate guidelines, from time to time, for summoning an accused in a complaint case. The Courts and the magistrates have to be conscious of the immense burden that they carry at he stage of summoning. Before summoning an accused, the material collected during inquiry must satisfy the judicial standards. The summoning of an accused should not be based on some whims and individual predilections.

Can the Court undertake Meticulous examination of the material gathered during inquiry:

What should be the level of appreciation of the material gathered during inquiry. Can the court deal with it meticulously? The Apex Court in the case of **Rosy vs. State of Kerala, (2000) 2 SCC 230** discussed the issue and observed that at the stage of summoning of accused u/s 204 of the CrPC, a meticulous examination of the evidence cannot be done. It has to be left for the stage of trial. The observation deserves to be quoted in full:—

"39. This Court in Kewal Krishan v. Suraj Bhan: 1980 CriLJ 1271, dealt with the case where instead of finding out prima facie case made out against the accused, the Magistrate passed an order by meticulously appreciating the evidence in a case exclusively triable by a Sessions Court, at the stage of Sections 203 and 204. The Court held that the Magistrate committed an irregularity by exceeding his jurisdiction and observed thus (Para 9 of AIR, Cri LJ):

At the stage of Sections 203 and 204. Criminal Procedure Code in a case

exclusively triable by the Court, of Session, all that the Magistrate has to do is to see "whether on a cursory perusal of the complaint" and the evidence recorded during the preliminary inquiry under Sections 200 and 202, Criminal Procedure Code, there is prima facie evidence in support of the charge leveled against the accused. All that he has to see is whether or not there is "sufficient ground for proceeding" against the accused.

The Court further made it clear thus (Para 9):

At this stage, the Magistrate is not to weigh the evidence meticulously as if he were the trial Court. The standard to be adopted by the Magistrate in scrutinising the evidence is not the same as the one which is to be kept in view at the stage of framing charges. The standard of 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 framing charges. A fortiori, at the stage of Sections 202/204 if there is prima facie evidence in support of the allegations in the complaint relating to a case exclusively triable by the Court of Session, that will be a sufficient ground for issuing process to the accused and committing them for trial to the Court of Session.

Chapter XVI of the Code contains provisions for commencement of proceedings before magistrate. Section 204, which is already referred to, enjoins on the magistrate to issue process if the magistrate forms the opinion that there is "sufficient ground for proceeding". When the offence is triable by a Court of Session the task of the magistrate cannot be restricted to considering whether process should be issued. There must be sufficient ground for proceeding."

Having dealt with the general principles of determining the grounds sufficient to proceed against an accused, we find that the crystallised view is that the magistrate must not act as mere post-office, taking cognizance and summoning accused, as a matte of course, in all complaint coming before him. Rather, the magistrate needs to be vigilant, right since the stage of filing of the complaint till the stage where he decides whether he should summon the accused or not. While doing so, the magistrate is not only to be guided by the procedural laws but also the substantive law covering the subject matter of the offence alleged in the complaint. The laid-back attitude cannot be accepted as the summoning of a person to face trial in a criminal court, even if for a minor offence, involves great hardship to the person summoned.

What are the material that the court should rely upon while deciding to summon an accused or to dismiss the complaint?

As has already been discussed that during inquiry, the magistrate needs to record the sworn statement of the complainant, and its witnesses. Further, the magistrate can also seek help from the police or any other person. In order to conclude, he is entitled to consider the evidence taken by

him or recorded in an enquiry under section 202, or statements made in an investigation under that section, as the case may be. But he is not entitled to rely upon any material besides this.[x]

So, the materials on which the Magistrate is to act are expressly limited by section 200 to the statement on oath (if any) of the complainant and the result of any investigation or enquiry under section 202. As has been discussed earlier, the opposite party cannot appear and present material or argue that process should not issue. IWhere the Magistrate asked for the police report, it has to be considered as material under section 202. Non-consideration of material amounts to abuse of the process of the court.[xi]

The findings of the enquiry officer under section 202(1) of the CrPC is not binding. The Magistrate should exercise his independent judgment when he receives the report of the investigation or inquiry that he has ordered.[xii] He is not bound by the opinion of the person holding the inquiryxiii. He cannot surrender his judgment to the police and the report made to him by the police at best is meant only to assist him in finding out the truth or otherwise of the complainant.[xiv]

In arriving at his judgment he is not fettered in any way except by judicial considerations; he is not bound to accept what the Inquiring Officer says, nor is he precluded from accepting a plea based on an exception, provided always there are satisfactory and reliable materials on which he can base his judgment as to whether there is sufficient ground for proceeding on the complaint or not.[xv]

Are we to summon the accused in all cases, where the complainant has presented few witnesses for examination before the court.

The topic has been deliberated, in detail, in the foregoing paragraphs. The Supreme Court, in umpteenth number of cases, has observed that it is not necessary for the magistrate to summon an accused, in all cases whenever the complainant has examined few witnesses. It will depend upon the material that the witnesses or the complainant have produced before the court. *(see* **Pepsi Co. Ltd, (1998) 5 SCC 749)**

In **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89,** the Hon'ble Apex court while stressing upon the mandatory recording of satisfaction as to the existence of sufficient grounds for proceeding against the accused, the court had explained the scope of such satisfaction.

> *"Section 203 of the Code empowers a Magistrate to dismiss a complaint without even issuing a process. It uses the words "after considering" and "the Magistrate is of opinion that there is no sufficient ground for proceeding". These words suggest that the Magistrate has to apply his mind to a complaint at the initial stage itself and see whether a case is made out against the accused persons before issuing process to them on the basis of the complaint…*
>
> *It is settled principle that while summoning an accused, the court has to see prima facie evidence. The "prima facie evidence' means the evidence sufficient for summoning*

the accused and not the evidence sufficient to warrant conviction. The enquiry u/s 202 CrPC is limited only to ascertain of truth or falsehood of allegations made in the complaint and whether on the material placed by the complainant a prima facie case was made out for summoning the accused or not."

Is it necessary to examine all the witnesses named in complaint case, especially in complaint alleging sessions triable offences?

As per the Code, whenever the complaint shows that the accused is resident of a place outside the territorial jurisdiction of the magistrate, then the magistrate should examine the complainant and his witnesses. The court should also examine the witnesses when the allegation leveled in the complaint pertains to sessions triable offences. But there is no law that if the complainant fails to examine all the witnesses named in the complaint then the complaint will be dismissed. There is no requirement to examine all the witnesses named in the complaint. **(Shivjee Singh Vs. Nagendra (2010) 7 SCC 578.)**

Is it necessary to give reasons in detail, for summoning of an accused:

Upon completion of enquiry, the magistrate need to pass orders for summoning the accused. Often, an issue is raised whether the magistrate need to pass an elaborate order expressing his satisfaction for summoning the accused or is his brief opinion sufficient?this question has also been deliberated upon by the Hon'ble Supreme Court in a catena of case-laws. We will go through few of the illustrative ones.

In **H.S. Bains vs. State (Union Territory of Chandigarh), (1980) 4 SCC 631** the court remarked:—

"We do not propose to say a word about the merits of the case since it was entirely a matter for the learned Magistrate to take cognizance or not to take cognizance of the several offences. We however wish to observe that it was wholly unnecessary for the Magistrate to write such an elaborate order as if he was weighing the evidence and finally disposing of the case."

In the case of **Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal, (2003) 4 SCC 139,** it has mentioned that the magistrate is not required to give any detailed reasons for summoning of an accused.

Earlier, the issue of passing detailed reasons for summoning an accused u/s 204 of the CrPC arose wherein the Apex Court in **U.P. Pollution Control Board v. Mohan Meakins Ltd. [(2000) 3 SCC 745]** and later in **Kanti Bhadra Shah v. State of W.B. [(2000) 1 SCC 722]** it was held as follows:—

"The legislature has stressed the need to record reasons in certain situations such as dismissal of a complaint without issuing process. There is no such legal requirement

imposed on a Magistrate for passing detailed order while issuing summons. The process issued to accused cannot be quashed merely on the ground that the Magistrate had not passed a speaking order."

The Supreme Court while deliberating on this issue in **Sunil Bharti Mittal v. CBI, (2015) 4 SCC 609** has held that while summoning an accused, the order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect.

The afore-said case-laws reveal that while passing summoning orders, though a detailed, and extensive order is not required to be made but some reasoning should be given. The reason will help reflect the satisfaction of the court summoning the accused.

Dismissal of Complaint under section 203 of the CrPC:

Though the subject of dismissal of the complaint is not explicitly within the domain of this article yet I will deal with it, cursorily, as it is closely related with the topic of summoning of the accused. In every complaint where the magistrate does not summon the accused person, it dismisses the complaint. The provision for dismissal of complaint finds place in section 203 of the CrPC. In this segment of the article, we will look into the circumstances and conditions in which the complaint can be dismissed. We will also go through the requirements of law in a case where the magistrate opts for dismissing the complaint u/s 203 of the CrPC.

Section 203, consists of two parts: the first part indicates what are the materials which the Magistrate must consider, and the second part says that if after considering those materials there is in his judgment no sufficient ground for proceeding, he may dismiss the complaint.[xvi]

While discussing the dismissal of the complaint, we can for our benefit, go through the conditions in which the court can quash the complaint. Here we can draw an analogy and can safely conclude that we can in such cases dismiss the complaint as well.

In **Nagawwa v. Veeranna Shivalingappa Konjalgi (1976) 3 SCC 736** the court laid down that in the following conditions the complaint case can be quashed u/s 482 of the CrPC:

"(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused:

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process in capricious

and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defect, such as, want of sanction, or absence of a complaint by legally competent authority and the like."

If the Magistrate has dismissed the complaint only stating that the complainant was absent without any steps and did not record his opinion that there is no ground for proceeding further, the impugned order was held to be contrary to the provisions of sections 202 and 203 of the Code.xvii

When a complaint is filed against persons more than one but the court summons only some of them then the complaint as regards the other accused, who are left out, amounts to dismissal. Such orders are routinely passed by the court but the courts passing such orders must take care to record reasons for not issuing process as against others.

Detailed Reasons to be given when dismissing complaint—While dismissing complaint case, reasons needs to be given. Section 203 of the CrPC, lays down:

> 203. **Dismissal of complaint.**—If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

A comparative look at section 204 and 202 of the CrPC on the one hand, and section 204 of the CrPC on the other hand shows that while the requirement for giving reasons for summoning the accused is not mentioned or necessary but giving of reasons for dismissing the complaint is must.

Precautions To be Observed in Summoning the Accused

1. The court taking cognizance must first see that it is empowered to take cognizance of the offence mentioned in the complaint. This involves both, subject matter jurisdiction, and also territorial jurisdiction. For example, if a complaint, alleging offences under prevention of corruption act 1988, or say SC/ST Act is filed before the magistrate, the magistrate should return the complaint to be filed before the competent court.xviii If an incident is alleged to have occurred at say district of Patna, and the complaint is lodged at Begusarai, then the complaint should be returned to be filed at the proper place.
2. The court should also see that only the person empowered to file a complaint, as mentioned in section 193 to 199 of the code of criminal procedure. If the requisites as laid down in these provisions are not followed then the court should not take cognizance and subsequently not summon the accused.

3. The magistrate should see that the name, address and age of the accused is properly mentioned in the complaint. This is to be done to save the court from the embarrassment of summoning a minor for facing trial of an offence.
4. In cases where the accused is resident o a place outside the jurisdiction of the court, the magistrate should take special care to conduct inquiry thoroughly. This becomes all the more imperative after the amendment done in 2005 to the CrPC. By 2005 amendment, a special provision was made mandating due care to be taken by the Magistrate in respect of those persons residing at a place beyond the area in which the Magistrate exercises his jurisdiction, to ensure that innocent persons are not harassed by unscrupulous persons.xix
5. The court should also see to it that they do not summon an accused against mandate of legislature.
6. The court should summon the accused only when the material collected during inquiry shows sufficient material to summon the accused. (this subject has been dealt with earlier)
7. It is settled law that the accused has no say in the enquiry, and almost all the times, the enquiry is done at the back of the accused. So this involves greater burden on the court to see that only the guilty face trial. The role of the magistrate becomes sort of inquisitorial, searching for truth using the tool of enquiry. The court would do well to remember that few extra minutes spent during inquiry would save days and months of judicial time later.
8. The court must not lose sight of the general principles of law when deciding on the sufficiency of the material to decide prima facie case. It is humbly submitted that the court must remember the observation of the Supreme Court made in **Dr. Budhi Kota Subbarao vs. K. Parasaran (1996) 5 SCC 530** where it was observed that no litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a license to file misconceived or frivolous petitions.xx

Some Illustrative matters invloving summoning/dismissal of Complaint:

Once we have dealt with the principles of summoning the accused, generally, we will now look at some of the illustrative subjects and matters that routinely come up in the courts conducting inquiry. Though all circumstances and fact situation cannot be dealt in the article, but some illustrative topic can be discusses briefly. An analysis of the pending cases in the court would show that the following subjects or matters are the most common ones. So the court will deal with the questions arising in these matter.

1. **Complaints u/s 498A of the IPC, and its Counter-blast.**
2. **Complaint involving Land disputes with Civil undertones.**
3. **Complaints alleging non-refund of the lent money.**
4. **Matters under Negotiable Instruments Act, 1881.**
5. **Simple hurt, theft which are mostly Counter-blast of pending G. R. Cases.**
6. **Complaint against Govt. servants including judges, and police officials.**
7. **Complaint of offences by women including that u/s 354, & 376 IPC.**
8. **Complaint Based on newspaper reports against actors, leaders etc. where the sole basis of information is the newspaper itself.**
9. **Complaint Against Doctors alleging medical negligence.**

Complaints u/s 498A of the IPC, and its Counter-blast.

When the court of Magistrates deals with complaint case u/s 498A of the IPC, the court has to deal with certain peculiar questions for deciding the sufficiency of material for summoning or not the accused persons. In this article we will try to deal with some of the important questions.

- **Place of suing:**—Rupali Devi Vs. State of U.P. (2019) 5 SCC 384. The Hon'ble SC, on a reference has finally settled the law on the place of suing in cases u/s 498A of the IPC. The court held that apart from the place of occurrence of the incident, the victim-woman can also lodge case/complaint also at place where she resides after moving from her matrimonial home. It has also been re-iterated in the case of Nitika Vs. Yadwinder Singh: MANU/SCOR/21179/2019)
- ***Who can be complainant in 498A IPC cases?***

  The complaint need not be filed by the victim-woman herself. As per section 198A of the CrPC, even the parents, the siblings can file the case on behalf of the victim. **Rashmi Chopra Vs. State of U.P.** Section 198A of the Cr.P.C. provides a list of persons, who can lodge complaint in cases of allegation of cruelty. Importantly, a friend cannot lodge a complaint on behalf of the victim.
- ***Whether the husband being in adultery or having extra-marital affair, alone, constitutes cruelty as under 498A of the IPC?***

  Merely because husband is in extra marital relationship is not "mental cruelty" as per section 498A of IPC. Affair may be illegal or immoral but not an offence under section 498A IPC. **(K. Prakash Balre Vs. State of Karnataka, (2017) 11 SCC 176 & AIR 2016 SC 5430)**
- ***Cases where the complainant has named all the relatives of the husband generally?***

Off late, a tendency to rope in all the relative in complaint under 498A of the IPC has developed. This is doe more often than not to pressurise the family of the husband. The Hon'ble Supreme Court noted this tendency and has laid down guidelines in a catena of case-laws.

As per the law laid down by the Hon'ble Supreme Court in **Geeta Mehrotra Vs. State of U.P., (2012) 10 SCC 741)** to summon relative other than husband, there has to be specific and covert act of the relative and mere vague, general, omnibus allegation won't suffice. Further the Hon'ble Supreme Court in the case of **Manju Rai Vs. State of West Bengal (2015) 53 SCC 693** observed in Para-8 of the judgment that the Court must be careful in summoning distant relatives without specific allegation.

Earlier, the Court in **G. V. Rao Vs. L. J. V. Prasad (2000) 3 SCC 693)** had said that when the Complainant has roped in all the members of the husband's household then the complaint is liable to be quashed. Similarly, in **Chandralekha Vs. State of Rajasthan, (2013) 14 SCC 374** the Supreme Court dropped the case against the accused, as the allegations against them were too general and vague. If the complainant has roped in the accused merely because they are relative of the husband then they cannot be summoned. **(Kansraj Vs. State of Punjab , (2000) 5 SCC 207)**

- ***Who is a relative as per section 498A of the IPC? What is the position of the law regarding second wife or girl friend?***

The Supreme Court in the case-law of **U. Suvetha Vs. State Inspector of Police, (2009) 6 SCC 757** dealt in [Para-7, 10 to 15 of the judgment as to who is "relative of husband" as per 498A IPC. This judgment was followed with approval in **State of Punjab Vs. Gurmit Singh (2014) 9 SCC 632.** First wife or concubine is not relative within the meaning of section 498A of IPC.

- ***What is cruelty as per section 498A of the IPC?***

At times we find that the complaint does not disclose the factum of cruelty as defined in section 498A of the IPC, yet the court summons the accused. So it is important that the magistrate should see to it that the material discloses cruelty or not. **Shobha Rani Vs. Madhukar Reddi (1988) 1 SCC 105** Deals what is cruelty as per section 498A of IPC.

- ***What is limitation for initiating process u/s 498A of the IPC?***

In **Udai Shankar Awasthi vs. State of U.P. (2013) 2 SCC 435,** the Supreme Court quoted with approval the judgments of: **Arun Vyas v. Anita Vyas: AIR 1999 SC 2071,** Supreme Court held that in a case of cruelty, the starting point

of limitation would be the last act of cruelty. (See also: **Ramesh v. State of Tamil Nadu: AIR 2005 SC 1989).**

Apart from 498A of the IPC cases, the courts also come across cases filed by the husband or his parents alleging some offences against the wife and relatives of wives. This is often done to pressurise the wife into submission. The court can easily recognise such complaints. Often, the story of such complaint is similar: the accused and his entire family comes and resides in the house of the complainant, and when the complainant wakes up in the morning, he finds that the accused have either decamped with the household articles or are in the process of doing so. It is matter of experience that those cases are mostly, if not all, false. A few intelligent questions by the court, and the matter comes out. The court should be circumspect while summoning the accused.

Cases against Govt. Officials:

There is another trend, which is quite common in our courts. Aggrieved persons, and also disgruntled elements, adopt the shortcut route and lodge complaint against senior government officials to harass and intimidate them. They seek to use the tool of complaint case to coerce the officials to do the work of their liking. Now in these types of complaint, the Court has to strike a balance between the rights of individual, and the right of public servants to do their duty fearlessly. So in this article, we will deal with the issues relating to complaint against the government officials.

The summoning of government officials for facing criminal trial, based on complaint, has for long been a vexatious issue. The protection accorded under section 197 of the CrPC has made the issue contentious.

In **Triyugi Nath Sinha vs State Of Bihar**,[xxi] decided by Hon'ble Patna High Court, a complaint was filed against judicial officer for his conduct during a judicial proceeding, casting aspersions on the integrity of the Presiding Officer, and also made intemperate and derogatory remarks against him. Complainant also made allegations of judicial impropriety and caste bias against him. The High Court discussed the bar on taking cognizance as laid down under section 197 of the CrPC, and also Judicial officer protection Act, 1850 and observed as follows:—

"25. In view of the absolute immunity granted to the Judicial Officers in relation to the judicial works done by them as well as for the judicial orders made by them under Section 3 of the Act of 1985? as quoted and discussed hereinabove, the learned Chief Judicial Magistrate, Saran at Chapra grossly erred in law by entertaining the complaint in question and in proceeding with the examination of the complainant on oath under Section 200 of the Code as well as in examining witnesses brought on behalf of the complainant in course of enquiry under Section 202 of the Code. The Chief Judicial Magistrate, Saran at Chapra ought to have dismissed the complaint at the very outset as not being maintainable and on grounds of being barred by law."

In **State of U.P. Vs. Paras Nath Singh 2009 (6) SCC 372** the Apex Court observed that the general jurisdiction of a Magistrate to take cognizance of any offence is provided by section 190 of the Cr.P.C. and in cases against a public servant, this general power to take cognizance was barred by section 197 Cr.P.C. unless the sanction was obtained from the appropriate authority. In absence of prior sanction, it was observed that Magistrate cannot order investigation against the public servant even while invoking power under Section 156(3) Cr.P.C.

The Hon'ble Supreme Court in the judgment of **Anil Kumar Vs. M. K. Aiyappa, (2013) 10 SCC 705,** followed in **L Narayan Swamy vs. State of Karnataka (2016) 9 SCC 598** has categorically held that the magistrate cannot take Cognizance against a public servant, if the act complained of is within the official duties. If the act complained of does not comes within the ambit of the official duties then the magistrate needs to give a specific finding to that effect and only then can she summon the accused officials.

But a bench of the Hon'ble SC in **Manju Surana Vs. Sunil Arora, (2018) 5 SCC 557** has referred the matter to a higher bench to test the validity of the law as laid down in Anil Kumar's case. So validity of Anil Kumar case is under challenge. When the article was being written, the **Manju Surana Case** was yet to be decided.

Apart from the stage of taking cognizance, the courts should also keep in mind the guidelines as laid down in the following case-laws, when dealing with complaint against senior officials.

In **Punjab National Bank Vs. Surendra Prasad Sinha, 1993 Supp(1) SCC 499;** the question in issue was the summoning of a senior bank official for acts alleged to have been committed in his official capacity. In para-6, of the Judgment, Supreme Court held that Judicial process should not be used as instrument of oppression. The court also held that the law sould not be permitted to be used to harass others.

> *"6. It is also salutary to note that judicial process should not be an instrument of oppression or needless harassment. The complaint was laid impleading the Chairman, the Managing Director of the Bank by name and a host of officers. There lies responsibility and duty on the Magistracy to find whether the concerned accused should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded then only process would be issued. At that stage the court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complaint as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance. Considered from any angle we find that the respondent had abused the process and laid complaint against all the appellants without any prima facie case to harass them for vendetta." (The judgment talks about the duties of magistracy in findings truth).*

Yet again, almost the same question came before the Hon'ble Supreme Court where the trial court had summoned bank officials to face trial for having done an act covered under official duties. In **M. N. Ojha Vs. Alok Srivastava , (2009) 9 SCC 682** (Para- 27 to 34) reiterated that the magistrate has not only to sit and summon accused, merely because complainant says so but has to apply his mind to the allegations and the evidence brought on record. The court observed thus:—

> *"20. The complainant in his complaint freely used choicest expressions such as "fraud, collusion, conspiracy and cheating, etc." but did not make any concrete allegations against the appellants suggesting commission of any offence. That a plain reading of the complaint and taking the allegations and averments made therein to be true on their face value do not reveal the commission of any offence whatsoever by the appellants who were only taking steps to realise the amount due to the Bank from the borrower and in the process encashed the FDRs offered by the guarantors as security for the discharge of the loan. What is the crime they have committed even if they did not proceed against the hypothecated properties before realising the FDRs offered by the guarantors? Where is the misappropriation of money? Whom did they cheat?"*

Thus, while dealing with a complaint against government officials the court must see, at the stage of filing of the complaint itself, whether the allegation as contained in the complaint barred taking of cognizance and so prevented the court to further proceed under chapter XV of the CrPC. If it was barred then the court should not proceed in the complaint.

Civil Disputes and Complaints:

Off late, a trend has developed where the litigants, give cloak of criminal case to civil dispute and lodge complaints. This has led to a great increase in filing of frivolous criminal cases. This is often done to avoid the rigours of the civil law which the litigants feel that is time consuming and arduous one. Civil disputes related to partitions, property, and business/partnership disputes etc. The parties prefer to lodge a complaint case against the opposite party in addition to filing of civil suits or initiation of arbitration proceedings. The magistracy should take care not to settle civil disputes through criminal cases.

The hon'ble Supreme Court has time and again commented on this facet of the law, a glimpse of which will be provided through discussion of important case-laws. The Apex court has deprecated the practice of converting civil actions into criminal cases and in appropriate cases have also quashed the criminal case. At the same time, the court has also held that merely because, a civil case is pending or that the matter also has civil undertones doesn't at all bar the filing of criminal cases. The supreme court has held that there could be a number of situations where the facts would disclose material for taking both, civil as well as criminal action.

In **Govind Prasad Kejriwal vs. State of Bihar AIR 2020 SC 1079,** the Hon'ble Supreme Court observed that:—

"It cannot be disputed that while holding the inquiry Under Section 202 Code of Criminal Procedure the Magistrate is required to take a broad view and a prima facie case. However, even while conducting/holding an inquiry Under Section 202 Code of Criminal Procedure, the Magistrate is required to consider whether even a prima facie case is made out or not and whether the criminal proceedings initiated are an abuse of process of law or the Court or not and/or whether the dispute is purely of a civil nature or not and/or whether the civil dispute is tried to be given a colour of criminal dispute or not. As observed hereinabove, the dispute between the parties can be said to be purely of a civil nature. Therefore, this is a fit case to quash and set aside the impugned criminal proceedings."

In **G. Sagar Suri and Ors. vs. State of U.P. (2000) 2 SCC 636** the Supreme Court observed the tendency of the litigant to giver criminal colour to civil matter and held:—

"It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal Court has to exercise a great deal of caution."

In the case of **Murari Lal Gupta vs. Gopi Singh (2005) 13 SCC 699,** the accused and the complainant entered into agreement to sell a land, wherein the accused was to sell in favour of the complainant for a consideration of Rs. 4.50 lakhs. An amount of Rs. 3.50 lakhs was paid. The balance of Rs. 1 lakh was to be paid at the time of registration of sale deed and delivery of possession. Thereafter, the accused did not honour the agreement in spite of three legal notices having been given. According to the complainant, the accused has thus cheated him. The Apex court held that the summoning of accused to face trial was bad in law and quashed the proceeding.

In **Kamaladevi Agarwal vs. State of West Bengal** the Apex Court quoted the observation made in **Rajesh Bajaj v. State NCT of Delhi, 1999 CriLJ 1833,** with approval and held as follows:—

In the last referred case this court also pointed out that merely because an act has a civil profile is not sufficient to denude it of its criminal outfit. We quote the following observations:

"10. It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating were committed in the course of commercial and also money transaction."

In **Hridya Ranjan Verma Vs. State of Bihar , (2000) 4 SCC 168,** a leading case on

Distinction between mere breach of contract and cheating, the Apex court held that Not every case of breach of terms of agreement is cheating as per IPC. It held:—

> *"15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."*

In **Indian Oil Corporation v. NEPC India Ltd. (2006) 6 SCC 736,** the Supreme Court observed the tendency of the litigant to adopt the shortcut of converting civil dispute to criminal one. The court observed as follows:—

> *13. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable breakdown of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged.*

In **Pooja Ravinder Devidasani v. State of Maharashtra, (2014) 16 SCC 1:** the Supreme Court held as follows:—

> *"30. Putting the criminal law into motion is not a matter of course. To settle the scores between the parties which are more in the nature of a civil dispute, the parties cannot be permitted to put the criminal law into motion and courts cannot be a mere spectator to it."*

In a recent case, **Commissioner of Police Vs. Devendra Anand, (2019) SCC Online SC 996** the Judgment lays down that filing of Criminal case for Civil dispute is abuse of law.

> *"Even considering the nature of allegations in the complaint, we are of the firm opinion that no case is made out for taking cognizance of the offence under Section*

420/34 IPC. The case involves a civil dispute and for settling a civil dispute, the criminal complaint has been filed, which is nothing but an abuse of the process of law."

A gist of the case-laws on the subject shows that when the magistrate should be more circumspect when they come across cases of civil nature with criminal undertones. The Hon'ble High Court has also quashed criminal proceedings where the court found that the fact revealed that the subject of complaint was civil in nature[xxii]. It is humbly submitted that the magistrate need not throw out the case at the outset, but should inquire into the case deeply.

Land Disputes and Complaint Case:

In this article, I have treated cases pertaining to Land dispute, as a distinct topic because of the frequency with which these cases are filed in the court of Bihar. There is also a tendency in the litigants to solve their land dispute through complaint cases, rather than adopting the long and arduous route of civil cases.

A typical case filed in the court is about a condition where the complainant alleges that the accused has sold or transferred the land belonging to him to the other accused persons aleging offences under section 420, 467, 468 to 471 of the IPC etc. Such cases go on for years in the court, along-with a parallel civil case. In one such matter, **Md. Ibrahim Vs. State of Bihar , (2009) 8 SCC 751** travelled to the Apex Court, where the Apex court discussed the provisions threadbare and needs to be read as whole. Similar observation was made by the Apex Court in **Devendra and others Vs. State of Uttar Pradesh: (2009) 7 SCC 495.**

Subsequently, relying on the observation made in these 2 judgments, the Hon'ble High Court set aside the summoning of accused in a huge number of cases. A list of such cases are worth mentioning.[xxiii]

Complaints involving Lending of Money:

Often we come across complaint cases wherein the complainant alleges that he lent a particular amount to the accused, for a certain time, but despite passage of time, the accused failed to return the amount. Normally, such cases are civil disputes and the recourse available to the complainant is to file a money suit, for the recovery of money, but often the complainant prefers the shortcut or rather the wrong path of filing of a complaint case.

It is advisable that during inquiry, the court should put questions to see whether the case could be covered under section 406 or 420 of the IPC, because these are the most preferred sections in such type of complaint. There have been occasions when the Apex Court have issued guidelines to deal with such cases.

In **Girish Kumar vs. State of Bihar 1999 (1) PLJR 561,** the Patna High Court quoted, with approval, the judgment of Apex Court in **Hari Prasad Chamaria v. Bishun Kumar**

Surekha: A.I.R. 1974 S.C. 301 in which facts of the case were that the Appellant before the Supreme Court intending to start business gave in full faith a large amount to the Respondents-accused persons for starting business. The accused started business in their own name and refused to render the account and return money. The Supreme Court held that even assuming prima facie all the allegations in the complaint to be true they merely amount to a breach of contract and could not give rise to criminal prosecution.

In **Vinod Natesan Vs. State of Kerala , (2019) 2 SCC 401**, the complainant filed a case under Section 420, 406 read with Section 34 of the Indian Penal Code alleging, inter alia, that after entering into the agreement by the Accused with the Complainant with regard to availing of intellectual services for marketing the products of the complainant, the Accused did not pay the amount due and payable under the agreement and paid a sum of Rs. 1,50,000/- only and without paying the remaining amount backed out from the agreement and thereby the Accused has committed the offence as alleged.

The Supreme Court held that merely because accused failed to pay money under agreement is no ground for criminal case and quashed the proceeding.

In **Satischandra Ratanlal Sah Vs, State of Gujrat, (2019) SCC Online SC 196,** Para-12 & 14 of the Judgment the Apex Court observed that: *"The law clearly recognises a difference between simple payment/investment of money and entrustment of money or property. A mere breach of a promise, agreement or contract does not, ipso facto, constitute the offence of the criminal breach of trust contained in Section 405 IPC without there being a clear case of entrustment."*

Negotiable Instruments Act, 1881.

With increase in commercial activities involving cheques, there is growing number of cases under section 138 NI Act. The number of complaint involving NI Act is so huge that special courts at of the rank of J M I Class has been set up in all the districts of Bihar. Case under NI Act can be clubbed under 2 headings:

Complaint u/s 138	1	Complaint mentioning merely s.138 NI Act.
	2	Complaint having 138 NI Act with offences under IPC.

While dealing with inquiry of cases under N I Act, the court has to see that the documents on which the complainant relies, is on record. At least the photo-copy of the document is present. The court also has to see whether the ingredients as laid down in section 138 of the NI Act is fulfilled or not: First, that the complainant has issued demand notice within 30 days of the receiving of the cheque return memo, Second, that the accused failed to pay the money, within 15 days of the receiving of the notice (here section 27 of the General Clauses Act will come into play), and Third, that the case is lodged within 30 days of the end of the time limit as given in the second condition.

In **Devendra Kishanlal Dagalia v. Dwarkesh Diamonds (P) Ltd., (2014) 2 SCC 246** at page 251, Supreme Court laid down the requirements for summoning an accused in 138 NI Act cases and held as follows:—

"13. The question concerning the jurisdiction of the Magistrate to issue summons fell for consideration before this Court in Escorts Ltd. v. Rama Mukherjee [(2014) 2 SCC 255] . In the said case the Court noticed the earlier decision in K. Bhaskaran v. Sankaran Vaidhyan Balan, (1999) 7 SCC 510]. In the light of the language used in Section 138 of the Act, the Court found five components in Section 138 of the Act, namely:

"(1) drawing of the cheque;

(2) presentation of the cheque to the bank;

(3) returning of the cheque unpaid by the drawee bank;

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

(5) failure of the drawer to make payment within 15 days of the receipt of the notice." [K. Bhaskaran v. Sankaran Vaidhyan Balan, (1999) 7 SCC 510 SCC p. 518, para 14)

After saying so, this Court held that offence under Section 138 of the Act can be completed only with the concatenation of all the above components and for that it is not necessary that all the above five acts should have perpetrated at the same locality; it is possible that each of those five acts were done at five different localities, but a concatenation of all the above five is a sine qua non for the completion of the offence under Section 138 of the Act."

In **Sabitha Ramamurthy v. R. B. S. Channabasavaradhya, (2006) 10 SCC 581,** the Apex Court while laying down standards for summoning an accused in NI Act case observed as follows:—

"7. … it is not necessary for the complainant to specifically reproduce the wordings of the section but what is required is a clear statement of fact so as to enable the court to arrive at a prima facie opinion that the accused is vicariously liable. Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company."

By verbatim reproducing the words of the section without a clear statement of fact supported by proper evidence, so as to make the accused vicariously liable, is a ground for quashing proceedings initiated against such person under Section 141 of the NI Act."

While dealing with the summoning of an accused-director of a company, for offence u/s 138 if the NI Act, the Supreme Court in **Pooja Ravinder Devidasani v. State of Maharashtra, (2014) 16 SCC 1** held that:—

"20.In other words, the law laid down by this Court is that for making a Director of a company liable for the offences committed by the company under Section 141 of the NI Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the company."

Later in the same judgment, the Hon'ble Supreme Court held that "30. . . . Before a Magistrate taking cognizance of an offence under Sections 138/141 of the NI Act, making a person vicariously liable has to ensure strict compliance with the statutory requirements."

Successive notices can be issued in respect of the same cheque, and it will be perfectly valid. A cheque can be presented n Number of times for encashment. **MSM Leather vs. S Palaniappan (2013) 1 SCC 177.**

[Note: Proviso to Section 142(1)(b) of the NI Act stipulates that the limitation can be condoned, upon the complainant giving sufficient reasons for not filing the case within time. **Birendra Prasad Sah vs. State of Bihar AIR 2019 SC 2496]**

Section 145 of the NI Act lays down that during inquiry in cases u/s 138 NI Act, the court can record the evidence of the complainant and its witnesses, even on affidavit.

There is a tendency of the complainant to add section 406 and 420 of the IPC with the complaints of section 138 of the NI Act. Here it becomes the duty of the magistrate to see whether the allegations as made in the complaint reflects only a case u/s 138 simpliciter or also other offence. But these offences should not clubbed together routinely.

Complaint Based on newspaper reports against actors, leaders etc. where the sole basis of information is media itself.

Often complaints are filed against actors, politicians, public personalities, sportsman/woman for some of their remarks. Often, the basis of filing the complaint is newspaper reports or the media reports. Now the courts while dealing with such complaints must take into account the material before it. Its true that at the stage of taking cognizance, court cannot delve deeper but the court has to see whether there exist any material to take cognizance or not. If the averments of the

complaint does not disclose any evidence or that the entire complaint is based merely on hearsay evidence, then its advisable to exercise restraint while taking cognizance. The law regarding taking cognizance on such complaints can also be gathered from a reading of para-14 to 19 of the case-law of **Mohd. Abdulla Khan v. Prakash K., (2018) 1 SCC 615 :**

> *14. In the context of the facts of the present case, first of all, it must be established that the matter printed and offered for sale is defamatory within the meaning of the expression under Section 499 IPC. If so proved, the next step would be to examine the question whether the accused committed the acts which constitute the offence of which he is charged with the requisite intention or knowledge, etc. to make his acts culpable.*

Complaint Against Doctors alleging medical negligence.

In some cases, where it is alleged that because of negligence on the part of doctor, death or injury is caused to the complainant or to the victim, complaint case against the doctor is lodged. Normally, the court records the statement of the complainant and its witnesses and either summons the accused-doctor or dismisses the complaint. Seeing the rise of such complaints against the doctors, the Supreme Court laid down extensive guidelines for summoning a doctor to face trial. The guidelines are mandatory and the courts dealing with complaints against doctors must follow them.

In **Jacob Mathew vs. State of Punjab (2005) 6 SCC 1,** the Supreme Court dealt with the medical negligence jurisprudence, in extensive detail and in para-52 laid down certain guidelines. Of all the guidelines, the most important one, for our purpose being:—

> *"(i) A private complaint should not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor."*

The guidelines as laid down by the Apex Court in **Jacob Mathew's Cas**e has consistently been followed by the Apex court in later judgments.[xxiv]

While dealing with summoning of a doctor in a complaint case, the recent observation of Patna High Court in **Prabha Sinha vs. State of Bihar 2020 (4) PLJR 542** deserves mention. The court observed:—

> *"This Court further finds that in the recent past there has been a spurt in the cases to implicate the doctors after demise of the patient, some on account of extortion of illegal money from the doctors and some due to other reasons, only to harass the doctors, out of frustration and because of these factors, guidelines have been laid down by Hon'ble Apex Court in the case of Jacob Mathew (supra) and in the case of Kusum Sharma (supra), which have been detailed herein above in the preceding paragraphs."*

Here it is also important to mention that under Section 9 of the Bihar Medical Service Institution and Person Protection Act, 2011, the legislature enacted Bihar Medical Service Institution and Person Protection RULES, 2018, which also deals with the complain of medical negligence. Rule 7 to 11 of the aforesaid Rules gives the details to deal with a complaint case concerning medical negligence.

So, the magistrates dealing with the complaint against doctors would do well to remember the statutory provision,[xxv] and also the judicial guidelines as laid down in a catena of case-laws.

Standards to be adopted in summoning the accused after the case is returned by the revisional court:

The question of amenability of orders, either summoning the accused, or dismissal of complaint, have also been subject to intense litigation. In this respect, we will see some of the important points.

Revision against the order summoning an accused:

In **State of Gujarat v. Afroz Mohammed Hasanfatta, (2019) 20 SCC 539,** the Supreme Court held that the court should liberally construe the term interlocutory order appearing in section 397 of the CrPC. The court after quoting various judgments, with approval held that in appropriate cases, the accused summoned can prefer a revision against the order summoning him to face trial. The court held:—

> *The question whether against the order of issuance of summons under Section 204 CrPC, the aggrieved party can invoke revisional jurisdiction under Section 397 CrPC has been elaborately considered by this Court in [Urmila Devi v. Yudhvir Singh, (2013) 15 SCC 624] After referring to various judgments, it was held as under: (SCC p. 636, para 14)*
>
> *"14. … On the other hand in the decision in [Rajendra Kumar Sitaram Pande v. Uttam, (1999) 3 SCC 134], this Court after referring to the earlier decisions in [Amar Nath v. State of Haryana, (1977) 4 SCC 137], [Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551] and [V.C. Shukla v. State, 1980 Supp SCC 92 : 1980 SCC (Cri) 695] held as under in para 6: [Rajendra Kumar Sitaram Pande v. Uttam, (1999) 3 SCC 134 : 1999 SCC (Cri) 393] , SCC pp. 136-37)*
>
> *'6. … this Court has held that the term "interlocutory order" used in the Code of Criminal Procedure has to be given a very liberal construction in favour of the accused in order to ensure complete fairness of the trial and the revisional power of the High Court or the Sessions Judge could be attracted if the order was not purely interlocutory but intermediate or quasi-final. This being the position of law, it would not be appropriate to hold that an order directing issuance of process is purely*

interlocutory and, therefore, the bar under sub-section (2) of Section 397 would apply. On the other hand, it must be held to be intermediate or quasi-final and, therefore, the revisional jurisdiction under Section 397 could be exercised against the same. The High Court, therefore, was not justified in coming to the conclusion that the Sessions Judge had no jurisdiction to interfere with the order in view of the bar under sub-section (2) of Section 397 of the Code.'

This decision makes it clear that an order directing issuance of process is an intermediate or quasi-final order and therefore, the revisional jurisdiction under Section 397 CrPC can be exercised against the said order. This view was subsequently reiterated by this Court in K.K. Patel v. State of Gujarat, (2000) 6 SCC 195] ."

What is meaning of the phrase, "magistrate will conduct further inquiry", as used by the revisionist court ?

Often, while setting aside the magistrate's order, the revisionist court uses the term "magistrate will conduct further inquiry". Now the phrase means that the magistrate is free, either to conduct further inquiry or can pass fresh orders on the old material itself. This does not imply that the magistrate needs to conduct de-novo inquiry. When 'further enquiry' is ordered in the case by the superior Court, the Magistrate has to reappraise that very evidence, which was examined prior to the passing of the order, which was set aside in revision or any other evidence cited in the complaint but not examined earlier, but examined after the remand. If the inferior Court does not re-assess the evidence already examined and dismisses the complaint again on the ground that no fresh evidence is examined, then it violates the directions of the superior Court. **Gurdial Singh vs Kartar Singh 1980 Cri LJ 955,** and **Brijnath Sahai vs Babu Lal 1957 CriLJ 290(Pat);**

- In the case of **Saiyed Abrarul Hasnain v. The State of Bihar: 2005 (4) BBCJ 484,** Patna High Court, relying on two Division Bench decisions[xxvi] of Patna High Court Court, held that the law is well-settled that after enquiry if a complaint is dismissed and revisional Court orders for further enquiry on finding a prima facie case, then the Court below has nothing to do except to take cognizance. Therefore, if on the same material the learned Chief Judicial Magistrate had taken cognizance and ordered to issue summons, the impugned order passed by him cannot be said to be bad on that account.[xxvii]

Conclusion

The basic purpose of criminal law, in operation is to maintain law and order in the society. The order is to be maintained by punishing the offendors and making the price of committing crime higher. This involves making the access to the criminal justice system easy for the victims. Though the crimes are considered to be against the society and are so prosecuted by the state, but the

criminal justice system has also provided for the prosecution of the offendors by private persons, in appropriate cases.

The provision for Complaint Cases under code of criminal procedure permits the private individual to not only set the criminal justice system in motion but also allows them to prosecute. So, a duty has been cast upon the magistracy and the courts where these cases are initiated to see that the courts are not used to unnecessary harass the innocents and wreak vengeance on his opponents using state machinery. The courts are also to ensure that the guilty does not escape the clutches of law.

The court conducting proceeding under chapter XIV and XV, and XVI of the Cr.PC has to be constantly on their toes to see that neither the courts are misused nor the needy felt left out.

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xxii. Daya Shankar Prasad Shara vs. State of Bihar 2011(2) PLJR 63. Jageshwar Prasad Sah vs State of Bihar 2010(4) PLJR 808.

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Topic No. – 02

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Criteria for sending the complaint cases to police u/s 156(3) of the Cr.P.C.. with reference to the cases of M.K. Aiyappa & R.R. Chari' s case.

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Criteria for sending the complaint cases to police u/s 156(3) of the Cr.P.C. with reference to the cases of M.K. Aiyappa & R.R. Chari' s case.

Introduction:

Anyone can set the criminal law in motion and, has two options for initiation of such action. He may go to police and lodge an FIR. If his case stands established in investigation, it will be put to trial in the court of law. Secondly, he may approach the court directly at first instance, and trial would be held once the case stands established upon enquiry by the Magistrate. As per mandate of law, police is bound to register the FIR, if any cognizable offence is reported to it, however, reality shows otherwise. More often the police refuses to honour the mandate of law and register the case for investigation. Many of these cases are of nature where Magisterial enquiry would not be advisable. Moreover, it has also to be borne in mind that Court's are mainly for trial, and investigation is the primary duty of the police.

Section 156(3) Cr.P.C has given the way to such litigants to get the case investigated by police. The litigant may file complaint before the Magistrate and the Magistrate in seisin, may direct the Police to investigate and this time, police cannot refuse or neglect the registration of FIR and consequent investigation. But, it is important to note here that Magistrate is not a mere Post Office. He must be satisfied that there is sufficient ground for ordering an investigation by the police. Here, we are concerned with this satisfaction itself. However, in order to understand the concept of such satisfaction and grounds for satisfaction, few basic concepts of the criminal law e.g. complaint, investigation, enquiry, cognizance etc. has to be understood and they are also being discussed here for ready reference.

Complaint :

The complaint in ordinary parlence means an accusation by the aggrieved or someone on his behalf against some wrongdoer before some competent authority seeking some punitive action for the wrong he has done. The simplest example is childhood fight between two siblings or two fellow students, where a child alleges certain facts against the other before their parents/teachers in school, urging imposition of some kind of punishment for the alleged wrong committed by the other child. This is exactly the definition of complaint in Code of Criminal Procedure. Only change is, it can be made with respect to only different kind of offences defined in various laws and it should be made to competent authority i.e., Magistrate, who either himself is authorised by the law to try, or has to get it tried through Sessions Court by committing the same to it, if he takes cognizance. In this connection, attention is to be drawn to Section 2(d) of the Code which runs as follows:—

"complaint means any allegation made orally or in writing to a Magistrate, with

a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. Explanation.- A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant."

This definition of the complaint gives the essential ingredients of a complaint as follows:

i. **Allegation of offence/offences**—If no offence is made out, it would not come within the purview of complaint, and there would not be any prosecution.

ii. **Complaint may be oral or written**—The complaint filed under Section 200 of the Code of Criminal Procedure may be in writing, or oral. There is no difficulty in dealing with the written complaint. However, there is no specific provision as how to deal with the oral complaint. In this regard, the reference may be made to decision of Hon'ble Karnataka High Court in **Ashok S/O Shivalingappa ... Vs. Vasudev S/O Padappa Hanji [CRIMINAL REVISION PETITION NO.2230/2012** date of order 28 Sept. 2012], wherein it was held that if it is an oral complaint, the Magistrate should reduce it in writing and take cognizance and follow the next stages prescribed under the code.

iii. **It must be made to a Magistrate**—Police report has already been excluded, and so, the complaint before the Police Officer is not complaint within the meaning of the term in Code of Criminal Procedure. It is true that Criminal Law can be set into motion by making allegation before the Police or Magistrate orally or in writing. However, it comes within the purview of "complaint", only when it is made to a Magistrate and none else. Though Magistrate may not have the jurisdiction, the allegation still would be covered by definition of complaint. The Cr.P.C. specifically provides as to what is to be done by the Magistrate before whom the complaint is presented, if he has no jurisdiction. Many statutes require that the prosecution must be made on complaint. e.g. S. 16 of the Child Labour Prohibition & Regulation Act, 1986. If an act provides for filing of complaint, it must exclude the institution of FIR.

In P**atna Improvement Trust v. Smt. Lakshmi Devi & Ors.(1963 AIR 1077, 1963 SCR Supl. (2) 812)**, the Hon'ble Supreme Court spelt out the combined effect of the aforementioned principles thus: *"A general Act must yield to a special Act dealing with a specific subject-matter and that if an Act directs a thing to be done in a particular way, it shall be deemed to have prohibited the doing of that thing in any other way".*

At many times, confusion arises because the offences are classified as cognizable like that of Child Labour Prohibition & Regulation Act 1986. There it simply means that Police can arrest the accused without warrant and forward the accused to

Magistrate with complaint. Police cannot register the FIR, rather they are required to file complaint.

iv. **It must be made for taking action and so prayer for action must be there.**—In this connection a reference may be made to the case of **Rameshwar Prasad v. Bhatu Mahton and Ors., AIR 1958 Patna 11.** This is a Division Bench decision of the Hon'ble Patna High Court (Hon'ble Sahai and Raj Kishore Prasad, JJ.). In this decision in paragraph 2 it has been observed as follows: *"The entire definition makes it clear that a petition will be treated to be a complaint only when there is an accusation against some person and the prayer is for taking action upon a complaint under Sections 200 to 204 of the Code of Criminal Procedure."*

The Hon'ble Patna High Court, in **Naresh Chandra Das And Ors. vs State of Bihar And Ors. 2004 (2) BLJR 1143** had held, *"As has been noticed above, in the present protest petition no prayer has been made to take action under Sections 200 to 204 of the Code. On the other hand, the prayer has been made to keep the protest petition on record for future action. Thus, obviously this protest petition cannot be treated to be a complaint petition within the meaning of its definition as noticed above. There is no particular format of a complaint. A petition addressed to the magistrate containing an allegation that an offence has been committed, and ending with a prayer that the culprits be suitably dealt with, as in the instant case, is a complaint. Reference may be made to the decision of Hon'ble Supreme Court in AIR 2006 SC 705."*

v. Next question is as to **who can file the complaint** or whether the question of locus standi comes into the picture for criminal complaints. It is one of the fundamental postulates of the administration of criminal justice that anyone can set the criminal law into motion unless the statute enacting the offence makes a special provision to the contrary both with regard to the locus standi of the complainant, the manner and method of investigation and the person competent to investigate the offence, and the court competent to take cognizance. For example, Section 198(1) read with Section 198(2) of the Code of Criminal Procedure, 1973 carves out an exception to the general rule that anyone can set the criminal law in motion. Similarly, Section 199 of the Code of Criminal Procedure which provides for prosecution for defamation carves out the exception. Locus standi of the complainant is a concept foreign to criminal jurisprudence save and except that where the statue creating an offence provides for the eligibility of the complainant, by necessary implication the general principle gets excluded by such statutory provision. Numerous statutory provisions, can be referred to in support of this legal position such as (i) Sec. 187 A of Sea Customs Act, 1878 (ii) Sec. 97 of Gold Control Act, 1968 (iii) Sec. 6 of Import and Export Control Act, 1947 (iv) Sec. 271 and Sec. 279 of the Income Tax Act, 1961

(v) Sec. 61 of the Foreign Exchange Regulation Act, 1973,(vi) Sec. 621 of the Companies Act, 1956 and (vii) Sec. 77 of the Electricity Supply Act. This list is only illustrative and not exhaustive. In other words, the principle that anyone can set or put the criminal law in motion remains intact unless contra-indicated by a statutory provision. This general principle of nearly universal application is founded on a policy that an offence i. e. an act or omission made punishable by any law for the time being in force (See Sec. 2 (n), Cr. P. C.) is not merely an offence committed in relation to the person who suffers harm but is also an offence against society. The society for its orderly and peaceful development is interested in the punishment of the offender. Therefore, prosecution for serious offences is undertaken in the name of the State representing the people which would exclude any element of private vendetta or vengeance. If such is the public policy underlying penal statutes, who brings an act or omission made punishable by law to the notice of the authority competent to deal with it, is immaterial and irrelevant unless the statute indicates to the contrary. Punishment of the offender in the interest of the society being one of the objects behind penal statutes enacted for larger good of the society, right to initiate proceedings cannot be whittled down, circumscribed or fettered by putting it into a strait jacket formula of locus standi unknown to criminal jurisprudence, save and except specific statutory exception. The scheme underlying Code of Criminal Procedure clearly reveals that anyone who wants to give information of an offence may either approach the Magistrate or the officer in charge of a Police Station. References may be made to decision of the Hon'ble Supreme Court in **A. R. Antulay vs Ramdas Srinivas Nayak And Another [1984 AIR 718, 1984 SCR (2) 914** in this regard. In this case, an interesting question had come up for decision before Hon'ble Supreme Court and that was the maintainability of private complaint for corruption. The Hon'ble Apex Court had held,

"To hold that such an exception exists that a private complaint for offences of corruption committed by public servant is not maintainable, the court would require an unambiguous statutory provision and a tangled web of argument for drawing a far-fetched implication, cannot be a substitute for an express statutory provision. In the matter of initiation of proceeding before a special Judge under Sec. 8 (1), the Legislature while conferring power to take cognizance had three opportunities to unambiguously state its mind whether the cognizance can be taken on a private complaint or not. The first one was an opportunity to provide in Sec. 8 (1) itself by merely stating that the special Judge may take cognizance of an offence on a police report submitted to it by an investigating officer conducting investigation as contemplated by Sec. 5A. While providing for investigation by designated police officers of superior rank,

the Legislature did not fetter the power of special Judge to take cognizance in a manner otherwise than on police report. The second opportunity was when by Sec. 8 (3) a status of a deemed public prosecutor was conferred on a private complainant if he chooses to conduct the prosecution. The Legislature being aware of a provision like the one contained in Sec. 225 of the Cr. P. C., could have as well provided that in every trial before a special Judge the prosecution shall be conducted by a Public Prosecutor, though that itself would not have been decisive of the matter. And the third opportunity was when the Legislature while prescribing the procedure prescribed for warrant cases to be followed by special Judge did not provide by a specific provision that the only procedure which the special Judge can follow is the one prescribed for trial of warrant cases on a police report. The disinclination of the Legislature to so provide points to the contrary and no canon of construction permits the court to go in search of a hidden or implied limitation on the power of the special Judge to take cognizance unfettered by such requirement of its being done on a police report alone. In our opinion, it is no answer to this fairly well-established legal position that for the last 32 years no case has come to the notice of the court in which cognizance was taken by a special Judge in a private complaint for offences punishable under the 1947 Act. If something that did not happen in the past is to be the sole reliable guide so as to deny any such thing happening in the future, law would be rendered static and slowly wither away. One would therefore, require a cogent and explicit provision to hold that Sec. 5A displaces this scheme." The Hon'ble Supreme Court thus upheld the maintainability.

Proceeding on a Complaint:

When a private complaint is filed before the Magistrate, he has two options. He may take cognizance of the offence under Section 190 Cr.P.C. and proceed further in enquiry or trial. A Magistrate, who is otherwise competent to take cognizance, without taking cognizance under Section 190, may direct an investigation under Section 156(3) Cr.P.C. The Magistrate, who is empowered under Section 190 to take cognizance, alone, has the power to refer a private complaint for police investigation under Section 156(3) Cr.P.C. On receipt of private complaint under Section 200 of Cr.P.C., the Magistrate had two options, (i) to take cognizance and (ii) to refer the sworn statement of the complainant or any one of the complainants for investigation and then decide either to issue process or call upon the petitioners to substantiate. The conspectus of the provisions of Sections 200 to 204 of Cr.P.C therefore is necessary. The scheme enumerated in these provisions leaves no scope for doubt that at the time of taking cognizance, when a private complaint is presented in writing or when the complainant appears and requests the Court through his oral statement, the Magistrate is required, in law, under Section 200 Cr.P.C to record the

statement of the complainant if it is an oral complaint. If it is in writing, then he has to read the statement for the purpose of forming "an opinion". The word "opinion" spells out that the Magistrate is required to read the propositions for a substantive satisfaction and not objective assessment. No doubt, certain case laws are cited at the bar frequently to show that it is only an empty formality. Reference may be made to decision of the Hon'ble Karnataka High Court in the matter of **M Rajesh Palani vs The Station House Officer dtd 18 August, 2014** [https://indiankanoon.org/doc/123971387/] A Magistrate deals with a complaint case in consonance with the provisions of Chapter XV of the Code of Criminal Procedure. Section 200 of the said Chapter provides that a Magistrate empowered to take cognizance of an offence shall examine upon oath the complainant and the witnesses present, if any. After following the said provision, a Magistrate: (a) if finds that he is not competent to take cognizance of an offence, should resort to the provisions of Section 201 and return the complaint for its presentation before the proper Court. If it is an oral complaint, the Magistrate may direct the complainant "to the proper Court".

Thus, on a careful consideration of the facts and circumstances of the case the following legal propositions emerge –

1. That a Magistrate can order investigation under section 156(3) only at the pre-cognizance stage, that is to say, before taking cognizance under sections 190, 200 and 204 and where a Magistrate decides to take cognizance under the provisions of Chapter 14 he is not entitled in law to order any investigation under section 156(3) though in cases not falling within the proviso to section 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by section 202 of the Code.
2. Where a Magistrate chooses to take cognizance, he can adopt any of the following alternatives:
   (a) He can pursue that complaint and if satisfied that there are sufficient grounds for proceeding, he can straightaway issue process to the accused but before he does so he must comply with the requirements of section 200 and record the evidence of the complainant or his witnesses.
   (b) The Magistrate can postpone the issue of process and direct an enquiry by himself.
   (c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police.
3. In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding, he can dismiss the complaint. **Rosy & Another Vs. State of Kerala (2000 (1) SCR 107)** may be referred.

Where a Magistrate orders investigation by the police, before taking cognizance under section 156(3) of the Code and receives the report thereupon he can act on the report and discharge the accused or straightaway issue process against the accused or apply his mind to the complaint filed before him and take action under section 190 as described above. **[Tula Ram & Ors vs Kishore Singh [1977 AIR 2401, 1978 SCR (1) 615]**

Investigation :

'Investigation' is defined in Section 2(h) of the code to include all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf. 'Police report' is defined in Section 2(r) to mean a report forwarded by a police officer to a Magistrate under sub-s. (2) of Section 173. Chapter XII deals with investigation of a cognizable case. Section 156(1) and (2) are relevant, and may be extracted:—

> *"156(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII."*

Section 36 confers power of an officer-in-charge of a police station, on all police officers, superior in rank to an officer-in-charge of a police station. Section 173 provides for submission of a report by an officer in charge of a police station on completion of the investigation to the Magistrate empowered to take cognizance of the offence.

The State of Bihar is governed by the Indian Police Act, 1861, ('Act' for short), because it has not enacted any Police Act of its own. In Section 1 of the Act the word 'Police' is defined to include all persons who shall be enrolled under the Act and the words 'general police district' are defined to embrace any presidency, State or place, or any part of any presidency, State or place, in which the Act shall be ordered to take effect. Section 3 of the Indian Police Act provides as under:—

> *"3. The superintendence of the police throughout a general police-district shall vest in and, shall be exercised by the State Government to which such district is subordinate; and except as authorised under the provisions of this Act, no person, officer or Court shall be empowered by the State Government to supersede or control any police functionary".*

The Hon'ble Supreme Court in **H.N. Rishbud and Inder Singh v. The State of Delhi (1955 AIR 196, 1955 SCR (1)1150),** described the procedure prescribed for investigation under Ch. XIV of the Code of Criminal Procedure as: *"Thus, under the Code, investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender,*

(4) Collection of evidence relating to the commission of the offence which may consist of (a) examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by filing of a charge-sheet under section 173."

The Court, however, has not said that if a police officer takes merely one or two of the steps indicated by it, what he has done must necessarily be regarded as investigation. Investigation, in substance, means collection of evidence relating to the commission of the offence. The Investigating Officer is, for this purpose, entitled to question persons who, in his opinion, are able to throw light on the offence which has been committed and is likewise entitled to question the suspect and is entitled to reduce the statements of persons questioned by him to writing. He is also entitled, to search the place of the offence and to search other places with the object of seizing articles connected with the offence. No doubt for this purpose he has to proceed to the spot where the offence was committed and do various other things. But the main object of investigation being to bring home the offence to the offender, the essential part of the duties of an Investigating Officer in this connection, apart from arresting the offender, is to collect all material necessary for establishing the accusation against the offender. Merely making some preliminary enquiries upon receipt of information from an anonymous source or a source of doubtful reliability for checking up the correctness of the information, does not amount to collection of evidence and so cannot be regarded as investigation. [1964 AIR 221, 1964 SCR (3) 71]

Investigation And Preliminary Enquiry:

There has been quite a long debate on Preliminary Enquiry and Investigation. A two-Judge Bench of the Hon'ble Supreme Court in, **Lalita Kumari vs. Government of Uttar Pradesh & Ors. (2008) 7 SCC 164,** after noticing the disparity in registration of FIRs by police officers on case to case basis across the country, issued notice to the Union of India, the Chief Secretaries of all the States and Union Territories and Director Generals of Police / Commissioners of Police to the effect that if steps are not taken for registration of FIRs immediately and the copies thereof are not handed over to the complainants, they may move the Magistrates concerned by filing complaint petitions for appropriate direction(s) to the police, to register the case immediately and for apprehending the accused persons, failing which, contempt proceedings must be initiated against such delinquent police officers if no sufficient cause is shown. Other view was an officer-in-charge of a police station is not obliged under law, upon receipt of information disclosing commission of a cognizable offence, to register a case rather the discretion lies with him, in appropriate cases, to hold some sort of preliminary inquiry in relation to the veracity or otherwise of the accusations made in the report. In support of his submission, they placed reliance upon two-

Judge Bench decisions of the Hon'ble Supreme Court in P**. Sirajuddin vs. State of Madras (1970) 1 SCC 595, Sevi vs. State of Tamil Nadu 1981 Supp SCC 43, Shashikant vs. Central Bureau of Investigation (2007) 1 SCC 630,** and **Rajinder Singh Katoch vs. Chandigarh Admn. (2007) 10 SCC 69.** In view of the conflicting decisions of the Court on the issue, the matter was referred to a larger bench. The question posed was: whether under Section 154 CrPC, a police officer is bound to register an FIR when a cognizable offence is made out or he (police officer) has an option, discretion or latitude of conducting some kind of preliminary inquiry before registering the FIR. The use of the word "shall" in Section 154(1) of the Code clearly shows the legislative intent, that it is mandatory to register an FIR if the information given to the police discloses the commission of a cognizable offence. The legislative intent of Section 154 is vividly elaborated in **Bhajan Lal (1992 AIR 604, 1990 SCR Supl. (3) 259)** which is as under:—

"30. The legal mandate enshrined in Section 154(1) is that every information relating to the commission of a "cognizable offence" (as defined Under Section 2(c) of the Code) if given orally (in which case it is to be reduced into writing) or in writing to "an officer incharge of a police station" (within the meaning of Section 2(o) of the Code) and signed by the informant should be entered in a book to be kept by such officer in such form as the State Government may prescribe which form is commonly called as "First Information Report" and which act of entering the information in the said form is known as registration of a crime or a case.

31. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the concerned police officer cannot embark upon an inquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate, subject to the proviso to Section 157. In case, an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by sub-section (3) of Section 154 of the Code."

The Hon'ble constitution Bench in the said **Lalitha Kumari Vs. State of UP [2013 (4) Crimes 243 (SC)** settled the controversy making following Conclusion/Directions:—

"111) In view of the aforesaid discussion, we hold: i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation. ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not. iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further. iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence. v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence. vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under: a) Matrimonial disputes/ family disputes b) Commercial offences c) Medical negligence cases d) Corruption cases e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay. The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry. vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and, in any case, it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry. viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above." So, now it is mandatory for the Police to register the FIR and investigate, if cognizable offence is reported to it except for the given exceptions.

Difference between investigation U/S 156(3) and 202 Cr.P.C :

Section 156 falling within Chapter XII, deals with powers of police officers to investigate cognizable offences. Investigation envisaged in Section 202 contained in Chapter XV is different from the investigation contemplated under Section 156 of the Code. Chapter XII of the Code contains provisions relating to "information to the police and their powers to investigate", whereas Chapter XV, which contains Section 202, deals with provisions relating to the steps which a

Magistrate has to adopt while and after taking cognizance of any offence on a complaint. Provisions of the above two chapters deal with two different facets altogether, though there could be a common factor i.e. complaint filed by a person. Section 156, falling within Chapter XII deals with powers of the police officers to investigate cognizable offences. True, Section 202, which falls under Chapter XV, also refers to the power of a Magistrate to "direct an investigation by a police officer". But the investigation envisaged in Section 202 is different from the investigation contemplated in Section 156 of the Code. The various steps to be adopted for investigation under Section 156 of the Code have been elaborated in Chapter XII of the Code. Such investigation would start with making the entry in a book to be kept by the officer in charge of a police station, of the substance of the information relating to the commission of a cognizable offence. The investigation started thereafter can end up only with the report filed by the police as indicated in Section 173 of the Code. The investigation contemplated in that chapter can be commenced by the police even without the order of a Magistrate. But that does not mean that when a Magistrate orders an investigation under Section 156(3) it would be a different kind of investigation. Such investigation must also end up only with the report contemplated in Section 173 of the Code. But the significant point to be noticed is, when a Magistrate orders investigation under Chapter XII he does so before he takes cognizance of the offence. But a Magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Code. A reading of Section 202(1) of the Code makes the position clear that the investigation referred to therein is of a limited nature. The Magistrate can direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. This can be discerned from the culminating words in Section 202(1) i.e. "or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding".

Cognizance

Cognizance is the fundamental judicial act for a magistrate, but it's definition is one of the most debatable topics of criminal law. The Supreme Court in the case of **State of Karnataka and another v Pastor P Raju, (2006) 6 SCC 728,** explained the word "cognizance" and termed it as judicious hearing of a matter and held as under:—

> *"10. Several provisions in Chapter XIV of the Code of Criminal Procedure use the word "cognizance". The very first section in the said Chapter viz. Section 190 lays down how cognizance of offences will be taken by a Magistrate. However, the word "cognizance" has not been defined in the Code of Criminal Procedure. The dictionary meaning of the word "cognizance" is - "judicial hearing of a matter". The meaning of the word has been explained by judicial pronouncements and it has acquired a definite*

connotation. The earliest decision of the Hon'ble Supreme Court on the point is ***R.R. Chari v State of U.P., AIR 1951 SC 207*** *wherein it was held : "... taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to the suspected commission of an offence" In* ***Darshan Singh Ram Kishan v State of Maharashtra, AIR 1971 SC 2372*** *while considering Section 190 of the Code of 1898, it was observed that, "Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint, or on a police report, or upon information of a person other than a police officer."*

Similarly, in the case of **S.K. Sinha, Chief Enforcement Officer v Videocon International Ltd. and others, (2008) 2 SCC 492,** the Hon'ble Supreme Court explained that expression "cognizance" has not been defined in the Code but the word is not of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means *"become aware of and when used with reference to a Court or a Judge, it connotes "to take notice of judicially"*. Taking cognizance does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is thus a sine qua non or condition precedent for holding a valid trial. It is also settled that cognizance is taken of an offence and not of an offender. The Apex Court in the case of Anil Saran v. State of Bihar and Anr. 1996 AIR 204, 1995 SCC (6) 14 , has held that as soon as the Magistrate applies his judicial mind to the offence stated in the complaint or the police report etc., cognizance is said to be taken. It is further observed that whether the Magistrate has taken cognizance of offence on a complaint or on a police report or upon information of a person other than the Police Officer, determines the course of further action taken pursuant thereto and the attending circumstances of the particular case including the mode in which the case is sought to be dealt with or the nature of the action taken by the Magistrate. In **State of West Bengal and Another v. Mohd. Khalid and Others (1995) 1 SCC 684,** the Hon'ble Apex Court has observed as follows: *"It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out."* The following observations of Mr. Justice Das Gupta in the case of Superintendent and Remembrancer of Legal Affairs, **West Bengal v. Abani Kumar Banerjee AIR 1950 Cal 437** are worth noting –

"What is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any magistrate has taken cognizance of any offence under Section 190(1)(a) Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter - proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence." The observations of Mr. Justice Das Gupta above referred to were also approved by the Hon'ble Supreme Court in the case of **Narayandas Bhagwandas Madhavdas v. State of West Bengal, 1959 AIR 1118, 1960 SCR (1) 93 and Gopal Das Sindhi And Ors. vs State Of Assam And Anr. [1961 CriLJ 39]**. In the case of **Gopal Das Sindhi and Ors. v. State of Assam & Anr,** the Hon'ble Apex Court while approving the observations of Justice Das Gupta in the case referred to above observed as follows *:- "It would be clear from the observations of Mr. Justice Das Gupta that when a Magistrate applies his mind not for the purpose of proceeding under the various sections of Chapter XVI but for taking action of some other kind,, e.g. ordering investigation under section 156(3) or issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of any offence."* To the same effect is the decision of the Hon'ble Supreme Court in ***Jamuna Singh & Ors.v. Bhadai Sah(1964 AIR 1541, 1964 SCR (5) 37),*** *"It is well settled now that when on a petition of complaint being filed before him a Magistrate applies his mind for proceeding under the various provisions of Chapter XVI of the Code of Criminal Procedure, he must be held to have taken cognizance of the offence mentioned in the complaint. When however he applies his mind not for such purpose but for purposes of ordering investigation under section 156(3) or issues a search warrant for the purpose of investigation he cannot be said to have taken cognizance of any offence." Our own Hon'ble Patna High Court had held in* ***Ram Narain Giri Vs. State Of Bihar & Anr (Criminal Miscellaneous No.6160 OF 1999)*** that, at the time of taking cognizance, the Magistrate is not required to give a detailed description of the allegation in the order. It is the complete satisfaction of the Magistrate on the basis of material available before him disclosing prima facie commission of the offence to further proceed in the case. This is in consonance with the decision of the Hon'ble Supreme Court in R. R. Chari and Darshan Singh Ram Kishun case noted above to the effect that cognizance requires no formal action.

Role of a Magistrate in Investigation :

General Law is that normally the Magistrate should not and cannot interfere in the investigation. There was apparent reluctance of superior courts on this. In **State Of Haryana And Ors vs Ch. Bhajan Lal And Ors [1992 AIR 604, 1990 SCR Supl. (3) 259]** the Hon'ble Supreme Court had observed :—

"The next aspect to be considered is whether it is open to the Court to interfere with the investigation which is still proceeding. It has been conceded before us and rightly in our view, that investigation is a matter for the police under the scheme of the Code. Judicial opinion seems to be settled and we have several authorities of this Court where interference by the Court into police investigation has not been approved. A three Judge Bench of Hon'ble Supreme Court in the case of **State of West Bengal v. S. N. Basak, (1963 AIR 447, 1963 SCR (2) 52)** quoted with approvalthe observations of the Judicial Committee in the case of **King Emperor v. Khwaja Nazir Ahmad, ((1945) 47 BOMLR 245)** where the Hon'ble Privy Council observed: "The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved under s. 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus. In such a case as the present, however, the Court's functions begin when a charge is preferred before it, and not until then. The question again arose in the case of **S. N. Sharma v. Bipin Kumar Tiwari & Ors .(1970 AIR 786, 1970 SCR (3) 946)** on this occasion the Hon'ble Supreme Court was called upon to examine the scope of magisterial power. After referring to the relevant sections, the Hon'ble Court concluded that: *"The scheme of these sections, thus, clearly is that the power of the police to investigate any cognizable offence is uncontrolled by the Magistrate, and it is only in cases where the police decide not to investigate the case that the Magistrate can intervene and either direct an investigation or, in the alternative, himself proceed or depute a Magistrate subordinate to him to proceed to enquire into the case. The power of the police to investigate has been made independent of any control by the Magistrate."* There is a clear cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the executive through the police department, the superintendent over which vests in the State Government. The executive which is charged with a duty to keep vigilance over law and order situation is obliged to prevent crime and if an offence is alleged to have been committed it is its bounden duty to investigate into the offence and bring the offender to book. Once it investigates and finds an offence having been committed it is its duty to collect evidence for the purpose of proving the offence. Once that is completed and the investigating

officer submits report to the Court requesting the Court to take cognizance of the offence under s. 190 of the Code its duty comes to an end. On a cognizance of the offence being taken by the Court the police function of investigation comes to an end subject to the provision contained in s. 173(8). From there commences the adjudicatory function of the judiciary to determine whether an offence has been committed and if so, whether by the person or persons charged with the crime by the police in its report to the Court, and to award adequate punishment according to law for the offence proved to the satisfaction of the Court. There is thus a well defined and well demarcated function in the field of crime detection and its subsequent adjudication between the police and the Magistrate. This has been recognised way back in King Emperor v. Khwaja Nazir Ahmad, where the Hon'ble Privy Council observed as under: "In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved under s. 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus. In such a case as the present, however, the court's functions begin when a charge is preferred before it, and not until then". This view of the Judicial Committee clearly demarcates the functions of the executive and the judiciary in the field of detection of crime and its subsequent trial and it would appear that the power of the police to investigate into a cognizable offence is ordinarily not to be interfered with by the judiciary. In **State of Bihar And Anr Vs J.A.C. Saldanha And Ors [1980 AIR 326, 1980 SCR (2) 16]** it was held that the core of the Sections 156, 157 and 159 of the Code of Criminal Procedure is that if a police officer has reason to suspect the commission of a cognizable offence, he must either proceed with the investigation or cause an investigation to be proceeded with by his subordinate; that in a case where the police officer sees no sufficient ground for investigation, he can dispense with the investigation altogether; that the field of investigation of any cognizable offence is exclusively within the domain of the investigation agencies over which the Courts cannot have control and have no power to stifle or impinge upon the proceedings in the investigation so long as the investigation proceeds in compliance with the provisions relating to investigation and that it is only in a case wherein a police officer decides not to investigate an offence, the concerned Magistrate can intervene and either direct an investigation or in the alternative, if he thinks fit, he himself can, at once proceed or depute any Magistrate sub-ordinate to him to proceed to hold a preliminary inquiry into or otherwise to dispose of the case in the manner provided in the Code. Still, the law was consistent that ball finally lied

with court and it had full discretion to accept or reject the police report and issue direction for further investigation. In **AIR 1968 SUPREME COURT 117 "Abhinandan Jha Vs. Dinesh Mishra",** it was held that If, the Magistrate feels, after considering the final report, that the investigation is unsatisfactory, or incomplete, or that there is scope for further investigation, it will be open to the Magistrate to decline to accept the final report and direct the police to make further investigation, under Section 156 (3). Even if the Police had exonerated some or all accused, it had always been within the domain of the Magistrate to take cognizance, if he found prima facie material. However, on investigation, the trend has changed with decision of the **Hon'ble Supreme Court in Sakiri Vasu v State of U.P. (2008) 2 SCC 409,** where it has been held that if a person has a grievance that his FIR has not been registered by the police, or having been registered, proper investigation is not being done, then the remedy of the aggrieved person is not to go the High Court under Article 226 of the Constitution of India, but to approach the Magistrate concerned under Section 156(3) CrPC. If such an application under Section 156(3) CrPC is made and the Magistrate is, prima facie, satisfied, he can direct the FIR to be registered, or if it has already been registered, he can direct proper investigation to be done which includes in his discretion, if he deems it necessary, recommending change of the investigating officer, so that a proper investigation is done in the matter. In one of the cases, the Hon'ble Supreme Court observed *"We have said this in Sakiri Vasu case because what we have found in this country is that the High Courts have been flooded with writ petitions praying for registration of the first information report or praying for a proper investigation. Under Section 156(3) CrPC, this court can: (i) direct registration of FIR, (ii) if FIR has already been registered, issue a direction for proper investigation to be made, which includes, if he deems it necessary, recommending change of investigating officer, and can also (iii) monitor the investigation."* **[Sudhir Bhaskarrao Tambe v. Hemant Yashwant Dhage, (2016) 6 SCC 277].**

Order for Investigation U/S 156(3) Cr.P.C. by the Magistrate :

Section 156 under Chapter XII of the CrPC gives police officer powers to investigate cognizable offence in three situations. It reads as under:—

"(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to enquire into or try under the provisions of Chapter XIII. (2) No proceeding of a police officer in such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate. (3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned. "

In **Dilawar Singh v. State of Delhi, (2007) 12 SCC 641,** the Hon'ble Supreme Court ruled thus: (SCC pg 647, para 18) —

> *"The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156 (3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all, registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156 (3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter"*

In **CREF Finance Ltd. v. Shree Shanthi Homes (P) Ltd., (2005) 7 SCC 467,** the Court while dealing with the power of the Magistrate taking cognizance of the offences, has opined that having considered the complaint, the Magistrate may consider it appropriate to send the complaint to the police for investigation under Section 156 (3) of the Code of Criminal Procedure. And again, in **Madhao v. State of Maharashtra, (2013) 5 SCC 615,** it was observed,

> *"When a Magistrate receives a complaint, he is not bound to take cognizance if the facts alleged in the complaint disclose the commission of an offence. The Magistrate has discretion in the matter. If on a reading of the complaint, he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156 (3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence itself. As said earlier, in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156 (3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190 (1) (a). However, if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to revert back to the pre- cognizance stage and avail of Section 156 (3)."*

Recently, in **Ramdev Food Products (P) Ltd v. State of Gujarat, (2015) 6 SCC 439**, while dealing with the exercise of power under section 156(3) CrPC by the learned Magistrate, a three- Judge Bench has held that, (SCC p. 456, para 22) *"The direction under Section 156(3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does*

not take cognizance and does not find it necessary to postpone the issuance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued. The cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine -existence of sufficient ground to proceed". After analyzing the statutory provisions of the Cr.P.C. and the earlier decisions of the Supreme Court as stated herein above, the Hon'ble Court observed in paras 27 to 31 as under:—

> *"Regard being had to the aforesaid enunciation of law, it needs to be reiterated that the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order. There is no dispute that the Magistrate has the discretion, but as always discretion does not mean arbitrariness. It means judicious decision for meeting the ends of justice."*

Pre-requisites/Criteria for sending the Complaint for Investigation U/S 156(3) Cr.P.C.:

It is settled that a Magistrate can order investigation under Section 156(3) only at the pre-cognizance stage, that is to say, before taking cognizance under Sections 190 and where a Magistrate decides to take cognizance under the provisions of Chapter 14, he is not entitled in law to order any investigation under Section 156(3) though in cases not falling within the proviso to Section 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by Section 202 of the Code.

Section 154 of the CrPC under Chapter XII enables every person, who intends to report relating to commission of a cognizable offence to approach an officer-in-charge of a police station, who then is required to reduce such information in writing and to register an FIR, as provided for under Section 154(1) of the Cr.P.C. However, if an officer-in- charge of a police station refuses to register an FIR, the person aggrieved may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses commission of a cognizable offence, shall either investigate the case himself or direct investigation made by any police officer subordinate to him in view of the provisions contained under Section 154 (3) of the Cr.P.C To understand the real purport of the same, Section 154 has also to be read along with section 156 which provides:—

> "156. **Police officer's power to investigate cognizable case.**—(1) Any officer in charge of a Police Station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a Police Officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as mentioned above." Keeping these provisions in mind, it has to be seen as to when the Magistrate is required to use his discretion."

Question comes whether powers vested in the Court under Section 156(3) of the CrPC can be exercised only when an officer-in-charge of the police station has refused to record information given by the informant disclosing commission of a cognizable offence and also despite being approached the Superintendent of Police, has failed to take appropriate action in the matter as provided for under section 154(3) of the CrPC or whether the Magistrate can be approached at the first instance. The Hon'ble Supreme Court has considered the exercise of power by the Magistrate under Section 156(3) CrPC and issuance of direction by the Court in exercise of such power in the matter of **Priyanka Srivastava and Another vs. State of Uttar Pradesh and Others reported in 2015(6) SCC 287,** which is an authority on this aspect. The Hon'ble Supreme Court had observed

"At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellows citizens, efforts are to be made to scuttle and curb the same". Making this observation, the Hon'ble Apex Court further went on to hold and direct –

(a) Section 156(3) Cr.P.C applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate.

(b) Magistrate to verify the truth and also can verify the veracity of the allegations.

(c) It cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.

(d) There has to be prior applications under Section 154(1) and 154(3) while filing a petition under Section 156(3)

(e) both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed.

In **Ramdev Food Products Private Limited v. State of Gujarat [Criminal Appeal No. 600 of 2007 decided on 16.03.2015],** while dealing with the exercise of power under Section 156(3) CrPC by the learned Magistrate, a three-Judge Bench has held that: *".... the direction*

under Section 156(3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone issuance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued. Cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine "existence of sufficient ground to proceed."

In **Bipin Kumar Singh & Anr vs The State of Bihar Cr. WJC No.413 of 2015 dt.21-01-2016 [https://indiankanoon.org/doc/33529742/],** relying upon the decision of the Hon'ble Supreme Court in Priyanka Srivastava case, the Hon'ble Patna High Court had held that *" In view of the law laid down by the Hon'ble Supreme Court in the matter of Priyanka Srivastava (supra), before passing the order under Section 156(3) CrPC it was incumbent upon the learned CJM to ensure that before coming to the Court, the complainant did approach the officer-in-charge of the police station for recording the information disclosing commission of a cognizable offence and on refusal to register FIR, the complainant sent the substance of such information in writing and by post to the Superintendent of Police under Section 154(3) CrPC. A duty is also cast upon the Magistrate to apply his judicial mind at the time of exercise of power under Section 156(3) Cr.P.C and only a principled and really aggrieved citizen with clean hands should be allowed to invoke such power."*

In the matter of **Indian Oil Corporation vs. NEPC India Ltd. and Others reported in (2006) 6 SCC 736,** referring to the growing tendency in business circle to convert purely civil disputes into criminal cases, the Hon'ble Supreme Court has held in paragraphs 13 and 14 as under:—

> *"13. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged*
>
> *14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law."*

In **G. Sagar Suri vs. State of UP [2000 (2) SCC 636],** this Court observed, *"It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."*

In the matter of **State of Haryana and Others vs. Bhajan Lal and Others reported in 1992 Suppl.(1) SCC 335,** the Hon'ble Supreme Court has laid down the principles on which the superior courts can quash the criminal proceedings under Article 226 of the Constitution of India or under section 482 CrPC.

In the aforesaid decision of Supreme Court in Priyanka Srivastava Case, responsibility was bestowed upon the Magistrate to verify the truth and also verify the veracity of the allegations and caution was advised that it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores. The Hon'ble Patna High Court in Bipin Kumar Singh case, has impliedly held that the illustrative grounds for quashing the criminal prosecution in authoritative landmark judgment in Bhajan Lal case has to be ruled out. The grounds for quashing, which has to be ruled out at the time of making order U/S 156(3) Cr.P.C are as under:

(i) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.

(ii) Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a caseagainst the accused.

(i) Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(ii) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(iii) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(iv) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

Now, prior to sending any such petition of complaint for its registration and investigation u/s 156 (3) Cr. P.C. it is obligatory for the ld. Magistrate to go through the petition of complaint and to apply his judicial mind as to whether it would be fit and proper on the basis of allegations made therein to register a police case and to investigate the matter u/s 156 (3) Cr. P.C. for an appropriate and effective investigation into the allegations made in the petition of complaint. There are cases where under compelling circumstances, police investigation is absolutely necessitated for recovery of incriminating articles like weapon of murder and materials e.g. blood stained wearing apparels of the deceased or assailants and also for collecting medical papers, Post mortem Examination Report etc. (such list is merely illustrative not exhaustive) in case of allegation of very serious offences and in some other cases of similar nature. In such types of cases Police investigation should necessarily be ordered in exercise of power u/s 156 (3) Cr. P.C. But in other cases by exercising his judicial discretion, if the ld. Magistrate is of the opinion that the police investigation is not necessitated in view of nature of allegations made in the petition of complaint, he should be prompt enough to take cognizance and to examine witnesses etc. and thereafter, to issue process in appropriate cases. It is, therefore, made absolutely, clear that on receipt of a petition of complaint u/s 156 (3) Cr. P.C. ld. Magistrate is required to weigh both the options and, thereafter, exercise his judicial discretion in this way or that way by examining the nature of allegations as is available at that stage from the petition of complaint. It is not the spirit of the relevant provision of law as enshrined u/s 156 (3) Cr. P.C. that in every case ld. Magistrate would simply forward the petition of complaint directing its registration and investigation without even applying his judicial mind to the allegations levelled against the accused persons. More so, it is settled position of law that mere allegations without any supporting materials would not justify order for investigation u/s 156 (3) Cr. P.C. In fact, the scope of powers available to the ld Magistrate u/s. 156 (3) Cr. P.C. is limited. Exercise of such power is restricted to the extent that after ensuring compliance with section 154 (3) Cr. P.C., if the ld. Magistrate is satisfied without taking cognizance that there are materials in respect of allegations made in the petition of complaint, he could then only pass directions or order in terms of section 156 (3) Cr. P.C. On the contrary, ld. Magistrate need not order any such investigation if he proposes to take cognizance of the offence. But once he takes cognizance of the offence he is to follow the procedure envisaged in chapter XV of the Code. In the light of foregoing discussions it is held that even for ordering investigation by police u./s 156 (3)

Cr. P.C. the ld. Magistrate cannot act merely as a post office and he is to apply his judicial mind before doing so. It is, however, within the absolute discretion of the ld. Magistrate as to whether he would exercise the power vested upon him u/s. 156 (3) Cr. P.C. at pre-cognizance stage after taking into consideration the allegations made in the petition coupled with relevant supporting materials thereto. There is no scope to exercise such discretion arbitrarily without any application of judicial mind.

The word 'may' occurring in Section 156(3) Cr.P.C. is of utmost significance. It gives the magistrate a discretionary power to order or not for an investigation into the cognizable offence disclosed in the petition. This discretionary power ought to have been exercised only on reasons and not on arbitrariness. This discretionary power has been given to magistrates to enable them to deal adequately with both types of the petitions (i) the genuine petitions containing truthful allegations about the commission of the cognizable offence and (2) the petitions having baseless or false allegations. The increasing tendency of the people to file petitions on false allegations cannot be ignored. The petitions of later category are filed with the motive to unnecessarily harass the opponents, by taking the undue advantage of the provisions of Section 156(3) Cr.P.C.

The Hon'ble Allahabad High Court in **Smt. Anjum vs State of U.P. & Anr. on 24 January, 2008 [https://indiankanoon.org/doc/1650049/]** had held that, while dealing with the petitions under Section 156(3) Cr.P.C. it is the duty of the magistrate to make it a point that no petitioner of the latter category may succeed in his wicked game. His petition needs to be dismissed with firmness and boldness. At the same time it is the pious duty of the Magistrates to ensure that no case of the former category may go uninvestigated. The magistrates are thus saddled with a great responsibility to keep such a balance. It is for this purpose that the magistrates are endowed with the aforesaid discretionary powers. It is not an easy task to distinguish between the aforesaid two types of petitions. Hence following few guidelines may help them, while dealing with the powers contained in Section 156(3) Cr.P.C.

(i) The investigation under Section 156(3) Cr.P.C. cannot be ordered where the petition does not disclose the commission of a cognizable offence.

(ii) Magistrates are not under any obligation to order the investigation invariably in all the petitions, which disclose the commission of the cognizable offences.

(iii) Where the allegation of the commission of cognizable offence is supported by any such documents which tends to inspire the confidence of the magistrate regarding the commission of a cognizable offence, the magistrate must pass the order for the investigation. Such documents may include the medical report or some other cogent material of the like nature.

(iv) Where the allegation, in itself, is of such a nature which naturally inspire the confidence of a reasonable man in its truthfulness the magistrate must pass the order for an investigation. Such allegations include the allegation of rape, outraging the modesty of

a woman, sodomy or the offence under Sections 363 and 366 etc, provided the victim is related to the petitioner. Such allegations involve the reputation of the family of the victim and the petitioner both, hence such allegations are generally, not levelled falsely. Hence in such cases also the magistrates must pass the order for an investigation.

(v) Where the name of the accused is not known to the petitioner, the chances of false implication are ruled out. Hence in such cases also, the investigation must be ordered,

(vi) Where the recovery of the victim or the victim's corpse is to be made, the investigation must be ordered. Such as in the case of allegations of the offences under Section 363, 366 and 364 IPC.

(vii) Where the recovery of any valuable movable property is to be made and where there is cogent document to show the ownership of the petitioner over such moveable property, the investigation may be ordered.

(viii) Where there is allegation regarding the commission of a heinous offence, the investigation must be ordered. Such as in the case of murder, culpable homicide not amounting to murder etc.

(ix) Where the magistrate is of the opinion that some more facts which are in obscurity but are necessary to be investigated for the just decision of the case, the magistrate may order for the investigation provided the petition discloses the commission of a cognizable offence.

(x) where there is nothing to convince the magistrate regarding the truthfulness of the allegation and where there is nothing to rule out the possibilities of the allegation being false, the magistrate must avoid to pass an order for investigation.

(xi) In other cases the magistrate must apply his own mind and reason while dealing with the powers under Section 156(3) Cr.P.C. The magistrate must always keep it in mind that the passing of an order for investigation in frivolous and vexatious petitions containing false allegations is an abuse of the process of the court. Simultaneously declining to pass the order for an investigation in genuine petitions containing truthful allegations, is akin to denial of justice to the needy persons. Both of these situations are dangerous.

It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle "quando lex aliquid alicui concedit,

concedere videtur et id sine quo res ipsae esse non potest" (when the law gives a person anything it gives him all that without which it cannot exist).

Division Bench of the Hon'ble Madras High Court, in **G.Prabakaran Vs. Superintendent of Police and another reported in 2018(5) CTC 623**, held that Eschewing Section 156(3) Cr.P.C. is only on exceptional and rarest of rare cases. Monstrosity of the offence, extreme official apathy and indifference, need to answer the judicial conscience, and existence of hostile environment are few of the factors to be borne in mind to bring a case under the rarest of rare one.

Our own Hon'ble Patna High Court had taken view in **Sakal Deo Paswan Vs, State of Bihar [Crl. W.J.C. 783/2014]** on 25/06/2015 that it is condition precedent that Magistrate must have not taken cognizance. If he had taken cognizance and proceeded U/S 200 Cr.P.C., he cannot switch back over to 156(3) Cr.P.C. The appropriate course of action for a Magistrate while rejecting a prayer under Section 156(3) CrPC, is to take cognizance of the alleged offences under Section 200 CrPC and to examine the complainant and her witnesses to determine as to whether the process should be issued. Again under Section 202(1) CrPC the Magistrate, instead of issuing process, may direct an investigation to be made by a police officer. An investigation under Section 202(1) CrPC may hold the Magistrate to ascertain whether or not there is substantial ground to proceed further." **[Pranati Das v. State of W.B., 2020 SCC Online Cal 132, decided on 21-01-2020]**

The Hon'ble Punjab & Haryana High Court had taken the view that the order for Investigation U/S 156(3) Cr.P.C. need not be a detailed reasoned order. Holding this it observed that : The next question is whether the Magistrate is required to record any reason for passing an order under Section 156(3) Cr.P.C or not. It is well settled law that requirement of recording reasons is not the same thing as acting by application of mind or acting fairly. Recording of reasons for a particular decision is a function of provision under which the order is required to be passed. The recording of reasons is required only if provisions so requires. The legal proposition has been amply clarified by the judgment of the Hon'ble Supreme Court rendered in case of **National institute of Mental Health and Neuroscience vs. Dr. K.Kalyana;1992 AIR SC 1806.** There are so many provisions in Cr.P.C which require the Magistrate or the Court to record reasons for arriving at a decision. Under some provisions even for passing orders before taking cognizance and even during investigation; the Court is required to record reasons. The examples for this can be found in Section 167 Cr.P.C. However, the provision of Section 156(3) Cr.P.C does not cast any duty upon the Magistrate to record the reasons, and this omission in language of Section 156(3) Cr.P.C is deliberate and for good reasons. The Magistrate can apply his mind to the facts disclosed in the complaint and documents attached therewith for limited purpose to see if cognizable offence is disclosed, and if it is so disclosed; whether an investigation by police is required. But he need not put-out his thinking on order sheet. The Hon'ble Supreme Court in the case of **Anil Kumar** *(supra)* has observed that the Magistrate would be required to dilate upon the matter in such a manner which reflects upon the application of mind. However, in considered opinion of this Court,

such application of mind can be reflected even by a terse and telling language; giving indication of application of mind, though not directly recording reasons. In such a situation, of course, the Magistrate; while acting under Section 156(3) Cr.P.C; may be required to record a few lines; which might reflect upon application of mind, however, he is not required to record the detailed reasons for passing the order; either way. Otherwise also, recording of reasons at the stage of exercise of powers under Section 156(3) Cr.P.C can lead to further undesirable and absurd consequences and complications, and can; sometimes; lead to direct confrontation with other provisions contained in Cr.P.C. If the Magistrate is required to record the reasons to justify his order in such terms, by recording all the reasons, that the order can be analysed in revision and appeal, then it would, definitely, be dilating upon the merits of the case. Once the Magistrate enters into the merit of the case at the stage of Section 156(3) Cr.P.C, that would tantamount to taking the case in the realm of Section 200 Cr.P.C and may tantamount to taking cognizance. If while deciding the issue of sending case to police under Section 156(3) Cr.P.C the Magistrate records detailed or explicit reasons, than this would also adversely affect the consideration of case by the Magistrate either in case of possible protest petition against cancellation report or in case of consideration under Section 203 Cr.P.C or under Section 204 Cr.P.C or even at the stage of framing of charge. By any means, since it has to be pre-cognizance stage, as held by the Hon'ble Supreme Court, application of mind for the purpose of recording any finding of any kind; is not even germane and jurisprudentially sustainable. Bare language of Section 156 Cr.P.C would also make it clear that no reasons are required to be recorded by Magistrate for ordering investigation. After an FIR has been recorded by the police, under Section 156 Cr.P.C, the Police Officer can investigate a case; regarding which a local Court has jurisdiction to take cognizance. He need not record any reason for either registering an FIR or for entering into investigation. Still further Section 156(2) Cr.P.C further provides that such an investigation shall not be called in question before any Court for the reason that such police officer was not empowered to investigate the case. Since the power of the police to investigate is flowing only from competence of court to take cognizance of a matter, therefore, Section 156(3) Cr.P.C as a classificatory provision of general supervisory powers of Magistrate to control and monitor the investigation, provides that a Magistrate may also order investigation of a case where he has the competence to take cognizance of that offence. This power of the Magistrate also; like power of police to investigate, is without any statutory 'ifs' and 'buts'. The only regulatory factor for this power is the competence of Magistrate to take cognizance of such offence. Needless to say that, as has been held by the Hon'ble Supreme Court in case of **Madhu Bala vs. Suresh Kumar;1997 (3) RCR (Criminal) 679, Mohd. Yousuf vs. Smt. Afaq Jahan; 2006 (1) RCR (Criminal) 451,** and in case of **T.C. Thangaraj vs. V. Engammal and others; 2011 (3) RCR (Criminal) 751,** the Magistrate cannot only order investigation in a case, but he can also order registration of FIR and even monitor the investigation in such a case. Hence, it is clear that power of police to investigate the offence suo moto, on registration of FIR, and power of the Magistrate to order investigation by

registering the FIR; both are regulated by the same controlling factor, i.e., the competence of the local Court to take cognizance of the offence. In such a statutory situation, if no reasons are required to be recorded by the police for registration of FIR and for investigating the same, then there is no question of the Magistrate being required to record reasons for the same. By any means, and under no provision of Cr.P.C, the power of the Magistrate can be put at a pedestal lower than the one enjoyed by the police whom the Magistrate is empowered to monitor and supervise. On the contrary, the Magistrate, statutorily, is the controlling authority over the power of the police in the matter of investigation of a case. There is another reason to highlight as to why the Magistrate is under no obligation to record reasons for ordering investigation under Section 156(3) Cr.P.C. The Hon'ble Supreme Court has repeatedly held that even after taking cognizance when the Magistrate passes a summoning order, he is not required to record any explicit or detailed reasons. In case of **Nupur Talwar vs. CBI [2012(3)RCR(Cr.)595],** the Hon'ble Supreme Court has held that despite the police, submitting a report otherwise, it is the satisfaction of the Magistrate, whether to issue any process in the case or not, and for issuing such process the Magistrate need not record any reasons. Non-recording of reasons does not vitiate the order of the Magistrate. Even if he records any reasons, the higher court is not required to appreciate 'sufficiency' of material or reasons for such order, rather it has to restrict itself to see the 'existence' of material or reasons. By holding this, in fact, the Hon'ble Supreme Court has only applied the criterion which is applied for 'judicial review' of any administrative order/executive exercise, like the proclamation issued by the President of India under Article 356 of the Constitution of India. Therefore, such an order of Magistrate has been taken at par with supervisory administrative or executive order; instead of taking it as part of a strictly judicial process. Another aspect which has come up for consideration collaterally is certain judgments from various High Courts in which it has been observed that the jurisdiction under Section 156(3) Cr.P.C should not be invoked merely on asking of a complainant and that before passing an order under Section 156(3) Cr.P.C the Magistrate should take affidavit and document from the complainant and then try to find out the veracity of the documents and truth of allegation in the complaint and only then he should order investigation by the police To the same effect is another judgment from the Hon'ble Supreme Court in case of **Mrs. Priyanka Srivastava and another vs. State of U.P. and others[2015 AIR(SC)1758].** However, a careful reading of this judgment shows that this judgment does not lay down taking of affidavits and finding truth in allegations by the Magistrates, as a pre-condition for exercising power under Section 156(3) Cr.P.C or for ordering investigation. Rather in that case, faced with a piquant situation of repeated misuse of provision of Section 156(3) Cr.P.C by an unscrupulous defaulter borrower; against secured creditors and statutory authorities, and even that by concealing the entire sequence and events/results of earlier litigations, the Hon'ble Supreme Court has observed that the Magistrate would be well advised to take affidavit from such persons and can even verify the veracity of allegation to come to a conclusion if any cognizable case is even remotely revealed in the complaint. These observations had emerged from the fact

that the complainant in that case had not come to the Court with clean hands and there was a specific bar created by Section 32 of SARFESI ACT against taking cognizance of any suit, prosecution or any other proceedings against secured creditor or any other officer or manager working in that regard. Despite such statutory bar, the Magistrate had entertained repeated applications under Section 156(3) Cr.P.C. against statutory authorities and had ordered registration of FIRs without full knowledge of series of litigations in which the complainant had already failed on similar grounds. Therefore, the Hon'ble Supreme Court had observed that in case a complaint is filed against statutory authorities for passing statutory orders then the Magistrate has to take extra precaution in exercising powers under Section 156(3) Cr.P.C; lest this provision should be turned into a routine tool of harassment by the unscrupulous defaulters against the high and responsible officers of the statutory authorities. However, in this judgment itself, the Hon'ble Supreme Court has held that it was conscious of the fact that there cannot be separate set of law for high-up; because nobody is above the law. Therefore, the Hon'ble Supreme Court has clarified that a principled and really grieved citizen; with clean hands; must have free access to invoke the power of the Magistrate under Section 156(3) Cr.P.C. While it protects the ordinary citizen, but when pervert litigation takes the route of Section 156(3) Cr.P.C, efforts should be made to scuttle and curb the same. Hence, this judgment of the Hon'ble Supreme Court does not lay down, as a precedent, that taking of affidavits and finding the veracity and truth of allegations by a Magistrate is a 'sine qua non' for passing order under Section 156(3) Cr.P.C. This has been left to the discretion of the Magistrate, if considered appropriate in a particular case; but only as an advisory. That discretion is always there otherwise also. Still further insisting upon affidavits at the stage of Section 156(3) Cr.P.C may not be otherwise desirable; because an affidavit is a sworn statement, which if submitted before the Magistrate, may not be possible for him to ignore at that time even if it turns out to be false later on. Still further, all such judgments as mentioned above have not emanated from the interpretation of language of Section 156(3) Cr.P.C. Rather, as mentioned above, this category of judgments has emanated from an inherent fear of a scare of Indian system of administration of criminal justice, called the 'FIR'. These judgments are pitched against possible misuse of provision by getting the 'FIR' registered. However, possible misuse of a provision is nowhere recognised as a criterion or a valid tool for interpretation of statutes. Therefore, all such judgments, though deserve all the respect as a decision on a lis in those particular cases, yet cannot be raised to the status of precedent qua exercise of power by a Magistrate under Section 156(3) Cr.P.C. Such judgments can, at the best, serve as an advisory to the Magistrate to be careful while dealing with a matter under Section 156(3) Cr.P.C, and nothing more. In fact, actuated by possible misuse of this provision, incorporating more conditions in language of Section 156(3) Cr.P.C by judicial interpretation is not even the remedy for the fear of the demon called 'FIR'. The remedy lies in extending the scope of other rights of citizen/persons against whom FIR has been registered. Remedy lies in purposive and liberal interpretation of the provisions regarding anticipatory bail, bail, discharge and acquittal. Remedy lies in shedding off the tendency to follow a person till his

grave once an FIR is registered against him. Remedy lies in removing the legal and judicial disqualifications and disadvantage which are stuck to such a person; despite the fact that such person might have been found innocent during investigation, might have been discharged by the Court or even might have been acquitted by a Court. Remedy lies in giving restrictive interpretation to the police powers vis-a-vis rights of individual and the remedy lies in training the Courts not to write in their judgments of acquittal that the accused is acquitted 'by giving benefit of doubt'. Further, the remedy lies in treating the scare called 'FIR' with the contempt it deserves and not to exalt it as the only or even the main controller of the social aberrations and the social behaviour. It has to be treated nothing more than an information of an alleged offence. The system of administration of criminal justice deserve to mature itself to that degree. **[M/s Sujan Multiports Ltd vs. State of Haryana and others CRM-M-12329-2018(O&M) Date of decision:12.03.2019)]**

However, this decision having very appealing and sound reasons does not go well with the decision of the Hon'ble Supreme Court in **Anil Kumar v. M K Aiyappa (2013) 10 SCC 705**, wherein it was held that where jurisdiction is exercised on a complaint filed in terms of Section 156 (3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156 (3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156 (3) CrPC, should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation."

Decision in Anil Kumar Vs. M.K. Aiyappa :

There had been a great deal of academic unrest over the decision of the Hon'ble Supreme Court in **Anil Kumar Vs. M. K. Ayappa** *(supra).* Before discussing the points of academic controversies, it is necessary to know as to what exactly, the Hon'ble Supreme Court had said. In **Anil Kumar v. M.K. Aiyappa (two Judges Bench),** the Hon'ble Court proceeded to examine whether the Magistrate, while exercising his powers under Section 156(3) of the Cr.P.C., could act in a mechanical or casual manner and go on with the complaint after getting the report. In that context, a reference was made to an earlier judgment in Maksud Saiyed v. State of Gujarat case, where it was observed that there was a requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) of the Cr.P.C. Thereafter the Bench proceeded to draw a conclusion that a Special Judge/Magistrate cannot refer the matter under Section 156(3) Cr.P.C. against a public servant without a valid sanction order. The Hon'ble bench went on to hold that Sub-section (3) of Section 19 has an object to achieve, which applies in circumstances where

a Special Judge has already rendered a finding, sentence or order. In such an event, it shall not be reversed or altered by a court in appeal, confirmation or revision on the ground of absence of sanction. That does not mean that the requirement to obtain sanction is not a mandatory requirement. Once it is noticed that there was no previous sanction, as already indicated in various judgments referred to herein above, the Magistrate cannot order investigation against a public servant while invoking powers under Section 156(3) Cr.P.C. The above legal position, as already indicated, has been clearly spelt out in Paras Nath Singh and Subramaniam Swamy cases.

Reference to Larger Bench:

The two judge Bench of Hon'ble Supreme Court consisting of Hon'ble J. Chelameswar and Justice Sanjay Kishan Kaul in the matter of **Manju Surana vs Sunil Arora on 27 March, 2018** referred the matter to Larger Bench. The question of law sought to be raised in the appeals was as to whether prior sanction for prosecution qua allegation of corruption in respect of a public servants is required before setting in motion even the investigative process under Section 156(3) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.'), where the appellant submitted a complaint before the Special Judge under Sections 7 & 13 of the Prevention of Corruption Act, 1988 (hereinafter referred to as the 'PC Act') and Sections 420, 467, 468 & 471 read with Section 120B of the Indian Penal Code, 1860 against the accused (being the Superintending Engineer, Chief Engineer, ex Chief Minister (as she then was), ex Minister of P.H.E.D., Finance Secretary, Deputy Accountant General and P.S.L. Company through its Managing Director) before the Special Judge. The Special Judge closed the complaint in terms of order dated 4.2.2014 on account of the fact that the accused persons arrayed as respondents are either public servants or have remained as public servants and no prior sanction has been granted by the competent authority under Section 19 of the PC Act read with Section 197 of the Cr.P.C. To support this conclusion, reliance was placed on the judgment of this Court in **Anil Kumar v. M.K. Aiyappa** opining that no complaint could be forwarded for investigation under Section 156(3) of the Cr.P.C. nor could any proceedings be initiated under Sections 200 & 202 of the Cr.P.C. in the absence of such sanction. It was, thus, observed that further proceedings in the case would be conducted on the filing of sanction. The appellant preferred a revision petition against this order, which has been dismissed by the detailed impugned order dated 30.4.2014. The order refers to various judicial pronouncements and then concludes that in view of the judgment in Anil Kumar v. M.K. Aiyappa and P. Nallammal v. State both for the reasons of absence of any sanction, as also the revision petition being directed against an interlocutory order, the petition was not maintainable.

Grounds for reference to the Larger Bench for Decision-

The sub-stratum of the argument addressed by appellants was that the requirement of prior sanction for prosecution against the public servant would arise only when cognizance is taken,

while no such sanction was required at the stage of setting into motion an investigation under Section 156(3) of the Cr.P.C. It was, thus, contended that the observations in these two judgments are per incuriam or in conflict with the long line of earlier judgments on the question as to when the cognizance can be stated to have be taken. Under Section 19(1) of the PC Act, the bar is to the court taking "cognizance of an offence except with the previous sanction". Section 197 of the Cr.P.C. prescribes a pre-condition of obtaining sanction before the court takes cognizance against a public servant. The submission of appellant was that there is a distinction between the investigation carried out at pre-cognizance stage, which would not face the requirement of a prior sanction qua a public servant, as against a post cognizance proceeding which needs prior sanction. The decisions of **R.R. Chari v. State of U.P.; Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerjee; Gopal Das Sindhi v. State of Assam (three Judges Bench); Jamuna Singh v. Bhadai Shah (three Judges Bench); Nirmaljit Singh Hoon v. State of W.B. (three Judges Bench),** were referred on the point of cognizance and to contend that the application of mind only for ordering investigation under Section 156(3) or issuing a warrant for purposes of investigation could not be said to have taken cognizance of the offence. Similarly, in **Devarapally Lakshminarayana Reddy v. V. Narayana Reddy** (three Judges Bench) –Appellants referred to the aforesaid judgment to contend that when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV to the Code of 1973, he is said to have taken cognizance of the offence within the meaning to Section 190(1) (a). If, instead of proceeding under Chapter XV, he has, in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence. Tula Ram v. Kishore Singh (two Judges Bench) – was also cited, where it was observed that Sections 190 and 156(3) of the Cr.P.C. are mutually exclusive and work in totally different spheres. Thus, even if a Magistrate receives a complaint under Section 190, he can act under Section 156(3) provided that he does not take cognizance. Chapter 14 deals with post cognizance stage while Chapter 12, so far as the Magistrate is concerned, deals with pre-cognizance stage, that is to say that even when a Magistrate starts acting under Section 190 and the provisions following, he cannot resort to Section 156(3). Thus, Section 202 would apply only in cases where the Magistrate has taken cognizance and chooses to inquire into the complaint either himself or through any other agency. Before proceeding to do so, there may be a situation where the Magistrate, before taking cognizance himself, chooses to order a pure and simple investigation under Section 156(3) of the Cr.P.C. Despite the aforesaid catena of judgments, a different path has been traversed in two judgments of this Court where the offences alleged are under the P.C. Act read with the I.P.C. Academic analysis of the decision of Hon'ble Supreme Court in **Anil Kumar Vs. M. K. Ayyapa** in the light of earlier decisions of the Hon'ble Apex Court : In the said case, the appellants had relied upon the judgments of the Hon'ble Supreme Court itself in **R. S. Nayak v. A.R. Antulay**

(1984) 2 SCR 495, P. V. Narasimha Rao v. State (CBI/SPE) (1998) 4 SCC 626, Tula Ram and Others v. Kishore Singh (1977) 4 SCC 459 and Srinivas Gundluri and Others v. SEPCO Electric Power Construction Corporation and Others (2010) 8 SCC 206. The decision of the Hon'ble Supreme Court is criticised in Bar / Academic Circles stating that these decisions had not been dealt with for disagreement. No decision was overruled nor was any decision distinguished. The Hon'ble Supreme Court itself admitted in **Anil Kumar Vs. M. K. Aiyappa** case that order U/S 156(3) is a pre-cognizance stage. It observed " In **State of West Bengal and Another v. Mohd. Khalid and Others (1995) 1 SCC 684,** this Court has observed as follows: *"It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out.*

10. The meaning of the said expression was also considered by this Court in Subramaniam Swamy case (supra). The judgments referred to herein above clearly indicate that the word "cognizance" has a wider connotation and not merely confined to the stage of taking cognizance of the offence. When a Special Judge refers a complaint for investigation under Section 156(3) Cr.P.C., obviously, he has not taken cognizance of the offence and, therefore, it is a pre-cognizance stage and cannot be equated with post-cognizance stage. When a Special Judge takes cognizance of the offence on a complaint presented under Section 200 Cr.P.C. and the next step to be taken is to follow up under Section 202 Cr.P.C. Consequently, a Special Judge referring the case for investigation under Section 156(3) is at pre-cognizance stage." And the language of prohibition is very clear that bar is upon the cognizance and not on any stage prior to such cognizance.

Perusal of the decision shows that the Hon'ble Court had relied upon four judgments to arrive at such conclusion. They are - **General Officer Commanding v. CBI, Maksud Saiyed v. State of Gujarat, Subrahmanyam Swami Vs. Dr. Manmohan Singh and State of U.P Vs. Paras Nath Singh.**

In Maksud Saiyyad case, the learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability. Throughout the complaint petition, no allegation had been made as

against any of the respondents herein that they had anything to deal with personally either in discharge of their statutory or official duty. Hence, the Hon'ble Court observed "It appears to the Court that the learned Chief Judicial Magistrate has not applied his mind while passing the order under Section 156(3) of the Criminal Procedure Code directing the police to investigate in the matter. The impugned order, on the face of it, reveals that he has not gone through the complaint. As a matter of fact, the accused No. 1 was the Ex-Chairman and Managing Director of Dena Bank, and the accused No. 2 was the Executive Director. The accused Nos. 3 to 10 are Directors of Dena Bank. None of these persons are Managers or Branch Manager. Despite this, the learned Chief Judicial Magistrate has mentioned in his order that they are Managers or Branch Managers. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. Obviously, order U/S 156(3) must reflect due application of mind. But, this decision said nothing at all on sanction.

In Commanding officer case, it was observed, *"Thus, it is evident from the aforesaid comparative chart that under the provisions of Cr.P.C. and Prevention of Corruption Act, it is the court which is restrained to take cognizance without previous sanction of the competent authority. Under the Act [The Army Act] 1990, the investigating agency/ complainant/person aggrieved is restrained to institute the criminal proceedings; suit or other legal proceedings. Thus, there is a marked distinction in the statutory provisions under the Act 1990, which are of much wider magnitude and are required to be enforced strictly." In this case the Supreme Court summed up the discussion as under –*

"66. Sum up:

(i) The conjoint reading of the relevant statutory provisions and rules make it clear that the term 'institution 'contained in Section 7 of the Act 1990 means taking cognizance of the offence and not mere presentation of the charge sheet by the investigating agency.

(ii) The competent Army Authority has to exercise his discretion to opt as to whether the trial would be by a court-martial or criminal court after filing of the charge sheet and not after the cognizance of the offence is taken by the court.

(iii) Facts of this case require sanction of the Central Government to proceed with the criminal prosecution/trial.

(iv) In case option is made to try the accused by a court-martial, sanction of the Central Government is not required. So, this decision allows the stage upto filing of charge sheet i.e. completion of investigation and question of sanction comes only after submission of police report even when institution itself is barred U/S 7 of the Army Act 1990."

In **Subrahmanyam swami case,** the Hon'ble Apex Court had held that, the next question

which requires consideration is whether the appellant has the locus standi to file a complaint for prosecution of respondent No.2 for the offences allegedly committed by him under the 1988 Act. There is no provision either in the 1988 Act or the Code of Criminal Procedure, 1973 (CrPC) which bars a citizen from filing a complaint for prosecution of a public servant who is alleged to have committed an offence. Therefore, the argument of the learned Attorney General that the appellant cannot file a complaint for prosecuting respondent No.2 merits rejection. A similar argument was rejected by the Constitution Bench in **A.R. Antulay v. Ramdas Sriniwas Nayak (1984) 2 SCC 500.** The facts of that case show that on a private complaint filed by the respondent, the Special Judge took cognizance of the offences allegedly committed by the appellant. In this case the Hon'ble Supreme Court observed that

> *"It was, however, submitted that even if it be held that the Special Judge is entitled to entertain a private complaint, no further steps can be taken by him without directing an investigation under Section 5-A so that the safeguard of Section 5-A is not whittled down. This is the same argument under a different apparel. Accepting such a submission would tantamount to saying that on receipt of the complaint the Special Judge must direct an investigation under Section 5-A, There is no warrant for such an approach. Astounding as it appeared to us, in all solemnity it was submitted that investigation of an offence by a superior police officer affords a more solid safeguard compared to a court. Myopic as this is, it would topsy turvy the fundamental belief that to a person accused of an offence there is no better safeguard than a court. And this is constitutionally epitomized in Article 22 that upon arrest by police, the arrested person must be produced before the nearest Magistrate within twenty- four hours of the arrest. Further, numerous provisions of the Code of Criminal Procedure such as Section 161, Section 164, and Section 25 of the Indian Evidence Act would show the Legislature's hesitation in placing confidence on police officers away from court's gaze. And the very fact that power is conferred on a Presidency Magistrate or Magistrate of the first class to permit police officers of lower rank to investigate these offences would speak for the mind of the Legislature that the court is a more reliable safeguard than even superior police officers." (emphasis supplied). In view of the aforesaid judgment of the Constitution Bench, it must be held that the appellant has the right to file a complaint for prosecution of respondent No.2 in respect of the offences allegedly committed by him under the 1988 Act. It also quoted with approval. In Pastor P. Raju's case, this Court referred to the provisions of Chapter XIV and Sections 190 and 196 (1-A) of the Cr. P. C and observed: "There is no bar against registration of a criminal case or investigation by the police agency or submission of a report by the police on completion of investigation, as contemplated by Section 173 Cr. P. C. If a criminal case is registered, investigation of the offence is done and the police submits a report as a result of such investigation before a Magistrate without the*

previous sanction of the Central Government or of the State Government or of the District Magistrate, there will be no violation of Section 196(1-A) CrPC and no illegality of any kind would be committed."

There is again nothing at all to suggest that sanction is required for order U/S 156(3) Cr.P.C. It is not supporting the stand taken by M.K. AYAPPA case.

In Paras Nath Singh Case – it was observed –

"10. That apart, the contention of the respondent that for offences under Sections 406 and 409 read with Section 120-B of IPC sanction under Section 197 of the Code is a condition precedent for launching the prosecution is equally fallacious. This Court has stated the legal position in S.R. Munnipalli v. Bombay (1955 (1) SCR 1177) and in Amrik Singh v. State Pepsu (1955 RD-SC 9) that it is not every offence committed by a public servant, which requires sanction for prosecution under Section 197 of the Code, nor even every act done by him while he is actually engaged in the performance of his official duties. Following the above legal position, it was held in Harihar Prasad, etc. v. State of Bihar (1972 (3) SCC 89) as follows: "As far as the offence of criminal conspiracy punishable under Section 120-8, read with Section 409, Indian Penal Code is concerned and also Section 5(2) of the Prevention of Corruption Act is concerned, they cannot be said to be of the nature mentioned in Section 197 of the Code of Criminal Procedure. To put it shortly, it is no part of the duty of a public servant, while discharging his official duties, to enter into a criminal conspiracy or to indulge in criminal misconduct. Want of sanction under Section 197 of the Code of Criminal Procedure is, therefore, no bar."

In the said decision, the Hon'ble Supreme Court did not redefine the term "cognizance" to mean any stage prior to those contemplated in S. 190 Cr.P.C, which is well established through various earlier judicial pronouncements of the Hon'ble Supreme Courts itself. In fact the decision in Paras Nath case itself says that no sanction at all is required in such cases. The offence involved in M.K. Aiyappa case were offences defined under Section 406, 409, 420, 426, 463, 465,468, 471, 474 read with Section 120-B IPC and Section 149 IPC and Section 8, 13(1)(c), 13(1)(d), 13(1)(e), 13(2) read with Section 12 of the Prevention of Corruption Act. The court perhaps drew strength from the observation –

"So far as public servants are concerned the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The Section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, 'no

court shall take cognizance of such offence except with the previous sanction'. Use of the words, 'no' and 'shall' make it abundantly clear that the bar on the exercise of power of the court to take cognizance of any offence is absolute and complete. Very cognizance is barred. That is the complaint cannot be taken notice of. According to Black's law Dictionary the word 'cognizance' means 'Jurisdiction' or 'the exercise of jurisdiction' or 'power to try and determine cases'. In common parlance it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have committed during discharge of his official duty."

This observation is just a passing remark or obitur dicta and not the stare decisis. Here, entertaining the complaint could not have meant mere filing of the complaint. Entertaining is in the sense of cognizance for trial. And nothing more or nothing less.

In **R.R. Chari v. State of U.P: (1951) SCR 312,** the Supreme Court approved a widely known observation of the Calcutta High Court in **Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abni Kumar Banerjee (AIR 1950 Cal 437)**: *"When the magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g. ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."* While referring the issue to the larger bench remarked: There is divergence of opinion which ought to be settled by a larger bench. There is no doubt that even at the stage of 156(3), while directing an investigation, there has to be an application of mind by the Magistrate. Thus, it may not be an acceptable proposition to contend that there would be some consequences to follow were the Magistrate to act in a mechanical and mindless manner. That cannot be the test."

There had been widespread academic criticism and unrest over this decision of Anil Kumar Vs. M.K. Aiyappa in legal circle.

Revision against the Order U/S 156(3) Cr.P.C.:

The issue whether revision petition against an order accepting an application under Section 156(3) Cr.P.C. was maintainable came up for consideration before the Full Bench of the Allahabad High Court in the decision reported as 2011 (2) ALJ 217 **Father Thomas vs. State of U.P. & Anr.** wherein it was held that a prospective accused has no locus standi to challenge direction for investigation under Section 156(3) Cr.P.C. by filing a revision petition before cognizance or issuance of process against him. Holding that a revision petition against such an order directing registration of FIR under Section 156(3) Cr.P.C. was not maintainable, the Full bench noted that the accused has a right to raise his defence only during the course of trial and even on filing of complaint, when the Magistrate proceeds to take cognizance, the prospective accused cannot intervene or raise his defence unless summons are issued. An order directing registration of

FIR under Section 156(3) Cr.P.C. being an interlocutory order, a revision petition challenging such an order was barred. However, the Full Bench of Allahabad High Court in the decision reported as **AIR 2014 All 214 Jagannath Verma v. State of U.P.,** distinguishing the decision in **Father Thomas** *(supra)* dealing with the issue of maintainability of a revision petition against the order rejecting an application under Section 156(3) Cr.P.C. held:—

> *"58. xxx In view of the discussion above and for the reasons which we have furnished, we have come to the following conclusion: (i) Before the Full Bench of this Court in Father Thomas, the controversy was whether a direction to the Police to register a First Information Report in regard to a case involving a cognizable offence and for investigation is open to Revision at the instance of a person suspected of having committed a crime against whom neither cognizance has been taken nor any process issued. Such an Order was held to be interlocutory in nature and, therefore, to attract the bar under sub-section (2) of Section 397. The decision in Father Thomas does not decide the issue as to whether the rejection of an application under Section 156(3), would be amenable to a Revision under Section 397, by the Complainant or the informant, whose Application has been rejected; (ii) An Order of the Magistrate rejecting an Application under Section 156(3) of the Code for the registration of a case by the Police and for investigation is not an Interlocutory Order. Such an Order is amenable to the remedy of a Criminal Revision under Section 397; and (iii) In proceedings in Revision under Section 397, the prospective Accused or, as the case may be, the person, who is suspected of having committed the crime is entitled to an opportunity of being heard before a decision is taken in the Criminal Revision. The reference to the Full Bench is, accordingly, disposed of. The proceedings shall now be placed before the appropriate Bench in accordance with the roster of work for disposal in light of the principles laid down in this decision."*

The Division Bench of Bombay High Court in the decision reported as **2015 SCC OnLine Bom 5197: 2016 ALLMR (Cri) 985 Avinash and Ors. v. The State of Maharashtra and Ors** held that the order passed directing police to investigate under Section 156(3) of the Code is not an interlocutory order, but in the nature of a final order terminating the proceedings under Section 156 (3) of the Code which would be revisable under the revisional powers of the Sessions Court or the High Court. The Court observed:—

> *"12. It is trite law that once directions are passed by the learned Magistrate under Section 156(3) Cr.P.C. directing registration of FIR he becomes functus-officio. [See (2016) SCConline Del 5490 M/s. Gabrani Infrastructure Pvt. Ltd. Vs. M/s. Unitech Hi-Tech Developers Limited & Ors and MANU/GJ/7486/2007 Randhirsinh Dipsinh Parmar vs. State of Gujarat & Ors.]. Thus, disposing of an application under Section 156(3) Cr.P.C. amounts to adjudication of a valuable right whether in favour of accused or the complainant.*

13. The issue that since the accused has not been summoned as an accused and has no right to file a revision petition is alien, while deciding an application under Section 156(3) Cr.P.C. The said issue crops up when the Magistrate entertains the complaint and on taking cognizance proceeds as a complaint case. In case directions are issued for registration of FIR immediately, on registration of FIR, the person against whom allegations are made in the FIR attains the status of an accused. His rights in so far as the Police can summon him for investigation, arrest him without warrants for allegations of cognizable offences are duly affected. In a situation where the fundamental right of freedom and liberty of a person is affected, it cannot be held that he has no right to be heard at that stage. Thus to hold that since directions only have been issued under Section 156(3) Cr.P.C. and no cognizance has been taken thus no revision would lie would be an erroneous reading of the decisions of the Supreme Court. Therefore, an order dismissing or allowing an application under Section 156 (3) Cr.P.C. is not an interlocutory order and a revision petition against the same is maintainable."

Direction to CBI for Investigation U/S 156(3) Cr.P.C. :

In the case of **Central Bureau Of Investigation Vs. State Of Rajasthan And Another [2001 (3) SCC 333],** the question that came up before the Hon'ble Supreme Court was, 'has a magistrate power to direct the Central Bureau of Investigation to conduct investigation into any offence', wherein the Honourable Supreme Court observed: "As the present discussion is restricted to the question whether a magistrate can direct the CBI to conduct investigation in exercise of his powers under Section 156(3) of the Code it is unnecessary for us to travel beyond the scope of that issue. We, therefore, reiterate that the magisterial power cannot be stretched under the said subsection beyond directing the officer in charge of a police station to conduct the investigation. At this juncture, it is pertinent to note that the Constitutional Courts alone can order CBI Probe and the said principle have been emphasized in State of West Bengal and others Vs. The Committee for Protection of Democratic Rights West Bengal and others [(2010) 3 SCC 571: AIR 2010 SC 1476]. There will be yet another question related to the topic, Can CBI take over the investigation of a criminal case registered by the State Police? Yes, it can, but only in the situations detailed hereunder: (i) The concerned State Government makes a request to that effect and the Central Government agrees to it. (ii) The State Government issues notification of consent under Section 6 of the DSPE Act (Delhi Special Police Establishment Act., 1946) and the Central Government issues notification under Section 5 of the DSPE Act. (iii) The Supreme Court or High Courts being the Constitutional Courts, orders CBI to take up such investigations.

Action for dis-obedience for the direction made 156(3) Cr.P.C. against the erring Police Officials:

The disobedience / non-compliance of the order for investigation U/S 156(3) is very serious

issue and has to be dealt with seriously. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence. A two-Judge Bench of the Hon'ble Supreme Court in, **Lalita Kumari vs. Government of Uttar Pradesh & Ors. (2008) 7 SCC 164,** after noticing the disparity in registration of FIRs by police officers on case to case basis across the country, issued notice to the Union of India, the Chief Secretaries of all the States and Union Territories and Director Generals of Police / Commissioners of Police to the effect that if steps are not taken for registration of FIRs immediately and the copies thereof are not handed over to the complainants, they may move the Magistrates concerned by filing complaint petitions for appropriate direction(s) to the police to register the case immediately and for apprehending the accused persons, failing which, contempt proceedings must be initiated against such delinquent police officers if no sufficient cause is shown.

Besides the aforesaid action for contempt, the Magistrate is further empowered to initiate prosecution for offence U/S 166, and 217 IPC, which are detailed herein after.

Section 166 provides that, "Public servant disobeying law, with intent to cause injury to any person.—Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Illustration: A, being an officer directed by law to take property in execution, in order to satisfy a decree pronounced in Z's favour by a Court of Justice, knowingly disobeys that direction of law, with the knowledge that he is likely thereby to cause injury to Z. A has committed the offence defined in this section."

Now, after amendment in 2013, a new provision has been added in the form of S. 166A IPC. It provides –

"Section 166A—Whoever, being a public servant.— (a) knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter, or (b) knowingly disobeys, to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation, or (c) fails to record any information given to him under sub-section (1) of Section 154 of the Code of Criminal Procedure, 1973, in relation to cognizable offence punishable under Section 326A, Section 326B, Section 354, Section 354B, Section 370, Section 370A, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E, Section 509 shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years and shall also be liable to fine." Section 166A(c) lays down that if a public servant (Police Officer) fails to record

any information given to him under Section 154(1) of the Code in relation to cognizable offences punishable under Sections 326A, 326B, 354, 354B, 370, 370A, 376, 376A 376B, 376C, 376D, 376E or Section 509, he shall be punished with rigorous imprisonment for a term which shall not be less than six months but may extend to two years and shall also be liable to fine. Thus, this provision clearly indicates that registration of FIR is imperative and police officer has no discretion in the matter in respect of offences specified in the said section. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed.

As per Section 217 IPC, "Public servant disobeying direction of law with intent to save person from punishment or property from forfeiture.—Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or subject him to a less punishment than that to which he is liable, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

Disobedience of the direction made by the magistrate for investigation under section 156 (3) of Code of Criminal Procedure is serious matter as it is the last resort for the aggrieved to knock the door of justice in the given facts and circumstances and hence, this dereliction cannot and shall not be ignored. Prosecution or action must be taken against the erring police officials under the aforesaid provisions, as the case may be. Doors of justice cannot be shut. Access to justice is one of the most cherished, natural, fundamental and human right. The justice shall triumph in all and whatever circumstances.

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Topic No. – 03

Remand of Accused Including Transit Remand; Principle, Practice, Difficulties and Safeguards and also Transit Bail. The Requirement of Issuance of Warrants, Order of Proclamation & Order of Attachment of Property by the Court.

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Topic : Remand of accused including transit remand; principle, practice, difficulties and safeguards and also transit bail. The requirement of issuance of warrants, order of proclamation & warrant for attachment of property by the court.

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Remand of accused including transit remand; principle, practice, difficulties and safeguards and also transit bail. The requirement of issuance of warrants, order of proclamation & warrant for attachment of property by the court.

PART I

PRE-COGNIZANCE REMAND

1. Personal Liberty : The Inalienable Right

The great political philosopher Bolingbroke once said,

"Liberty is to the collective body, what health is to every individual body. Without health no pleasure can be tasted by man; without Liberty, no happiness can be enjoyed by society."

Civilized countries have recognized that liberty is the most precious of all the human rights. The American Declaration of Independence 1776, French Declaration of the Rights of Men and the Citizen 1789, Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights 1966 all speak with one voice - liberty is the natural and inalienable right of every human being. Similarly, the Preamble of the Indian Constitution guarantees the most sacred and cherished right of personal liberty to each and every citizen of India. Article 21 provides that person shall be deprived of his life and personal liberty except according to the procedure established by law. The expression "life or personal liberty" has been held to include the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the state or its functionaries. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under trials, and other persons in custody, except according to procedure established by law. Actually Article 21 provides sparkles of hope to the life of arrestee, under trial and convicts. The treatment with such people has to be humane and, in the manner, prescribed by law. Further Article 22(1) of the Constitution gives a person arrested a two fold protection, viz.

1. that an arrested person shall not be detained in custody without being told the grounds of such an arrest and
2. that he shall be entitled to consult and to be defended by a legal practitioner of his choice.

Article 22(2) gives yet another protection stating that every person who is arrested and detained in custody must be produced before the nearest Magistrate within 24 hours excluding the time necessary for the journey from the place of arrest to the Court of Magistrate and that no such

person shall be detained in custody beyond the said period without the authority of a Magistrate. **Section 50, Code of Criminal Procedure'1973 ("Cr.P.C" as hereinafter)** which is a corollary to **Article 22** Clause (1) and (5) of the Constitution of India, enacts that the persons arrested should be informed of the ground of arrest, and of right to bail. Section 57 Cr. P.C. which is also in consonance with **Article 22(2)** of the Constitution of India, provides that no police officer shall detain in custody, a person arrested without warrant for a longer period that under all circumstances is reasonable and such period shall not in the absence of a special order of a Magistrate under Section 167 Cr.P.C. exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. **Article 20(3) of the Constitution** lays down that a person accused of an offence shall not be compelled to be a witness against himself. These are some of the constitutional safeguards provided to a person with a view to protect his personal liberty against an unjustified assault by the State. In tune with the constitutional guarantee a number of statutory provisions also seek to protect personal liberty, dignity and basic human rights of the citizens. However, despite the Constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidence of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights take place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third degree methods including torture, and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. Unfortunately, the reports of dehumanising torture, assault, rape and death in custody of police or other governmental agencies, has now become a common occurrence and, is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the credibility of the Rule of Law and the administration of criminal justice system.

In **Maneka Gandhi vs UOI, AIR 1978 SC 597,** the Supreme Court held that the State and for that matter the police as its principal law enforcing agency have the undoubted duty to bring offenders to book. Even so, the law and procedure adopted by the State for achieving this laudable social objective have to conform to civilized standards. The procedure adopted by the State must, therefore, be just, fair and reasonable.

In **Nilabati Behera v. State of Orissa and Ors.; (1993) 2 SCC 746,** a three Judge bench of Supreme Court held, "It is an obligation of the State, to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under trials or other prisoners in custody, except according to procedure established by law.

2. Arrest : A Precursor to Remand

Before getting into the topic of remand in detail it is pertient to understand the concept of arrest and the procedure to be followed while arresting a person as per procedure established by law. This is because arrest and remand are inter-related topics. Time to time the Hon'ble courts

have issued given guidelines with regard to procedure to be adopted while making an arrest or while remanding an arrested person.

In **Joginder Kumar versus State of Uttar Pradesh, 1994 AIR 1349, 1994 SCC (4) 260,** Hon'ble court has considered the dynamics of power of police to arrest and held that power to arrest is one thing and justification for exercising the power to arrest is another.

The landmark judgement of **D K Basu versus State of West Bengal (1997 (1) SCC 416)** is one such judicial pronouncement where the Hon'ble Supreme Court, has laid down certain basic "requirements" to be followed in all cases of arrest or detention. The Hon'ble Supreme Court has laid down specific guidelines required to be followed while making arrests:

I. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particular of all such personnel who handle interrogation of the arrestee must be recorded in a register.

II. That the police officer carrying out the arrest shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

III. A person who has been arrested or detained and is being held in custody in a police station or interrogation center or other lock up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

IV. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aids Organization in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

V. The person arrested must be made aware of his right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

VI. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

VII. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his /her body, must be recorded at that

time. The Inspector Memo' must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

VIII. The arrestee should be subjected to medical examination by the trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctor appointed by Director, Health Services of the concerned State or Union Territory, Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

IX. Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record.

X. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

XI. A police control room should be provided at all district and State headquarters where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

3. Understanding the Concept of Remand

Law does not allow detention unless there is legal sanction for it. Detention in custody of the police is disfavoured, and even in the case of an accused, such detention can only be with the authority of a Magistrate. In the context of detained person, the legal term which is being used very commonly is "remand" which means to send back the arrested person who is waiting to conclude his trial, in the custody of competent authority. Remand is the process of keeping a person in custody before the actual process of trial. The object behind furthering detention is to keep the person away from the society, for the security of the society and the security of the person himself. It is also necessary that he is present for further investigation and inquiry and he does not evade the process of law. Remand is usually granted when the court is of the opinion that the required investigation cannot be completed in given time and there is reasonable doubt that the concerned person is involved in the commission of the offence.

The dictionary meaning of the word remand is to return or send back. However, in the legal world, it has two different meanings.

(1) Firstly, it is used to send back the accused in the custody of the competent authority.

(2) Secondly, it is used to send back the cases from the appellate court to the lower court.

Remand is an aid to the successful completion of an investigation. In other words, it is the remand where we send back the accused into the custody of police or that of the magistrate for collecting evidence and completion of investigation. In a nutshell, the purpose of remand is to facilitate completion of investigation.

The Criminal Procedure Code 1973 does not authorise detention by the police for more than twenty-four hours after the arrest. Sections 56 and 57 of Cr.P.C make it quite clear. Section 56 provides that a police officer making an arrest without warrant shall, without unnecessary delay, take or send the person arrested before a magistrate. Article 22 (2) of the Constitution of India and Section 57 of Cr. P.C. give a mandate that every person who is arrested and detained in police custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of the arrest to the court of the magistrate and no such person shall be detained in the custody beyond the said period without the authority of a magistrate. These two provisions clearly manifest the intention of the law in this regard and therefore it is the magistrate who has to judicially scrutinise circumstances and if satisfied can order the detention of the accused in police custody. This is the point from where the role of magistrate comes into picture, and some powers are conferred by the statute for making an arrest by police subject to restraints and judicial supervision and scrutiny to protect the fundamental right to life under Article 21 of the Constitution of India. Imposition of such restraint is clearly the recognition of rights of the arrested person as has been held in a plethora of cases viz. **State (Delhi Admn.) v. Dharam Pal and others, 1982 Crl. L.J.1103; Central Bureau of Investigation vs. Anupam J. Kulkarni, 1992 AIR 1768, 1992 SCR (3) 158.**

(i) Types of Remand (Under Cr.P.C.)

A. On the basis of custody, there are two types of remand:

(1) Police remand (2) Judicial remand

(1) Police remand: In general, police remand comes first out of the above two. When an accused person is sent back to the police station for further inquiry and investigation, it is called police remand.

(2) Judicial remand: It refers to a situation where the accused is sent back to jail on being produced before the court within 24 hours after the registration of FIR in case of cognizable offence for further investigation.

B. On the basis of stage:

The power of sending back of the accused in the custody of competent authority is provided in the Code of Criminal Procedure and can be exercised under the following three specific provisions:

(a) **Remand under S.167 (2) Cr.P.C**: It relates to the stage of investigation and is ordered for furthering the investigation and can be either in judicial custody or police custody. At this stage, there is a concept of transit remand. When a warrant of arrest is executed outside the district in which it was issued, and the court which issued the warrant is not within 30 km of the place of arrest, then the person arrested may be produced before Executive Magistrate, District Superintendent

of Police or Commissioner of Police who shall direct his removal in custody to such court.

(b) Remand under S.209 (2) Cr.P.C: It relates to the stage when the magistrate commits the case, he can remand the accused to the custody during and until the conclusion of the trial subject to the provisions of bail under the code.

(c) Remand under Sec 309(2) of the Cr.P.C .: It relates to a stage after cognizance and here accused can only be sent to judicial custody. The difference lies in the stage at which it is ordered. While remand under Sec 167(2) relates to the stage of investigation, the remand under Sec 209(b) and Sec 309(2) is for securing the presence of the accused during the trial.

C. On the basis of authority who orders it:

(a) Any Magistrate with or without jurisdiction

(b) An Executive Magistrate, where a judicial magistrate is not available and on whom the powers of a judicial magistrate or metropolitan magistrate have been conferred

(c) Special courts

(ii) Section 167 : Procedure When Investigation Cannot be Completed in Twenty-four Hours

(1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty- four hours fixed by section , and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub- inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

i. ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

ii. sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub- section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation I.- For the avoidance of doubts, it is hereby declared 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;].

Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.]

(2A) 1 Notwithstanding anything contained in sub- section (1) or subsection (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub- inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub- section shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub- section (2): Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in

charge of the police station or the police officer making the investigation, as the case may be.

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons- case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under sub- section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub- section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify.

(a) Object & Scope of Section 167 Cr.P.C.

The object and scope of Section 167 Cr.P.C. is well-settled that it is supplementary to S. 57 Cr.P.C It is clear from S. 57 that the investigation should be completed in the first instance within 24 hours and if cannot be done, the arrested person should be brought by the police before a magistrate as provided under Section 167. In other words, the object of this provision is two-fold; firstly, that the law does not favour detention in police custody except in special cases and that too for reasons to be stated by the Magistrate in writing, and secondly, to enable such person to make a representation before a Magistrate.

Section 167 of Cr.P.C does not confer power on a Magistrate to dispense with police custody but what it does is to empower him to extend such custody beyond what is permitted under Section thereof. Reading these two sections together one can safely conclude that Section 167 comes into play only when:

1. The accused is arrested without warrant and is detained by a police officer (Section 41 Cr.P.C)
2. It appears that more than twenty-four hours will be needed for investigation,
3. There are grounds for believing that the accusation or information against him is well founded, and

4. The officer in charge of the police station or the investigating officer not below the rank of a Sub-Inspector forwards the accused before the nearest Magistrate along with a copy of entries in the diary.

When this happens, the Magistrate may authorise the detention of the accused detention either in police custody or judicial custody as such the Magistrate thinks fit, or the Magistrate may refuse to detain the accused if adequate grounds does not exist as per his satisfaction.

(b) Who is Empowered to Authorise Detention of The Accused?

The term "magistrate" in section 167 (2) Cr.P.C implies "judicial magistrate" only and not the "executive magistrate" because 167 (1) Cr.P.C clearly provides that the police officer would transmit the material to the nearest judicial magistrate and special power was given to the executive magistrate also in the year 1978 by The Code of Criminal Procedure (Amendment) Act, 1978 with the insertion of S.167(2A). That can be exercised only in the absence of the judicial magistrate.

The term used is magistrate and not judicial magistrate first class or judicial magistrate second class or chief judicial magistrate, therefore it can be implied that the right to order remand is conferred to all three of them under S.167(2). But there is a limitation on this power of the judicial magistrate second class under proviso (c) of S.167(2), which provides that he cannot authorize detention in police custody unless specifically empowered by the High Court.

Also, the provision 167 (1) Cr.P.C. provides for the word 'nearest judicial magistrate' and not the term 'magistrate who has the authority to take cognizance of the matter'. Also, under S.167(2), expressly lays down that the magistrate to whom the accused is forwarded and the materials are transmitted may have or not have the jurisdiction.

(c) Procedure to be Followed by the Nearest Magistrate

As already discussed, these provisions of the section are supplementary to those contained in section 57 of the Code, and require the police officer making the investigation when such investigation cannot be completed within twenty-four hours to forward the accused with certain papers to the nearest magistrate and obtain his authority for his further detention. In the matter of remand, the magistrate exercises discretionary functions, keeping in view all the facts and circumstances of the case including the nature of the charge, the gravity of the alleged offence, the area of investigation, the antecedents of the accused and all other relevant factors which may appropriately help the court in determining whether to keep the accused in custody or to release him on bail. The magistrate authorising detention of the accused under this section has complete freedom to remand the accused to whatever custody he thinks fit or to refuse remand if not required. While deciding an application of remand under this section, court must apply its mind on the material produced before it, and just to pass an order is not sufficient rather a reasoned order for the same is required. The magistrate has to exercise his judicial mind while deciding whether or

not the detention of the accused in any custody is necessary. The magistrate should consider all available materials including the copy of the case diary before authorizing detention. The order of detention is not to be passed mechanically as a routine order on the request of the police for remand.

Firstly, magistrate has to scrutinise following things:

✓ Firstinformationreport

✓ Case diary

✓ Duly signed Forwarding letter given by the officer in charge of police station or the police officer making investigation

✓ Whether arrest has been made as per section section 41 Cr.P.C. or not, and if not compliance of section 41A Cr.P.C. must be ensured.

✓ Memorandum of arrest prepared as per section 41B Cr.P.C, attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made; and countersigned by the person arrested; and shall contain the time and date of arrest.

✓ Memorandum of evidence submitted by the police officer, and It is an obligation of the Magistrate to ensure that there must not be an infringement of the indefeasible right of the accused to life or personal liberty, except in accordance with law. It is the duty imposed on the Magistrate, before whom the arrested person is produced, to satisfy himself that following requirements have been complied with:

✓ An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where he is being detained. It is the duty of the police officer to inform the arrested person about this right when he is brought to the police station.

✓ An entry shall be required to be made in the diary as to who was informed of the arrest.

✓ The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within period of 8 to 12 hours after the arrest.

✓ An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

✓ The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The 'Inspection Memo' must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

✓ It is the duty of Magistrate to inquire whether arrested person was given ill treatment by police as instructed in para 3(1) of chapter I of The Criminal Manual. This direction was also issued in the case of **Sheela Barse vs. State of Maharashtra AIR 1983 SC 378.**

✓ The arrestee should be subjected to medical examination by the trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory.

✓ Section 50 (2) Cr.P.C. lays down that if arrest is made without warrant in a bailable case, the accused should be informed of his right to be released on bail after furnishing sureties.

✓ Copies of all the documents including the memo of arrest, referred above, should be sent to the Magistrate for his record, in case accused was produced before the magistrate without jurisdiction

✓ Accused must be informed to have his counsel, and if he is unable to hire, legal aid would be ensured for him.

In **Khatri Versus State of Bihar 1981 SC 928,** as far back as in 1981, it was held by the Hon'ble Court that a person arrested needs a lawyer at the stage of his first production before the magistrate, to resist remand to police or jail custody and to apply for bail. He would need a lawyer when the charge sheet is submitted and the magistrate applies his mind to the charge sheet with a view to determine the future course of proceedings. He would need a lawyer at the stage of framing of charges against him and he would, of course, need a lawyer to defend him in trial.

Of late, in **Mohd. Ajmal Mohd. Amir Kasab alias Abu Mujahid Vs. State of Maharashtra AIR 2012 SC 3565** the Hon'ble Supreme Court held that during first production, the Magistrate is under duty and obligation to make the accused fully aware about his right to consult and to be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the state. Even if the accused does not ask for a lawyer or remains silent, it is the Constitutional duty of the court to provide him with a lawyer and any failure to fully discharge the duty would amount to dereliction of duty and would make the magistrate concerned liable to departmental proceedings.

✓ The arrestee may be permitted to meet his lawyer during interrogation, though not

throughout the interrogation. Apart from all the formalities discussed above, the Magistrate when deals with the matter for the first time, ought to enquire about the status of the victim of the crime as well and whether the victim needs immediate first aid or any other interim compensation. A recommendation in this regard can be made by the Magistrate concerned to the District Legal Services Authority. DLSA shall go on to grant compensation in accordance with the Victim Compensation Scheme. In cases relating to motor accidents, the Magistrate may ensure that the SHO Concerned informs the Motor Accident Claims Tribunal of the accident within 48 hours and files the mandatory Accident Information Report (which is entertained as a Claim Petition), within the stipulated 30 days from the registration of the FIR, so as to ensure timely dispensation of compensation to the victims.

(d) Discretion of the Magistrate vis a vis Remand

The magistrate has complete discretion to decide the remand application. The magistrate is given the liberty or discretion to detain the accused either in police custody or judicial custody. The discretion of enlarging the accused on bail is also given to the magistrate if he is not satisfied with the grounds on which the police asked for remand. The condition precedent being the order must be based on valid grounds and must be reasoned one. Section 167(3) provides that the magistrate shall record reasons while authorizing detention in police custody under the section. The sub section mandates the magistrate to record reasons while ordering detention in police custody as the word used is 'shall' and not 'may', but the section is only limited to the cases where detention to police custody is ordered and not judicial custody. But it is always desirous to do so even in the case of detention in judicial custody. His functions in these matters are not only supplementary, at a higher level, to those of executive but are intended to prevent abuse. The magistrate has wide and unrestricted power to remand an accused to police custody. They are not restricted or limited to any provisions of law in making the order or limited to any provisions of law in making the order of remand. But these discretions being vested in a court of law has to be exercised judicially on well recognized principles. If the discretion is exercised in an arbitrary or non-judicial manner, remedy by way of resort to the higher courts is always open to the aggrieved party.

In the case of **Manubhai Ratilal Patel v. State of Gujrat and others (2013) 1 SCC 314,** the Hon'ble Apex Court observed that, remand is a fundamental judicial function of the Magistrate. While performing this judicial function, Magistrate has to satisfy himself that there are reasonable grounds and that materials placed before him justify remand of accused. While remanding accused it is obligatory on part of Magistrate to apply his mind to facts and not to pass remand order automatically or in a routine manner.

A careful reading of **Sec 167(1), Cr.P.C.** would show that an investigating officer can ask for remand only when there are grounds for believing that the accusation or information is well founded and it appears that the investigation cannot be completed within the period of 24 hours fixed by sec57. Therefore, it follows that a remand by a Magistrate is not an automatic one and

sufficient grounds must exist for the Magistrate to exercise their powers of remand. That is the reason why it is required that a copy of the entries in the diary should be forwarded to the Magistrate along with the arrested persons. This is the second stage in remanding the accused persons. Under the provisions of the Criminal Procedure Code, the duty of the police officer is to produce the arrested persons before the concerned Magistrate within 24 hours along with their remand report and a copy of the diary maintained by him at the time of the remand as required under S. 167, Cr.P.C. Thereafter, it is for the concerned Magistrate to apply his mind and satisfy himself that the accused should be remanded to judicial or police custody. If the prima facie accusation or information is not well founded and sufficient grounds do not exist for the Magistrate to exercise his power of remand, in such cases, remand of accused can be refused.

A remand order cannot be without application of mind and it must not be in a routine or mechanical manner. But all the same it does not require that the order sheet should look like a judgment delivered after full trial. Hon'ble Justice Krishna Iyer in Mantoo Majumdar and Dasdev Singh vs. State of Bihar, 1980 Cri.LJ 1980 observed that where the magistrate concerned practically authorises repeated detentions, unconscious of the provisions which obligated them to monitor the proceedings which warrant such detentions. It was concluded that all possible breach that may result from delays between the time of prosecuting officers discover sufficient evidence to proceed against an accused and the time of instituting those proceeding is to be guarded against by the courts which are obliged to the society.

A fortiori, a remand by a Magistrate is not an automatic one and sufficient grounds must exist for the Magistrate to exercise their powers of remand. "Judicial remands should not be passed in a mechanical manner. If the arrest seems unwarranted in the facts of the case, the magistrate can always disallow both judicial and police custody and release the person on bail (on surety or personal bonds), or even by way of a special-order u/s 59 of the Cr.P.C. A more active use of this provision is the need of the hour. In cases of totally unjustified arrests, the magistrates should not shirk from pointing this out in their orders and direct initiation of disciplinary proceedings against the erring police officers.

(e) Duty of the Police

It is the duty of the police to satisfy the magistrate that there is sufficient evidence against the accused so as to order remand. The evidence must be obtained by the police if the magistrate is not satisfied on the basis of present evidence for obtaining the order of remand. It is only after the satisfaction of the magistrate that the remand order should be made by him. If it is a case of offence punishable with less than seven years or which may extend to seven years, section 41 (1) (b) of Cr.P.C. comes into the picture.

Section 41: **When police may arrest without warrant:**—(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person-

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

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

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence; When police may arrest without warrant.

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

- to 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, or
- tampering 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 so as to dissuade him from disclosing such facts to the Court or to the police officer; or
- as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing:

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest. In all such cases, the police office before arrest must put a question to himself about requirement and purpose of arrest. It is, only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. And for all other cases compliance of section 41A Cr.P.C. is mandatory and it is duty imposed on police officers to issue notice of appearance against the accused person.

(f) Mandatory compliance of Section 41(A)

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

1. Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.
2. Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.
3. Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice."

The Hon'ble Supreme Court, has in the case of **Arnesh Kumar Vs State of Bihar And Another (2014) 8 SCC 273**, held as follows: *"Our endeavour in this judgement is to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorize detention casually and mechanically"*. In this case the Hon'ble Supreme Court has issued following directions in respect of all offences which are punishable with imprisonment for a term which may be less than 7 years or which may extend to 7 years; whether with or without fine:

(a) All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the I.P.C is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.P.C;

(b) All police officers be provided with a check list containing specified subclauses under Section 41(1)(b)(ii);

(c) The police officer shall forward the check list duly filed and furnish the reasons and material which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

(d) 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 authorise detention;

(e) 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;

(f) Notice of appearance in terms of Section 41(A) of Cr.P.C 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;

(g) 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;

(h) Authorizing detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

Further it has also been said that the directions aforesaid shall not only apply to the cases under Section 498-A of the I.P.C. or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine.

(g) Custody of Accused – Either Police or Judicial From Time to Time

Actually, the word 'remand' as such is not used in the section. What is authorised to be done under section 167(2) by the magistrate is the making of an order for detention of the accused in such custody as he thinks fit for a term not exceeding fifteen days as a whole. But there is no special reference to police custody. What is to be regarded is the period of detention and not the nature of the custody. When an investigation cannot be completed within the period of twenty-four hours and the accused is forwarded to the nearest judicial magistrate, he can authorise detention of the accused in police custody or judicial custody as the case may be.

A remand to police custody ought not to be granted by a magistrate without satisfying himself as to its necessity and the period of remand ought also to be restricted to the necessities of the case. At every stage when they obtain a remand, the police must satisfy the magistrate that there is sufficient evidence against the accused and further evidence might be obtained and it is only when he is satisfied, after looking into the case diary, that he should direct a remand. The magistrate's power to remand an accused person to police custody is regulated by the provisions of this section. When an accused is produced before a magistrate having jurisdiction to try the offence with a request for further detention and the magistrate is satisfied that adequate grounds exist for further detention as he is authorised under proviso (a) to sub-section (2) to extend the term of detention. The magistrate has a discretion to authorise detention for extended period otherwise than in police custody. But where the magistrate is satisfied for reasons to be recorded in writing that further detention in custody is necessary in the interest of justice, he can extend the period of detention but the total period of detention cannot exceed sixty days in cases other than those which are punishable with death, imprisonment for life or imprisonment for a term not less than ten years. For the latter category of offences, the period of detention can exceed up to ninety days.

The legislature has in its wisdom made adequate safeguards requiring a magistrate to look into the case diaries and then decide about detention of an accused, record his reasons for authorising detention in police custody and that too only in special cases for such limited period as the necessities of the case might require. With all the case law on the point and the express

provisions of the Code, the fact remains that the magistrates frequently fail to realise their responsibility in the matter of granting remand.

The Judicial Magistrate can in the first instance authorise the detention of the accused in such custody ie, either police or judicial from time to time but the total period of detention cannot exceed fifteen days in the whole.

The Privy Council in **Emperor Vs. Khwaza Nazir Ahmad, AIR 1945 PC 18: 1945-46 Cri LJ 413** that under the Code there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime and that the functions of the judiciary and the police are complementary and not overlapping in this regard. On larger principle also, it seems apt that whilst the accused person must be guaranteed a fair investigation and a judicial trial thereafter, yet equally the police, which has a statutory duty to investigate, is not hampered or obstructed in the delicate task of unravelling crime at the threshold stage of the investigation. Therefore, the interpretative approach to these provisions is to strike a true balance in the larger social interest between a competent and incisive investigation into serious crimes by the police, on the one hand and the guaranteed right of the citizen to personal liberty under a reasonable and fair procedure established by law, on the other. [S. Harsimran Singh vs State Of Punjab,1984 Cri.L.J 253.] Within this period of fifteen days there can be more than one order changing the nature of such custody either from police to judicial or vice-versa. A person held in judicial custody can if circumstances justify be transferred to police custody or magistrate custody or vice versa within a period of 15 days referred to in Sec. 167(2) of the code. Accused should not be ordinarily remanded to police custody unless there is reason to believe that some material and valuable information is likely to be obtained which cannot be obtained except by remanding the accused to police custody. For verifying the statement made by the accused police custody may not be necessary. In such cases ordinarily Magistrate should remand the accused to Magistrate custody. If the Magistrate is of the opinion that the presence of the accused with police is not necessary for investigation, he may remand the accused to magisterial/judicial custody.

While remanding the accused to police custody, the Magistrate has to take note that:

(1) such custody should not be granted for more than 15 days on the whole,

(2) reasons for remanding the accused to police custody should be mentioned in the order and

(3) copy of the order and reasons should be sent to the Chief Judicial Magistrate.

It is also important for the Magistrates to remember that Police custody ought not to be given at the drop of a hat and at the mere asking of the police. While giving police custody, a copy of the order ought to be sent to the CJM/CMM of the area to bring the matter within his seisin. It is also advisable for the magistrate to scrupulously ensure medical examination of the accused before and after the grant of police custody, so as to rule out torture at the hands of the police. In many a case,

the injuries on the person of the accused are suppressed in the Medical Certificates. In such cases, the Magistrate may order a fresh medical examination of the Accused by a team of doctors at a reputed and independent medical institution and entrust the safety of the accused personally to a higher police functionary. It also needs to be remembered that the accused has a right to interact with his legal advisor during this time. Before remanding the accused to police custody, the Magistrate should first get satisfied that the accusations against the accused are well founded, and for that purpose he should not only go through the case diary and the statements of the witnesses, he should scrutinize the record and decide as to whether the prescribed formalities are followed and complied.

Whenever any person is arrested under Section 57 Cr.P.C. he should be produced before the nearest Magistrate within 24 hours as mentioned therein. Such Magistrate may or may not have jurisdiction to try the case. If Judicial Magistrate is not available, the police officer may transmit the arrested accused to the nearest Executive Magistrate on whom the judicial powers have been conferred.

If the arrested accused is produced before the Executive Magistrate, he is empowered to authorise the detention in such custody either police or judicial only for a week, in the same manner namely by one or more orders but after one week he should transmit him to the nearest Judicial Magistrate along with the records.

When the arrested accused is so transmitted the Judicial Magistrate, for the remaining period, that is to say excluding one week or the number of days of detention ordered by the Executive Magistrate, may authorise further detention within that period of first fifteen days to such custody either police or judicial. Detention in police custody (permissible only within 15 days of the first remand), is usually disfavoured by law, which guards personal liberty zealously. Courts are cognizant of the police's predilection for disclosure statements & confessions (often extorted), instead of scientific and objective methods of investigation. Therefore, at the time of giving police remand, the magistrate ought to ensure and record the imperative need for police custody, and as to why it is necessary for an effective investigation. The need for discovery of the weapon of the offence, fruits of crime, unearthing a larger conspiracy and facilitating the arrest of co-accused by disclosure are important considerations. However, mere verification of information given by the accused is not a ground for police custody. Similarly, the Magistrate should also ensure that remand is not taken merely to make a 'pointing out' memo. Such pointing-out memos, needless to state, have no statutory sanction or admissibility in a court of law. Only when there is a certain physicality to a discovered fact that the same falls within the definition of Section 27 of the Evidence Act.

One more thing that a Magistrate ought to be extremely cautious about is that in almost every criminal case - there is an (alleged) confession made to the police by the accused, however, practice shows that only seldom does the police file an application for the confession to be

recorded in the presence of the Magistrate, after compliance of Section 164 of the CrPC. It defies reason as to when so many accused are penitent and inclined to confess, then why no confessions are being recorded through the Magistrates. This becomes crucial since the confession before the Police Officer is inadmissible in law and has to be totally excluded from consideration. However, such confessions are employed to Investigating Officers routinely to have at least some semblance of a case against the accused and seek repeated Police Custody/Judicial Custody on that basis. Expediency should never be allowed to supersede the legal principle and Magistrates ought not to blink at such a practice, as the very fact of there being a police confession in every case but no judicial confession in none, reflects a pernicious, and a rather appalling state of affairs. In every case where the accused has allegedly confessed to the police, the magistrate ought to put a question to the I.O. as to what prevented him from getting the confession recorded before the court. This will keep the coerced confessions in check and encourage police officers to explore other avenues of investigation, which are more legitimate.

In **Central Bureau of Investigation vs. Anupam J. Kulkarni, 1992 AIR 1768,** an important question for consideration arose before the Hon'ble Apex Court that whether a person arrested and produced before the nearest Magistrate as required under section 167 (1) Cr.P.C can still be remanded to police custody after the expiry of the initial period of 15 days. It was held that after the expiry of the first period of fifteen days the further remand during the period of investigation can only be in judicial custody. There cannot be any detention in the police custody after the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage. But this bar does not apply if the same arrested accused is involved in a different case arising out of a different transaction.

(h) Remand of Accused During Further Investigation After Filing of Charge-sheet

In **State Through CBI Vs. Dawood Ibrahim and others (2000) 10 SCC 438,** it was held that the accused who would be arrested during the further investigation after filing of the charge-sheet and taking cognizance of case, would be governed by section 167 of Cr.P.C and the accused can be remanded to police custody.

The Supreme Court of India in **Central Bureau of Investigation vs Rathin Dandapath & Ors, 2015 SCC OnLine SC 743** dealt with a question that whether remand in police custody can be given to the investigating agency in respect of the absconding accused who is arrested only after filing of the charge sheet. The Court held that police remand can be sought under Section 167(2) CrPC in respect of an accused arrested at the stage of further investigation, if the interrogation is needed by the investigating agency. This Court has further clarified in said case that 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.

4. Concept of Default Bail

If the arrest is justified at the anvil of the considerations as discussed, and no case for release on bail is made out, the accused can be remanded to Police or Judicial Custody during the first 15 days, and thereafter, only judicial custody for a further period of 45 days (in case of offences punishable with imprisonment of 10 years or less) or 75 days (in cases of offences punishable with imprisonment greater than 10 years). If the investigation is not concluded within the said period, the accused, if still confined in custody, becomes entitled to statutory bail (also known as 'default bail' or 'compulsive bail') and an indefeasible right accrues in his favour. It deserves reiteration that Cr.P.C does not fix a time limit for investigation, but by entitling the accused to bail on the expiry of specific periods, it puts pressure on the police to complete the investigation within time. It has been judicially held that this right accrues to the accused on the expiry of the 60th or the 90th day, as the case may be, from the date of the first remand, and once this beneficial right has accrued in favour of the accused and availed by him, the accused should apply for bail and not necessarily by a formal application. The same cannot be defeated by subsequent filing of charge sheet, however, if after grant of bail, the accused does not meet the conditions of bail, for example: non furnishing of bail bonds, and in that eventuality, the right stands defeated. The Supreme Court has recently held that bail applications for default in filing of charge-sheet ought to be decided on the very day of filing, in order to avoid the salutary purpose from being frustrated by subsequent filing of police reports. The Magistrate should also be on the guard for incomplete reports masquerading as police reports, filed hastily with the sole motive to defeat the right of the accused. The police report, has to conform to the essentials laid down in Section 173 of the CrPC. After expiry of the 15 days period if further police custody remand is granted, it would be violation of Sec. 167 of the Code of the Criminal Procedure. In the case of C.B.I. V/s Anupam Kumar (2000) 9 SCC 266, the Honorable Apex Court has observed that Sec. 167 (2) provides that at a time accused can be remanded for 15 days. If further detention of accused is necessary on satisfaction of the Magistrate further detention in Magisterial custody can be allowed. Magistrate may authorize detention of the accused beyond the period of 15 days if he is satisfied that adequate grounds exist. However, there is further limitation for detention of accused persons in such custody. Accused can be so detained for the period of 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. The detention can be authorized for 60 days where the investigation relates to any other offence. As per Sec. 167 (2) if the investigation in respect of the offences punishable with imprisonment up to 10 years is not completed within 60 days or if the investigation in respect of offence punishable with imprisonment for a period 10 years or more is not completed within 90 days, then the accused shall be released on bail if he is ready and willing to furnish bail and if he furnishes bail. In the case of **Changat Satyanarayana and ors V/s State of Andhra Pradesh (1986) 3 SCC 141** it was held that for counting the said period of 60/90 days, the first date of remand is to be considered, and not the date of the arrest. In recent case of **Ramesh Kumar Paul versus State**

of Assam, (2017) 15 SCC 67, the hon'ble Apex Court has interpreted the word imprisonment for a term not less than ten years appearing in clause (I) of proviso (a) to section 167(2) of the Code of Criminal Procedure, 1973 as amended in 1978.

In **Hitendra Vishnu Thakur vs State of Maharastra, (1994) 4 SCC 602,** it has been held that if the statutory period has expired, the court shall have no option but to release the accused on bail if he seeks it and is prepared to furnish the bail as directed by the court.

In **Sanjay Dutt vs State (1994) 5 SCC 410** clarifying the judgement delivered in Hitendra Vishnu Thakur's case, the Constitution Bench of the Supreme Court in paragraph 48 observed as under:—

> *…...The indefeasible right accruing to the accused in such situation is enforceable only prior to filing of the Challan and it does not survive or remain enforceable on the Challan being filed, if already not availed of. .....*

The aforesaid observation of the Supreme Court clearly means that ordinarily the indefeasible right accruing to the accused will not survive or remain enforceable on the charge-sheet being filed but if the indefeasible right has been availed of' prior to filing of charge-sheet then the said right will survive or remain enforceable even upon filing of the charge-sheet. Therefore, what is of significance is whether the accused has availed of' the indefeasible right accruing to him by filing bail application and offering to furnish the bail as directed by the court, prior to the filing of the charge-sheet. A similar view was taken by the Hon'ble Patna High Court in the case of **Baharan Ali v. State of Bihar (2018) CriLJ 2892.**

In **Uday Mohanlal Acharya V/s. State of Mahatrahstra AIR 2001 SC1010,** the Honourable Apex court has held that where a charge sheet is not filed within requisite period of 60 days or 90 days as the case may be, the accused is entitled to indefeasible right to be released on bail. The Supreme Court culled out six conclusions, which are as under:

(1) Under sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police are investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.

(2) Under the proviso to the aforesaid sub-section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than in the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.

(3) On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation

within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.

(4) When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency in completing the investigation within the period stipulated.

(5) If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and the proviso to sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorised, and therefore, if during that period the investigation is complete and the charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

(6) The expression if not already availed of used by this Court in Sanjay Dutt case must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to sub- section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.

Thus the right of detenue to be relaeased on default bail continues to remain enforceable if the accused has applied for such bail, not with standing pendency of bail application or subsequent filing of chargesheet or a report securring extension of time by the prosectution before the court on filling of charge sheet during the interregnum when the challenge to the rejection of bail application is pending before the higher court. In **Vikram Pal Vs State of Bihar 2016 (1) PLJR 321** the Hon'ble Patna High Court has held that subsequent filing of chargesheet would not extinguish the indefeasible right of the petitioner to be released on bail.

In **Ravi Prakash Singh alias Arvind Singh vs. State of Bihar, (2015) 8 SCC 340,** it was held that while computing the period u/s 167(2), the day on which on the accused was remanded

to judicial custody has to be excluded and the day on which challan/chargesheet is filed in the court has to be included.

A three Judge Bench in **Rakesh Kumar Paul vs. Assam, (2017) 15 SCC 67,** has held that the court should not be too technical in matter of personal liberty and even oral arguments for default bail made by the counsel for the accused would suffice in lieu of written application keeping in mind that in matter of personal liberty and Article 21 of Constitution, it is not always advisable to be formalistic or technical. The history of personal liberty jurisprudence of this court and other constitutional court includes petition for a writ of habeas corpus and for other writs being entertained even on the basis of a letter addressed to the Chief Justice or the court.

In **S. Kari vs. State through the Inspector of Police Samynallur Police Station, Madurai district, (2020) SSC OnLine SC 529** it was observed that the indefasible write to default bail u/s 167(2) is an integral part of the right to personal liberty under Article 21 and the said right to well cannot be suspended even during a pandemic situation as is prevailing currently.

5. Remand under Special Statutes

(a) The Juvenile Justice (Care and Protection) Act, 2015

While dealing with juveniles, the court ought to proceed strictly in line with the principles of *parens-patriae* & best interests of the child and zealously guard their welfare. Any offender under the age of 18 years ought to be tried by the Juvenile Justice Board and is not to be exposed to the rigors of ordinary criminal law process. Whenever a plea of juvenility is taken by an accused, the age determination enquiry has to be conducted by the court only, in accordance with Juvenile justice Act, where, in the opinion of the Magistrate, the accused is patently (from the physical appearance or otherwise) below 18, the court shall immediately transfer the child to observation home and order production of the juvenile before the JJB concerned. In other cases, the inquiry has to be conducted by the court, and if the accused turns out to be a juvenile, he shall be ordered to be transferred to observation home the same day and if person has turned an adult on the date of such order, in that case, to a place of safety. As per the J.J.Act, 2015 the documents forming basic input for age enquiry are:

- Date of birth certificate from school first attended (not the play school), and in absence whereof;
- Birth certificate by corporation/municipal authority or a panchayat;
- Matriculation or equivalent certificates, if available; and
- In the absence of the above, medical board, who shall, in the case age cannot be ascertained ascertain it on the basis of medical tests of the CCL/ CNCP.

(b) Special Provisions Related to Women

In case of the female accused, they should not be kept in the police lock up in which male

suspects are detained. Female accused should be kept in separate lock up and guarded by female constables. Interrogation of female accused should be carried out only in presence of female police officers. In case of **Sheela Barse versus State of Maharastra 1983 SCC 96,** Hon,ble Supreme Court has given directives for treatment of women and legal aid. In **R D Upadhaya vs State of Andhara Pradesh (1998) 5 SCC 696,** the Apex court has given detailed directives for the development of children who are in jail with their mothers, who are in jails either as under trial prisoners or convicts.

(c) Remand Under The Narcotic Drugs and Psychotropic Substances Act, 1985

The N.D.P.S. Act, as it stands after the amendment of 2001 (w.e.f. 2/10/2001), provides for constitution of Special Court, for trying all offences under the Act which are punishable with imprisonment for a term of more than three years. Provisions of remand under the General 22 Of 27 Code are modified by virtue of Section 36A (1) (b) of this Act, which provides that a person accused of or suspected of the commission of an offence under the Act be forwarded to a Magistrate under sub-section 2 or sub-section 2A of Section 167 of the Code whereupon, Magistrate may authorize the detention of such person in such custody as he thinks fit for a period not exceeding 15 days and 7 days in a whole where such Magistrate is an Executive Magistrate. In case of offences triable by the Special Court, the proviso to the said sub section provides that when such person forwarded to him; or upon or at any time before the expiry of the period of detention authorized by him, the Magistrate considers the detention of such person is unnecessary, he shall Order such person to be forwarded to the Special Court having jurisdiction. When such person is so forwarded to the Special Court, the Special Court exercises all the powers of remand conferred on Magistrate under Section 167 of the Code. The period of remand of 90 days under Section 167 of the Code is modified with a period of 180 days, only for the offences under Section 19 or Section 24 or Section 27A or for offences involving commercial quantity. Section 37 of NDPS Act does not exclude the operation of section 167(2) of the code. The accused has right to seek bail on failure of prosecution to file charge- sheet within stipulated period. If he exercises his right within time and is released on bail, he cannot be rearrested on mere filing of charge-sheet **Bipin Shantilal Panchal vs. State of Gujarat 1996 Cri.L.J 1652; 1996 SCC(cri) 200; (1996)1 SCC 718**

(d) Remand Under The Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act 1989:

The controversy as to whether a Special Court designated under Section 14 of this Act could take cognizance of an offence, was set at rest by the Hon'ble Apex Court in case of **Ganguly Ashok Vs. State of Andhra Pradesh reported in AIR 2000 Supreme Court 740.** It has been held that Special Court designated under Section 14 of the Act is essentially a Sessions Court and hence it cannot take cognizance of the offences under the Act as a Court of original jurisdiction

without the case being committed to it by a Magistrate. The reason assigned is that neither in the Code nor in the Act, is there any provision to the effect that Special Court would take cognizance of the offence as a Court of original jurisdiction.

(e) Remand Under The Prevention of Corruption Act, 1988:

Sub Section 1 of Section 5 of this Act makes provision for taking cognizance of the offences under the Act by Special Judge without the accused being committed to him for trial. Hence, the Special Judge exercises powers of remand under Section 167 of the Code.

(f) Remand Under The Electricity Act, 2003

After the amendment by State of Maharashtra in the year 2005, for the State of Maharashtra and after amendment of Central Act in the year 2007 (w. e. f.15/06/2007), for whole of India, the Court can take cognizance of offences under the Act on police report filed under Section 173 of the Code. The provision is made for Constitution of Special Courts in Section 153 of the Act for the purposes of providing speedy trial of offences referred to in sections 135 to 140 and section150. The second proviso to Section 151 provides that special court constituted under section 153 of the Act shall be competent to take cognizance of an offence without the accused being committed to it for trial. Thus, for the aforesaid offences the Special Court can exercise powers of remand under Section 167 of the Code.

(g) Remand Under The Protection of Children From Sexual Offences Act, 2012

The Parliament with a view to provide more deterrent effect on the offenders of sexual offences legislated a new Act called **Protection of Children from Sexual Offences Act in the year 2012** which came into effect from **14.11.2012.** The Act provides for stringent punishment. However, it seems that the Act suffers from bad drafting and the same is giving tough time for judicial establishment which naturally will result in irregular/illegal orders being passed by the judiciary. The most glaring defect is in respect of production and remand of arrested accused.

Who is competent to remand under POCSO : The POCSO Act does not have any direct provision in this respect and the Code prescribes (so far as subsequent remand is concerned) for the magistrate having jurisdiction. Whereas the Act does not give jurisdiction to the Magistrate. In the normal course, the provisions, viz; Sec 56, 57,167 etc. and Art-22(2) of constitution deal with the after effect of the arrest of any person. However, in the context of POCSO Act, we have to read "Special Court" instead of "Magistrate" in Section 167. Therefore, nearest magistrate can also be the nearest special court for POCSO Act. Proceeding in respect of offences under other laws is governed by Section 4 and Section 5 of Cr.PC and Section 42A of POCSO Act which read as under:

Sec 4. Trial of offences under the Indian Penal Code and other laws.-

(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated,

inquired into, tried, and otherwise dealt with according to the provision hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

Sec 5 Saving- Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force. Sec 42A POCSO Act not in derogation of any other law:

The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

Section 28 of the POCSO Act 2012 further provides for the establishment of special courts for the trial of offences therein. For better understanding the section is being reproduced as under:

28. Designation of Special Courts:

1. *For the purposes of providing a speedy trial, the State Government shall in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, designate for each district, a Court of Session to be a Special Court to try the offences under the Act: Provided that if a Court of Session is notified as a children's court under the Commissions for Protection of Child Rights Act, 2005 or a Special Court designated for similar purposes under any other law for the time being in force, then, such court shall be deemed to be a Special Court under this section.*
2. *While trying an offence under this Act, a Special Court shall also try an offence [other than the offence referred to in sub-section (1)], with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial.*
3. *The Special Court constituted under this Act, notwithstanding anything in the Information Technology Act, 2000, shall have jurisdiction to try offences under section 67B of that Art in so far as it relates to publication or transmission of sexually explicit material depicting children in any act, or conduct or manner or facilitates abuse of children online.*

Clearly, unless the POCSO Act provides some different procedure, we have to follow the provisions of CrPC. The vexed question therefore is whether POCSO Act provides any other procedure for production or remand of accused or not. It's apparent that by virtue of operation of **Section 4(2) Cr.PC,** the procedure prescribed in the Cr.PC for production and remand of accused has to be followed. As such, even for the offences under POCSO Act, the arrested accused has to be produced before the Magistrate as the case may be. Such Magistrate may remand the accused for first 15 days. However, **Section 167(2) Cr.PC** further provides that if such Magistrate does not have jurisdiction to commit or try the case, he may forward the accused to the Magistrate having such jurisdiction. Certainly, this prescription is not for the first production of the accused as provision provides in the starting phase that Magistrate may authorize detention irrespective of jurisdiction (for convenience this Magistrate may be called as"Initial Magistrate"). It is clear that such Magistrate has to consider jurisdictional prescription upon first remand. Though seemingly, the forwarding part uses an expression "may" and therefore some fertile mind can contend that the Magistrate is not required to forward the accused to the Magistrate having jurisdiction. It however seems that such a contention cannot be accepted. If this was the intention of the legislature, there was not even a need for enacting such prescription. It is well settled law that in certain circumstances even an expression "may" can be deemed to be mandatory. The "Initial Magistrate" has to forward the accused to the "Jurisdictional Magistrate" upon the expiry of the first 15 days. From the discussion held above, it can safely be deduced that a person arrested for the offence under POCSO Act has to be produced and dealt with in the following manner.

1. If Special Court of the area is available, the first production shall be before only such court and remand shall be dealt with by such court only;
2. Any remand after first one shall be dealt with only by the Special Court;
3. If Special Court is not available for first production, the accused shall be produced before the Magistrate as the case may be treating him as the nearest Magistrate and irrespective of any jurisdiction.
4. Such Magistrate can grant remand up to 15 days but thereafter has to forward the accused to Special Court;
5. If Special Court grants remand for a period less than 15 days on first production and for further remand, it is not available for any reason, Magistrate cannot extend the custody. Reason is obvious. Only first production can be made irrespective of jurisdiction and not further production;
6. It is pertinent to mention here that special courts for the trial of offences under the POCSO Act 2012 has been largely constituted and hence now the power of remand under this Act vest with Special Judge appointed under Section 28 of the Act. It is now imperative for all police officers to produce the accused for remand before the special Court and not before the court of the magistrate. In **Kum. Shraddha**

Meghshyam Velhal- Vs- State of Maharashtra, in Cr. W. P. No.354/2013, Hon'ble High Court of Bombay has taken a view that all the remand proceedings have to be dealt with only by a special court and magistrate has no jurisdiction at all. It took support from the statement of objects and reasons for enacting the POCSO Act which says that special court is to be established for trial of such offences and for matters connected therewith or incidental thereto and that the Act is enacted for safeguarding the well-being of child at every stage of the judicial proceeding. Hence it was held that the Judicial Magistrate First Class is not empowered to entertain the remand and only special court will entertain the remand under this Act.

PART II

REMAND POST COGNIZANCE: PRINCIPLE, PRACTICE AND SAFEGUARDS

5. Post Cognizance Remand and Role of Courts

Sec. 167 of the Code provides for the detention of the accused during pendency of investigation. Sec. 209 provides for detention of the accused during pendency of Committal proceedings and Sec. 309(2) provides for detention of the accused during pendency of trial or inquiry. The scheme of Sections 167, 209 and 309 of Cr.P.C. are independent of each other and they must be so read and applied. Section 209 of Cr.P.C. mandates the Magistrate to pass an order of committal if the offence leveled against the accused is not triable by him and is exclusively triable by the Sessions Court or by any other Court. The said section makes it obligatory on the part of the Magistrate to remand the accused to custody on committing the case to the Court of Sessions. Though the Magistrate is required to specifically state in the order of committal that the accused is remanded to the custody during and until conclusion of the trial, absence of such a specific order would amount to a mere irregularity and even if such an irregularity is there it does not, per se, mean that the detention of the accused in custody would be illegal. Sub-Section 2 of Section 309 provides for the postponement of the commencement of the trial or the adjournment in the inquiry of trial and while doing so, the Court is empowered to remand the accused in custody. Once the committal order has been passed and the accused is remanded to the custody or the authority has been asked to take the accused in custody and produce before the trial court, the provisions of Section 309 will come into play, which deal with the custody of the accused during inquiries or trial and there is no discretion left but to grant judicial custody.

Section 209 Crpc

209. ***Commitment of case to Court of Session when offence is triable exclusively by it.****—When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall-*

(a) commit, after complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;]

(b)subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session

The Supreme Court in **State of U.P, v. Lakshmi Brahmin, AIR 1983 SC 439** took the view that after the accused is brought before the court along with the police report under S. 170 Cr. P.C. the Magistrate must forth with commit the accused to the Court of Session because the Magistrate would have no jurisdiction in the absence of any provision to remand the accused to custody till the order committing the case to the Court of Session is made is wholly untenable and must be set aside. Section 170 Cr. P.C. Obligates the investigating officer to submit the police report, if in the course of investigation sufficient evidence or reasonable ground is made out for the trial or for commitment for trial of the accused, to the Magistrate empowered to take cognizance of the offence upon a police report. On this report being submitted, the Magistrate takes cognizance of the offence disclosed in investigation as envisaged by S.190. Cognizance of an offence even if exclusively triable by the Court of Session has to be taken by the Magistrate because S. 193 precludes the Court of Session from taking cognizance of any offence. Taking cognizance of an offence under S. 190 is a purely judicial function subject to judicial review. The statutory obligation imposed by S. 207 read with S. 209 on the Magistrate to furnish free of cost copies of documents mentioned in S. 207 to the accused is a judicial function and it has to be discharged in a judicial manner. It is distinctly possible that the copies may not be ready. That makes it necessary to adjourn the matter for some time which may be spent in preparing the copies and supplying the same to the accused. The Magistrate can proceed to commit the accused for trial to the Court of Session only after he judicially discharges the function imposed upon him by S.207. This conclusion is fortified by the provisions contained in Ss. 226 and 227 of Chapter XVIII which prescribe the procedure for trial of a case by the Court of Session. When the Magistrate is performing a judicial function under s. 207, it would undoubtedly be an inquiry. The making of an order committing the accused to the Court of Session will equally be a stage in the inquiry. Thus from the time the accused appears or is produced before the Magistrate with the police report under S. 170 and the Magistrate proceeds to enquire whether S. 207 has been complied with and then proceeds to commit the accused to the Court of Session, the proceeding before the Magistrate would be an inquiry as contemplated by S. 2(g), and S. 309(2) would

enable the Magistrate to remand the accused to custody till the inquiry to be made is complete.

Under section 209 (b), the magistrate has power to remand the accused to custody during and until the conclusion of the trial. Therefore, the remand order should be unambiguous. When the warrant at the time of commitment under section 209 states that accused will be kept in custody during and until the conclusion of trial, it is not an in definite period. The period of detention begins from the date of commencement of the trial and ends with the conclusion of the trial. If the accused is already on bail he need not be remanded to judicial custody by the arrest. **(Sunder Lal v. State, 1983 Cr.L.J 736 (All)(FB)** An irregularity or illegality in passing the order of remand does not entitle the accused to be released on bail. The order of remand has no bearing on the proceedings of the trial itself nor it can have any effect on the ultimate decision of the case. If an order of remand is found to be illegal, it cannot result in acquittal of the accused or in termination of the proceedings.

In **State v. N.M.T Joy Immaculate, AIR 2004 SC 2782,** it was held that remand order cannot affect the progress of the trial or its decision in any manner. While committing the case to the court of session, the magistrate shall remand the accused to custody during, and until the conclusion of the trial. But this is subject to the provision of the code for the grant of bail under section 436 to 450 in chapter 33. If there are reasonable grounds to believe that the accused has committed an offence punishable with death or imprisonment for life, the accused while passing the order of commitment under section 209, shall be committed to custody. It has been held that a person released on bail under the proviso to section 167 clause (2) must be treated as a person released on bail under section 437 clause (1) and (2) therefore the accused cannot be taken into custody at the time of commitment under section 209 clause (b)solely on the ground that he had been been bailed out earlier on a technical ground. In **Bashir versus state of Haryana AIR 1978 SC 55,** the court has said it's important *"before directing the arrest of the accused and committing them to custody should consider it necessary to do so under section 437 (5) Cr.P.C.*

SECTION 309 CrPC

Sec 309. Power to postpone or adjourn proceedings (2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time: Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him. Provided also that –

(a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;

(b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;

(c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.

Explanation 1—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2—The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused.

The Hon'ble Supreme Court observed in **Central Bureau of Investigation, Special Investigation Cell-I, New Delhi Vs. Anupam J. Kulkarni, (1992) 3 SCC 141** that Section 309 comes into operation after taking cognizance and not during the period of investigation. Remand order under this provision (Section 309) can only be with judicial custody. Section 309(2) of the CrPC does not refer to an accused, who is subsequently arrested in course of further investigation. Even after cognizance is taken of an offence the police has power to investigate into it further and there is no reason why the provisions of Section 167 thereof would not apply to a person who comes to be later arrested by the police in course of such investigation. The phrase "accused if in custody" in Section 309(2) of the Cr.P.C relates to an accused who was before the court when cognizance was taken or when inquiry or trial was being held in respect of him and not to an accused who is subsequently arrested in course of further investigation.

(i) The accused can be remanded under Section 167(2) Cr.P.C during investigation till cognizance has not been taken by the Court.

(ii) That even after taking cognizance when an accused is subsequently arrested during further investigation, the accused can be remanded under Section 167(2) Cr.P.C.

(iii) 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 judicial custody only under Section 309(2) Cr.P.C.

Relevant provision of Section 309(2) Code of Criminal Procedure, empowering remand of an accused, provides as under:

(2) If the Court after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody.

Explanation 1.—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

The aforesaid provision authorizes post cognizance remand by a Court in contradistinction to pre cognizance remand by the Magistrate under Section 167 of the Code of Criminal Procedure. First proviso of section 309(2) of the Code restricts the power of the Magistrate to remand an accused to custody under the said section for a term not exceeding 15 days at a time.

In, **State through CBI v. Dawood Ibrahim Kaskar and Ors. (2000) 10 SCC 438,** a three-judge bench of the Supreme Court has laid down the law on the issue relating to grant of police custody of a person arrested during further investigation. The Supreme Court has held as follows:—

> *"There cannot be any manner of doubt that the remand and the custody referred to in the first proviso to the above Sub-section are different from detention in custody Under Section 167.While remand under the former relates to a stage after cognizance and can only be to judicial custody, detention under the latter relates to the stage of investigation and can initially be either in police custody or judicial custody"*

Section 309(2) has been interpreted by the Bombay High Court in **Mohd. Ahmed Yasin Mansuri v. State of Maharashtra MANU/MH/0130/1994 : 1994 Cri.LJ 1854 (Bom),**-- *"to mean that after the Court takes cognizance of an offence it cannot exercise its power of detention in police custody Under Section 167 of the Code, the Investigating Agency would be deprived of an opportunity to interrogate a person arrested during further investigation, even if it can on production of sufficient materials, convince the Court that his detention in its (police) custody was essential for that purpose. We are, therefore, of the opinion that the words "accused if in custody" appearing in Section 309(2) refer and relate to an accused who was before the Court when cognizance was taken or when enquiry or trial was being held in respect of him and not to an accused who is subsequently arrested in course of further investigation. So far as the accused in the first category is concerned, he can be remanded to judicial custody only in view of Section309(2), but he who comes under the*

second category will be governed by Section 167 so long as further investigation continues. That necessarily means that in respect of the latter the Court which had taken cognizance of the offence may exercise its power to detain him in police custody, subject to the fulfilment of the requirements and the limitation of Section 167."

The Supreme Court further clarified in said case that expression "accused if in custody" in Section 309(2) Code of Criminal Procedure does not include the accused who is arrested on further investigation before supplementary charge sheet is filed. The word "custody" used in Section 309, CrPC, means imprisonment both legal and illegal. In this regard, the decision in **Surjeet Singh v. State of U.P: 1984 All. L. J.375 (FB)** is of paramount consideration. The question before the Full Bench of Allahabad High Court was whether the word "custody" used in Section 309, CrPC, means imprisonment both legal and illegal? This was answered in the affirmative. The Full Bench held: "In view of the normal meaning of the word "custody" actual or physical imprisonment of a person both legal and illegal amounts to his being in custody. By restricting the meaning of the word "custody" in S. 309(2), Cr.P.C ., to only legal imprisonment the normal meaning is obviously curtailed. It is not at all necessary for the harmonious construction of the provisions of the code of criminal procedure to restrict the meaning of the word "custody" in S. 309(2), CrPC to legal imprisonment only. In fact, grave consequences follow if this restriction is placed on the meaning of the word "custody" for once the custody of the accused becomes illegal by his being confined in jail without a valid order or warrant of remand due to mistake of the Court it would become powerless to remand the accused to custody under S. 309(2), Cr.P.C ., and rectify its error.

The word "custody" in Section 309, Cr.P.C, in our opinion therefore, means physical imprisonment as distinct from being on bail. Even if the accused is in prison after his arrest in a criminal case without an order or warrant of remand by a competent Court he is in custody as distinct from being on bail. The word 'custody' therefore embraces both legal imprisonment as well as illegal imprisonment.; The Court is, therefore, competent to remand the accused to custody under S. 309(2), Cr.P.C ., even if he is in illegal imprisonment. It can thus rectify its mistake and transform his illegal imprisonment into legal imprisonment. Section 309 on which reliance has been placed by learned counsel for the appellant is as follows:

The Supreme Court had occasion to consider Section 167 and Section 344 of the old Code in **Gouri Shankar Jha vs. State of Bihar and others, 1972 (1) SCC 564.** The Court in paragraph No. 12 laid down following: - *"Section 167 operates at a stage when a person is arrested and either an investigation has started or is yet to start, but is such that it cannot be completed within 24 hours. Section 309, on the other hand, shows that investigation has already begun and sufficient evidence has been obtained raising a suspicion that the accused person may have committed the offence and further evidence may be obtained, to enable the police to do which, a remand to jail custody is necessary."*

The succeeding sections dealing with the remand that is ordered under Sec 309(2) of the CrPC relates to a **stage after cognizance** and can only be sent to judicial custody.

In the case of **Manubhail Ratilal Patel v. State of Gujrat and others (2013) 1 SCC 314,** Hon'ble Apex Court observed that, *remand is a fundamental judicial function of the Magistrate. While performing this judicial function, Magistrate has to satisfy himself that there are reasonable grounds therefore and that materials placed before him justify remand of accused. While remanding accused it is obligatory on part of Magistrate to apply his mind to facts and not to pass remand order automatically or in a mechanical manner.*

PART III

TRANSIT REMAND AND TRANSIT BAIL

1. Transit Remand

Meaning: It is a settled principle that a warrant of arrest can be executed outside the jurisdiction of the court which issued it. In such circumstances it becomes a substantial question as to how the accused who was apprehended under the said warrant can be produced before the magistrate without delay as envisaged in section 76 of the Code of Criminal Procedure. Section 76 in The Code of Criminal Procedure, 1973 is produced here in for reference

> *Sec 76.* ***Person arrested to be brought before Court without delay.****—The police officer or other person executing a warrant of arrest shall (subject to the provisions of section 71 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person:*
>
> *Provided that such delay shall not, in any case, exceed twenty- four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate' s Court.*

The framers of the criminal law very well contemplated the cumulative effects of these two situations and hence the evolved the concept of transit remand by virtue of operation of section 80 of the Cr.P.C. A transit remand is not specifically defined under the Code. However, the provisions of section 80 CrPC contemplate a transit remand within its ambit. The section contemplates that when a warrant of arrest is executed outside the district in which it was issued, and the court which issued the warrant is not within 30 km of the place of arrest, then the person arrested may be produced before Executive Magistrate, District Superintendent of Police or Commissioner of Police who shall direct his removal in custody to such court. In case of bailable offence such Magistrate/ DSP/ CP shall release the accused on bail, and if the offence is non-bailable it shall be lawful for Chief Judicial Magistrate or Session Judge to release accused on bail, by invoking powers under Section 81 proviso II, subject to the provision of Section 437 of CrPC. For e.g. if

an offence is committed in Delhi but the accused is arrested in Chandigarh, then the police will seek his remand from a court in Chandigarh to transport him to Delhi, so that he can be investigated and tried in Delhi. The legal provisions dealing with warrant directed to police officer for execution outside jurisdiction, Procedure on arrest of person against whom warrant issued,

Procedure by Magistrate before whom such person arrested is brought are defined under **Section 79, 80 and 81 of CRPC 1973.**

Section 79 of CRPC."Warrant directed to police officer for execution outside jurisdiction"

(1) When a warrant directed to a police officer is to be executed beyond the local jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement either to an Executive Magistrate or to a police officer not below the rank of an officer in charge of a police station, within the local limits of whose jurisdiction the warrant is to be executed

(2) Such Magistrate or police officer shall endorse his name thereon and such endorsement shall be sufficient authority to the police officer to whom the warrant is directed to execute the same, and the local police shall, if so required, assist such officer in executing such warrant.

(3) Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or police officer within whose local jurisdiction the warrant is to be executed will prevent such execution, the police officer to whom it is directed may execute the same without such endorsement in any place beyond the local jurisdiction of the Court which issued it.

Section 80 of CRPC. "Procedure on arrest of person against whom warrant issued"

When a warrant of arrest is executed outside the district in which it was issued, the person arrested shall, unless the Court which issued the warrant is within thirty kilometers of the place of arrest or is nearer than the Executive Magistrate or District Superintendent of Police or Commissioner of Police within the local limits of whose jurisdiction the arrest was made, or unless security is taken under section 71, be taken before such Magistrate or District Superintendent or Commissioner.

Section 81 of CRPC. "Procedure by Magistrate before whom such person arrested is brought"

(1) The Executive Magistrate or District Superintendent of Police or Commissioner of Police shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court:

Provided that, if the offence is bailable, and such person is already and willing to give bail to the satisfaction of such Magistrate, District Superintendent or Commissioner,

or a direction has been endorsed under section 71 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate, District Superintendent or Commissioner shall take such bail or security, as the case may be, and forward the bond, to the Court which issued the warrant:

Provided further that if the offence is a non-bailable one, it shall be lawful for the Chief Judicial Magistrate (subject to the provisions of section 437), or the Sessions Judge, of the district in which the arrest is made on consideration of the information and the documents referred to in sub-section (2) of section 78, to release such person on bail.

(2) Nothing in this section shall be deemed to prevent a police officer from taking security under section 71

The concept of Transit Remand is implicit in section 167 Cr.P.C and it can also be said to be a special type of or a subspecies of police custody remand as contemplated under section 167 Cr.P.C which is given for the particular purpose of the transit of the accused from one place to another to be presented before the jurisdictional magistrate.

Transit remand is also sought is when the accused person is in jail (either during the investigation, during the trial or after conviction), and he is also an accused in a case which has to be investigated and tried in a different district. In such a case, a request maybe made by the police authorities to the concerned court which may grant such permission, if it deems fit, to transfer the accused person and produce him before the court where he has to be tried for the other case. In such a case the accused would be formally arrested by the police and such an order would be in terms of section 167(2) Cr.P.C.

A perusal of the CrPC, shows that the term Transit Remand is absent. It is a term which has evolved colloquially. Simply put, transit remand is remand of the accused, sought by the police, for taking the arrested accused from one jurisdiction to another, in their own custody, usually for the purpose of producing him before the Jurisdictional Magistrate.

Although, in practice, the most commonly sought transit remand is the one as contemplated in section 167 Cr.PC, however the same being a generic word is also used in other situations. For instance transit remand may also be sought under Section 80 Cr.P.C. The main difference in both the situations is that Section 80 is applicable only where the accused is arrested under a warrant issued by a court in a district which is different from the district where the accused is arrested. However in cases where the police officer arrests without a warrant, the transit remand which has to be sought is the one contemplated under section 167 Cr.P.C.

(a) Precautions to be taken during Transit Remand:

The provision of transit remand is intended to place checks and balances upon the powers and the authority of the police to detain an individual as well lay down the manner in which police

remand or judicial custody remand of a person may be granted. Before granting transit remand, the court should take care of the following conditions:

Production of the Accused before magistrate:- It shall be mandatory for the police to produce the accused before the magistrate seeking remand. The magistrate should never remand without the accused before it, physically.

Relevant document to be placed before the magistrate:- The magistrate should ensure that the copy of the case-diary and other relevant material needs to be placed before the magistrate and the police officer applying for remand must not be an officer below the rank of Sub Inspector. Though the Magistrate examining the transit remand application is not required to go into the adequacy of the material, he should nevertheless satisfy himself about the existence of the material.

Magistrate should record reasons for remanding an accused:- As per section 167(3), the magistrate granting a police custody remand shall record his reasons for so doing.

Remand by authorities other than Judicial Magistrates:- Section 167(2A) of the CrPC, provides that in the event that a Judicial Magistrate is not available, the accused may be forwarded to an Executive Magistrate upon whom the powers of a Judicial Magistrate/ Metropolitan Magistrate have been conferred and such magistrate may grant custody (Judicial or police custody) for a period not exceeding seven days, after the expiry of which the accused must either be produced before the competent magistrate or be released on bail.

Grounds of arrest and right to defend be communicated:- The person arrested should be informed as soon as may be of the grounds of such arrest. Further the Magistrate has to ensure that the arrested person is not denied 'the right to consult, and to be defended by, a legal practitioner of his choice.' The Magistrate should ask the person arrested and brought before him whether in fact he has been informed of the grounds of arrest and whether he requires to consult and be defended by any legal practitioner of his choice.

In **Gautam Navlakha vs. State (NCT of Delhi) 253(2018) DLT 392** a division bench of Delhi High Court held that Magistrate before whom a transit application is filed is not required to merely satisfy himself that an offence has been committed and that the police officer seeking a remand is properly authorised. Such Magistrate is required to apply his mind to ensure that there exists material in the form of entries in the case diary that justifies the prayer for transit remand. The division bench quoted the observation of Supreme Court on remand in Manubhai Ratilal Patel v. State of Gujarat (2013) 1 SCC 314, and **Saurabh Kumar vs Jailor, Koneila Jail (2014) 13 SCC 436** with approval. The court held that non-compliances of the mandatory requirement of Article 22(1), Article 22(2) of the Constitution and Section 167 read with Section 57 and 41(1) (ba) of the Cr.P.C., which are mandatory in nature, rendered the order passed by the learned CMM granting transit remand to the Petitioner unsustainable in law.

Illustrations:

A was arrested at Pune (Maharastra) on 1.2.2021 at 11 am in connection with a case registered at Patna. Soon after arrest, the police proceeded for Patna with accused and produced magistrate before jurisdictional magistrate on 3.2.2021 at 1 pm ie after 50 hours from arrest. It was claimed that after exclusion of travel time, the accused has been produced before magistrate in time within 24 hour.

No exclusion of travelling time is for the purpose of presenting the accused before the nearest magistrate and not for taking him before the jurisdictional magistrate who is in a different district. The police ought to have produced the accused before magistrate at Pune for transit remand.

"A was arrested at Hyderabad in connection with a case registered at Jaipur. The police did not produce him before magistrate at Hyderabad and proceeded to Jaipur. However in the way before expiry of 24 hours time, the accused was produced before magistrate of District, which was in the way. Transit remand was prayed.

Transit remand ought to be refused as the accused was not produced before nearest magistrate for transit remand. **[Iqbal Kaur Kwatra vs Director General Of Police, 1996 CriLJ 2600]**

2. The Concept Of Transit Bail:

The transit bail, in fact, is a type of anticipatory bail granted to the applicant by the court situated beyond the jurisdiction of the place where the FIR or complaint has been lodged against the applicant. The transit anticipatory bail is granted for a limited time to the accused for the purpose of giving him some time to approach the concerned court for regular bail and proceed with the case. However, transit anticipatory bail is normally not granted especially when the accused is charged with committing heinous offences. The transit anticipatory bail can be granted in cases arising beyond the jurisdiction of the Court having invested with the powers of grant of anticipatory bail. But the Court granting anticipatory bail should leave it to the regular Court to deal with the matter after expiry of the duration specified the transit bail order. For instance, 'A' stays in Mumbai and there's an FIR registered against him in distant district or another state and he is scared that he might be arrested while in transit. To avoid such arrest, he is supposed to file Transit Anticipatory Bail application before the Session court in his area where he is residing or staying for the time being, seeking protection till he reaches and files the actual anticipatory bail application before the court which actually has jurisdiction to hear the anticipatory bail application. While doing so he has to serve copy of the transit anticipatory bail application to the local police station.

To understand the concept of transit anticipatory bail, a look at he following case-laws will be helpful.

In, **Sahil Hirenbhai Shah vs State of Gujarat R/CR.MA/13910/2016,** the Gujarat High court granted transit anticipatory bail for the offences mentioned in the FIR lodged at Lucknow under Sections 379,504,506 of the Indian Penal Code and Section 66 of the Information Technology Act (IT Act), 2000 to enable the applicant to approach the Competent Court at Lucknow for the purpose of seeking anticipatory bail where the offence is registered. In, **Suraj Pal vs Vijay Chauhan & Ors., CRL.M.C.2677/2015 & Crl.M.A.9653/2015**, the high court of Delhi was considering the Cancellation of transit bail granted to respondent-accused in case of dowry death. The court observed that the Sessions Court dealing with such like serious matters ought to be reminded that transit bail is not to be granted in serious offences of dowry death, etc. extraordinary circumstances be highlighted to adopt such an unusual course.

In, **Pritam Singh vs State of Punjab, 1980 CriLJ 1174,** The applicant filed a petition before the Delhi High court for confirming the interim bail which was confirmed under section 438 CrPC itself. The petitioner's case in the petition was that First Information Report No. 95 had been registered at Police Station Kotwali, Ludhiana, against him for offences under Sections 420, 406 and 411, Indian Penal Code on a complaint made to the Inspector General of Police, Punjab. The Delhi High Court held that, the petitioner is a permanent resident of Delhi and is carrying on his business at this place and is apprehending arrest at Delhi. Therefore, prima facie Delhi High court has jurisdiction not only to grant him interim bail but to confirm the same within the purview of Section 438 of the Code of Criminal Procedure. In given circumstances certain conditions can be imposed one of the conditions may be that the anticipatory bail so granted is effective till a contingency arises, like the filing of the First Information Report or a report under Section 173 of the Code of Criminal Procedure. The court might even impose a condition that within a given period the petitioner should move the court concerned for seeking bail. But it cannot be said that the court granting interim bail has no jurisdiction to confirm the order under Section 438 of the Code of Criminal Procedure.

The High Court of **Meghalaya in Smt. Merry Bina Marak vs . State of Meghalaya & Anr A.B. No.22/2018** while granting transit anticiparoty bail to the petitioner apprehending arrest in connection with Wanwadi, Pune, Maharashtra PS Case No.4791/2018 under Sections 419, 420 IPC and Section 66(d) of I.T. Act, discussing in detail the law regarding the transitory anticipatory bail, observed.

> *"The first question which arises for consideration is as to whether this Court can invoke powers under Sections 438 and 482 CrPC when the occurrence has taken place in the State of Maharashtra. Putting it otherwise, the question for determination is as to whether jurisdiction of the Court for invoking powers under Sections 438 and 482 CrPC is to be decided on the basis of place of occurrence, place of residence of the accused or place where the accused apprehends arrest. The question of jurisdiction in each case depends upon on its own facts i.e. to say if an offence is a continuing offence*

committed in different places but the case is registered at one place, in such a situation, place of occurrence can be at all places where part occurrence has taken place, so in such a situation, jurisdiction of the Court cannot be confined to the place where the case has been registered"

Therefore, in such a situation, the accused can seek invocation of powers under Sections 438 or 482 CrPC in the court within whose jurisdiction occurrence or part occurrence has taken place. In short, jurisdiction depends on the place of occurrence not the place where the accused resides or the place where the accused apprehends arrest.

In the judgment passed by the Kolkata High Court in the case of **"Sailesh Jaiswal v. State of West Bengal & ors": 1998 (2) ALD Cri 924,** the Full Bench of Kolkata High Court while dealing with reference of the Division Bench regarding specific point as to whether Section 438 CrPC empowers to grant anticipatory bail by any High Court or Court of Sessions within the country irrespective of the place of commission of an offence. After referring to Sections 177, 76 and 167(2) and various judgments, it was held:

> "27. ..... The exercise of jurisdiction of anticipatory bail by any other court namely the High Court or Court of Sessions beyond the local limits of the jurisdiction is limited to the extent of consideration of a bail for the transitional period but it has no jurisdiction to transgress into the limits of the local jurisdiction of the court within which offence is alleged to have been committed. ....."

The Delhi High Court in the case of **"Capt. Satish Kumar Sharma v. Delhi Administration & ors": ILR 1990 Delhi 203** has also granted bail. In the judgment rendered by the Full Bench of Kolkata High Court, it has been held that grant of transitory bail by the Court within whose jurisdiction accused has apprehension of arrest is allowable. But at the same time for grant of transitory bail, merit position of the case cannot be ignored.

The High Court of Gujarat in the case of **Tarun Ishwardas Jagyasi v. State of Gujarat**, Misc. App. 9578/2008 has also granted transitory bail for a period of 30 days.

The Rajasthan High Court in the case of **Rahul Agarwal v. State of Rajasthan,** Cri. Misc. Bail Application 11470/2013 vide order dated 04.12.2013 has granted transitory bail with the condition that the petitioner therein may approach the appropriate Court in the State of West Bengal within 15 days for grant of regular bail.

Personal liberty is precious. Deprivation whereof has to be in exceptional cases on reasonable ground. In the judgment rendered by the Hon'ble Apex Court in the case of **"Shri Gurbaksh Singh Sibbia & ors v. State of Punjab: (1980) 2 SCC 565,** it has been held that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Para 26 of the judgment is relevant to be quoted:

"26. We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned.

The High Court of Karnataka allowing Criminal Petition No. 1322 of 2014 in the case of **Smt Sharwari Alagharu V. State of Andhra Pradesh and another;** discussing all the above cited cases granted transitory bail till filing of the petition before the concerned jurisdictional Court at Hyderabad.

A perusal of the case laws discussed above shows that the power to be exercised under Sections 438 and 482 CrPC rest with the High Court or Court of Sessions within whose jurisdiction occurrence or part of occurrence has taken place. However, for grant of transitory pre-arrest bail regarding non-bailable offences in the deserving cases, power of the High Court or Court of Sessions within whose jurisdiction, person resides or place where he apprehends arrest, is permissible as such not barred. Therefore, accused can invoke jurisdiction of the High Court or Court of Sessions within whose jurisdiction he resides or place where he apprehends arrest however, grant of pre-arrest transit bail can't be a matter of routine. Host of circumstances, including heinousness of the crime have to be taken care of.

In, **Teesta Setalvad Vs. State of Maharashtra,** the bail application was moved before the Hon'ble Bombay High Court for the grant anticipatory bail under Section 438 of the Code of Criminal Procedure. The offences punishable under Section 406, 420, 120-B of the Indian Penal Code and Section 72(A) of the Information Technology Act, 2000, were registered at Crime Branch Ahmedabad, Gujarat. The court discussed judgments of various high courts and legal propositions and granted transit bail for four weeks so as to enable the applicant to approach appropriate Court in Gujarat, on the terms and conditions imposed in the interim order passed by Bombay High Court.

Further, in **Girish Chander Sharma Vs State Thr. (Govt. Of Nct of Delhi)** BAIL APPLN. 2325/2019, where the petitioner filed the petition before the Delhi High Court, inter alia,

seeking transit anticipatory bail for a period of four weeks in relation to FIR No. 0121/2018, under Sections 420/465/468/471/120-B of the Indian Penal Code, 1860, read with Section 13 of the Travel Professional Regulations Act, 2014 registered with the Jalandhar Police Station, the Hon'ble Delhi High Court allowed the transit anticipatory bail application in order to enable the petitioner to join the investigation at Jalandhar.

(a) The Jurisdiction Problem in Transit-bail

Chapter XIII of the Cr.P.C. explains how to determine the jurisdiction of criminal courts. It is striking how this set of provisions regularly confers jurisdiction upon more than one place. This is not accidental, as it is guided by the idea that technicalities should not override the criminal process. So, if the Cr.P.C. itself is happy with multiple jurisdictions for the inquiries and trials, Why can't both places, i.e. the site of accusations and the site of my fear of arrest, have jurisdiction in cases of anticipatory bail?

Throughout Chapter XIII, the jurisdiction of criminal courts is based on places having connections to the alleged offence, not where the accused lives. This leads some people to argue that jurisdiction, as a concept in Indian criminal procedure, is offence-based.

So, it appears that there are two key factors to decide jurisdiction: accusations of committing an offence, and apprehension of arrest; and it is not necessary for them to always overlap. And the place of residence for a defendant, as we saw, is not a principle for determining jurisdiction under Chapter XIII. Besides relying on principles, the argument of particularity in deciding anticipatory bail jurisdiction also gets support from the text of Section 438(1) Cr.P.C. Itself: When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this Section; and the Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(b) Diverging Judicial Opinion

In **State of Assam v. Brojen Gogol / R.K. Krishna Kumar & Ors. [(1998) 1 SCC 397],** the Supreme Court had a chance to address the issue. The case involved a batch of petitions where the Bombay High Court had granted anticipatory bail to accused persons in a case registered in Guwahati. When the State of Assam moved the Supreme Court, it transferred the cases to Assam, but while doing so expressly chose to leave the jurisdiction question undecided.

As a result, today there is still a spectrum of divergent judicial opinion on the issue. On one end are courts which subscribe to an expansive view on jurisdiction and allow applications to be filed in the place where the accused resides. This set includes some orders of the Delhi High Court. These courts do not bunk offence-based jurisdiction, but consider the expansive view necessary because of another, equally fundamental, principle of criminal procedure: ensuring the widest possible protection for personal liberty. At the other end of the spectrum are courts which

subscribe to the restrictive view sketched out in the previous section. Further textual support for their view is derived from Section 81 Cr.P.C., which expressly confers jurisdiction in bail cases on a court other than the court within whose territorial jurisdiction the case is filed. It appreciates how anticipatory bail works in practice, and in this practical context gives due consideration to both principles, of protecting personal liberty and also securing local jurisdiction for prosecuting crimes.

PART IV

REQUIREMENT BY MAGISTRATE TO ISSUE WARRANT OF ARREST, ORDER OF PROCLAMATION AND ORDER OF ATTACHMENT

1. WARRANTS OF ARREST

The provisions relating to warrants of arrest, proclamation and attachment of the property of the accused in order to secure his presence before the court constitutes the sub-structure on which the speedy disposal of any criminal proceeding largely depends. Chapter VI sections 60 to 90 of The Code of Criminal Procedure deals with process to compel appearance. Chapter VI of the Cr.P.C., which is captioned as 'processes to compel appearance' consists of four parts :

- Part A sections 60-69 relates to Summons;
- Part B sections 70-81 deals with warrant of arrest;
- Part C sections 82-86 relates to proclamation and attachment and
- Part D sections 87-90 relates to other rules regarding processes.

(a) Warrants: Meaning and Concept

Legally speaking a warrant is an order of a court which authorizes a law enforcement officer to arrest and bring a person before the judge. A warrant may be issued when a person is charged with a crime, convicted of a crime but failed to appear for sentencing, owes a fine or is in contempt of court. Thus, it is an order or writ of the Court directing and empowering a particular person/ authority to execute the directions in the warrant. Such direction may be of several kinds such as to arrest, to search, to receive an accused into custody, to direct to produce an accused/prisoner before the Court issuing the directions or before the superior court for trial.

No specific or particular definition for warrants (or bailable or non-bailable warrants) has been explicitly made in the Code of Criminal Procedure, 1973, yet it is under Sections 70 to 81 of the said code whereby the process and the circumstances to issue the warrants have been dealt with. Even in the absence of specific definition it is clear from the form of warrants, that these are written orders issued and signed by the magistrate and addressed to a police officer or some other person specially named, directing him or her to arrest the person named in the warrant. In this way, a warrant is different with respect to a summons as in the latter case, the summons is explicitly directed to the person sought to be summoned while in the former, the warrant is directed to the person who is ordered to arrest.

The issuance of a warrant is a more drastic step than the issue of a summons. Ordinarily, a warrant is issued only in serious cases and after a duly served summons is disobeyed or if the accused has willfully avoided the service of the summons. Sec. 70 of Cr.P.C., provides the essentials components of a valid warrant which states that every warrant of arrest shall be in writing issued by the Court; shall be signed by the Presiding Officer of such court and shall bear seal of the court it further provides for the duration of the warrants by expressly enumerating that that every such warrant shall remain in force until it is cancelled by the court which issued it or until it is executed even though it bears a returnable date. Form No. 2 Schedule 2 of the code provides the format for issing a warrant which clearly enunciating the following contents.

(b) **Types of Warrant:**

The Code of Criminal Procedure does not explicitly speak about the types of warrant; however, in day-to-day business we find that, there are two types of warrant namely **Bailable** and **Non-bailable** though the Code does not specifically use this term in conjunction with warrants.

(i) Bailable Warrants

Sec. 71 of Cr.PC deals with bailable warrants though it does not expressly use the term. As per Sec.71 any court issuing a warrant for the arrest of any person may in its discretion direct by an endorsement on the warrant that if such person executes a bond with sufficient sureties for his attendance before the court at a specified time and thereafter until otherwise directed by the court, the officer to whom the warrant is directed shall take such security and shall release such person from custody. The endorsement shall state the number of sureties, amount in which they and the person for whose arrest warrant issued, are to be respectively bound, the time at which he is to attend before the court. Whenever security is taken under this section, the officer whom warrant is directed shall forward the bond to the court.

The warrant may be issued to Police Officer or any other person to execute the same. Section 71 basically deals with bailable warrants where the person sought to be arrested can be released on execution of bond with sufficient sureties. Bailable warrants are mostly issued in case of offences which are bailable but in some cases bailable warrants have also been issued against non-bailable offences.

(ii) Non-bailable Warrants

A non-bailable warrant is other than the bailable warrant. Non-bailable warrants have been mentioned indirectly under Section 73, CrPC, wherein warrants against specific person can be issued. Sub-section (1) of Section 73 provides that the Chief Judicial Magistrate or a Magistrate of the First Class may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non bailable offence and is evading arrest. The section puts emphasis on both the aspects, that is, the person is accused of the non-bailable offence and is evading arrest.

Non-bailable warrants are issued in two circumstances:

(a) When the offences committed are non-bailable in nature

(b) When the accused does not come before the court even after the issuance of summons and bailable warrants.

Non-bailable Offences : Non-bailable offences are those offences in which grant of bail for an accused is not considered to be a right as is the case of bailable offences. This means that it is up to the discretion of the Court to grant a bail in case the accused files an application for the same. Offences of these nature are generally more heinous and graver in nature and hence to prevent the accused from committing such crimes, non-bailable warrants are issued. Such offences include the offence of committing a murder, subjection of married woman to cruelty, offence of rape, counterfeiting currency or bank notes, forgery for the purpose of cheating, theft etc.

Absolute Necessity : When not the case of non-bailable offences, non-bailable warrants are issued when it seems to the Court to be absolutely necessary to do so. In the case of, **Omwati v State of U.P. & Another (2004) 4 SCC 425** such circumstances were thoroughly discussed by the Court. The Court discussed a three-stage approach whereby it said that firstly the summons against the accused should be issued. In case the accused does not reply to the summons, then a bailable warrant should be issued. After exhausting all these remedies, if the Court is completely satisfied that the accused is trying to escape the proceedings of the Court, it may issue non-bailable warrants. Therefore, a non-bailable warrant issued without a preceding bailable warrant, where the offense is bailable, is not in accordance with the scheme of the Criminal Procedure Code and hence illegal.

(c) Essentials of a Valid Warrant

Section 70 of the Code of Criminal Procedure empowers the Magistrate to issue warrant of arrest to procure the appearance of the person. This statutory power has deterrent force compelling a person to obey the orders of the Court. It is a very valuable provision in the Code of Criminal Procedure. On number of occasions the Court is required to issue warrant of arrest, either bailable or non-bailable. The second Schedule to the Code of Criminal Procedure in form 2 contains the form of a valid warrant of arrest.

Sec 70. Form of warrant of arrest and duration.—(1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court and shall bear the seal of the Court.

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

The following can be said to be the requirements of a valid warrant in the light of statutory provisions contained under section 70:

- A warrant must be in writing.
- It must be signed by the Presiding Officer of the Court issuing the warrant.
- It must bear the seal of the Court.
- It must contain the description of the person to be arrested with sufficient certainty so as to identify him clearly.
- It must clearly specify the offence alleged to have been committed by the accused
- It must also name the person who is authorised to execute such warrant.
- It must mention the age of the person sought to be arrested.

A pertinent question that needs consideration is what would be the legal status of a warrant where it does not carry the seal of the court. In **Dasondhi v. Emperor AIR 1928 Lah 332 (2)** the warrants did not bear the seal of the court issuing them. It was held that the omission of the seal on a warrant renders it void and a person offering resistance to apprehension on such a warrant, does not commit an offence under section 225- B of the Indian Penal Code.

It has to be kept in mind that warrants of arrest cannot, in any case, be general or blank. A warrant directing officers to arrest unspecified persons is illegal. Moreover, conditional warrants directing some action to be done, the failure of which would lead to arrest, are also deemed illegal. In the case of **Alter Caufman v. Government of Bombay (1894) ILR 18 Bom 636** the Magistrate issued a warrant ordering the accused to remove themselves from India, failing which they would be arrested. This warrant was deemed illegal because the authority to determine whether the accused had done the needful was left to the officer entrusted with the arrest and not the Magistrate who issued the warrant itself. Now, when an officer proceeds to arrest a person on a warrant which is illegal, the right of private defence rests on that person to prohibit the officer from arresting.

(d) Against Whom a Warrant of Arrest Maybe Issued

The warrants are generally used for far more serious offences where issuance of summons would not achieve the desired objective of procuring the attendance of the person concerned. Even so, a number of interests need to be kept in mind, particularly the fundamental right to liberty. Only when societal interests dictate that the person be kept in custody lest he or she absconds, will the magistrate issue a warrant of arrest. In the landmark case of **State v. Dawood Ibrahim Kaskar, (2000) 10 SCC 438** it was held that section 73 confers a power upon the class of Magistrates mentioned therein to issue warrant for arrest of three classes of persons, namely, (i) escaped convict, (ii) a proclaimed offender and (iii) a person who is accused of a non-bailable offence and is evading arrest. It cannot be argued that Section 204 of the Code is the sole repository of the Magistrate's power to issue warrant and the various sections of Part B of Chapter VI including Section 73 only lay down the mode and manner of execution of such warrant

and a Magistrate referred to under Section 73 could not and would not have been empowered to issue warrant of arrest for apprehension of an escaped convict, for such a person cannot come within the purview of Section 204 as it relates to the initiation of the proceeding and not to a stage after a person has been convicted on conclusion thereof. It was further observed that Section 73 confers a power upon a Magistrate to issue a warrant and that it can be exercised by him during investigation also, can be best understood with reference to section 155 of the Code. As already noticed under this section a police officer can investigate into a non- cognizable case with the order of a Magistrate and may exercise the same powers in respect of the investigation which he may exercise in a cognizable case, except that he cannot arrest without warrant. If with the order of a Magistrate the police start investigation into a non- cognizable and non-bailable offence, [like section 466 or 467 (part-1) of the Indian penal Code] and if during investigation the Investigating Officer intends to arrest the person accused of the offence he has to seek for and obtain a warrant of arrest from the Magistrate. If the accused evade the arrest, the only course left open to the Investigating Officer to ensure his powers under section 73 and thereafter those relating to proclamation and attachment. In such an eventuality, the Magistrate can legitimately exercise his powers under section 73 for the person to be apprehended is "accused of a non-bailable offence and is evading arrest." Consequently, it was held that section 73 of the Code is of general application and that in course of investigation a Court can issue a warrant in exercise of power thereunder to apprehend, inter alia, a person who is accused of non-bailable offence and is evading arrest.

(e) Whether Non-bailable Warrant can be Issued Against Witnesses?

Warrants are also issued against the witnesses in case the petitioner or the respondent ask for the same in their applications to the Court and the Court agrees with the same and finds it reasonable to do so, also known as compelling the attendance of the witness. Non-bailable warrants can very well be issued against the witnesses. As has been held in the case of, **Smt. Mallamma v State (By Chamrajpet Police),2004 (1) KarLJ 606** wherein an appearance of a doctor was asked for by the petitioner. However the said witness did not appear even after the issue of summons and bailable warrant and a non-bailable warrant was issued to him which was questioned. It was observed that keeping in mind the fact that the witness's evidence was instrumental to the case, he allowed the petition. In **Ramesh Nandlal v. Special Judge Gorakhpur 1998 CrLJ 1569(All)** it was observed that in the case of a police officer where the warrant is not executed the Court may direct the Secretary home Department of the government or the highest police officer to produce the witness before the Court. However, in another case of **K Srinivas Rao v State of A.P. 2004 (4) ALT660,** the High Court has held that the issuance of non-bailable warrants against the witness and sending him to judicial remand is illegal and violative of article 21 of the constitution of India. Instead of doing that, in case a witness fails to attend the court proceedings and disobeys the orders of the Court, recourse should be taken to Section 350, CrPC whereby a maximum fine of Rs. 100/- can be imposed upon them for the non-appearance.

(f) Warrant of Arrest may be directed to a Police Officer or any Other Person

Sections 72 to 74 are inherently procedural and deal with direction of warrants to concerned officers. A warrant of arrest is normally directed to police officer. However, the Court can also issue arrest warrant to any other person or persons if its execution is necessary and police officer not available. If the arrest warrant is directed or issued to two or more officers or persons, then all any one will execute it. The relevant provisions are mentioned hereinafter:

> **Section 72 of CrPC Warrants to whom directed.**—(1) A warrant of arrest shall ordinarily be directed to one or more police officers; but the Court issuing such a warrant may, if its immediate execution is necessary and no police officer is immediately available, direct it to any other person or persons, and such person or persons shall execute the same.
>
> (2) When a warrant is directed to more officers or persons than one, it may be executed by all, or by any one or more of them.

Section 78 of the Code of Criminal Procedure, 1973 overrides the provisions of section 72. The court may forward a warrant, which is to be executed outside the local limits of his jurisdiction, by post or otherwise to any executive Magistrate or district superintendent of police Or the Commissioner of police within whose jurisdiction it is to be executed. However, in the case of **Jugal Kishore V. C.P.M Calcutta AIR 1968 Cal 220,** it was laid down that this provision cannot be extended beyond India. Section 73 (1) of the Code of Criminal Procedure lays down that The Chief Judicial Magistrate or a Magistrate of the first class may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non-bailable offence and is evading arrest. Sub section (2) provides that Such person shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enters on, any land or other property under his charge. According to section 73, which corresponds to section 78 of the old Code, the warrant may be addressed to any person within the local jurisdiction for the arrest of any escaped convict, proclaimed offender or any person accused of a non- bailable offence and evading arrest. The Law commission in its 41st report observed about this provision as under *"the section at present confers power on the district Magistrate or a sub divisional Magistrate to issue a special type of warrant to a land holder, farmer or manager of the land within his district or subdivision for the arrest of an escaped convict, proclaimed offender or person who has been accused of a non-bailable offence and who has eluded pursuit. Although the power is infrequently exercised, there appears to be no objection to conferring it on all magistrates of the first class and all the Executive Magistrate"* The neglect of such a person required to execute the warrant issued under section 73 (1) is punishable under section 187 of the Indian Penal Code Section 73 is of general application and in the course of the investigation the Court can issue a warrant in excess of power there under to apprehend a person who is accused of a non-

bailable offence and is evading arrest. If liberty of a person is to be curtailed, the same has to be done strictly in accordance with the law so provided for. Thus, the Court has to record his satisfaction that the conditions laid down in the law for issuing warrant of arrest has been fulfilled and the procedure has been complied with. This satisfaction of the Court should be reflected in the order itself, to be gathered from the record, then only warrant of arrest can be issued. The Court has to be prima-facie satisfied that the person accused of committing a non-bailable offence is also evading his arrest. There has to be material before the Court to reach at the aforesaid conclusion.

Without recording such subjective satisfaction to the effect that the accused is also evading his arrest, which should be on the basis of the materials placed before the Court, warrant of arrest cannot be issued. This satisfaction can be derived from the Police paper/ Case diary. Mere absence of the accused cannot give rise to a presumption that he is evading arrest, which in turn cannot be the sole ground to issue warrant of arrest.

In the case of **Dipti Ranjan Parida vs. State of Orissa, 2008 CrLJ 4651** it was observed that where there was nothing on record to show that the petitioner and the accused were evading arrest, issuance of non-bailable warrant against them without assigning any reason was not suitable. A warrant under section 73 cannot be issued where the accused is already in judicial custody in pursuance of an order passed by a competent Court; as was held in **Bineesh v. State of Kerala 2006 (2) crimes 173 (Ker).**

In **Washeshar Nath Chada V. State 1993 CrLJ 3214;** it was observed that a warrant under section 73 of the Code can also not be issued against a person whose presence has been refused as a witness.

Lastly section 74 provides that a warrant directed to any police officer may also be executed by any other police officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed. The terms of this section are express and no other person except a police officer is competent to execute a warrant of arrest under an endorsement from another police officer.

In **K. Kunju Kunju Case (1962) 2CrLJ 437** it was held that where there is no such endorsement the arrest is not a legal arrest

(g) Duties of Officers Executing the Warrant

The accused has vested in him certain rights during the course of any investigation; enquiry or trial of an offence with which he is charged and hence, he should be protected against any form of arbitrary or illegal arrest. In the leading case of **Kishore Singh Ravinder Dev vs. State of Rajasthan [1981 (1) SCC 503]** it was said that in India the Constitutional, evidentiary and procedural laws have made elaborate provisions in regard to protecting the rights of accused and with a view to protect his dignity as a human being and providing him benefits of a just, fair and impartial trial. There are two types of rights available to the arrested- 1) Rights at the time of arrest; 2) Rights at the time of trial

In case when the person is being arrested under a warrant, then according to Section 73 (3) of the Code of Criminal Procedure, he shall be made over with the warrant to the nearest police officer, who shall cause him to be taken before a magistrate within the statutory period unless security is taken under section 71.

Further according to section 75 of Code of Criminal Procedure, any person who is executing such warrant must notify the person who is being arrested, the content of such warrant, or show the warrant if required. If under any circumstance the substance of the warrant is not notified, the arrest would be unlawful. It is the duty of the authorised person making an arrest that the arrested person be bought before a judicial officer without any unnecessary delay, no matter how the arrest is made with or without warrant. Along with this provision it has to be seen that the arrested person should be taken and confined in a police station only and no other place. The same has been stated in section 56 and 76 of Cr.P.C. Section 76 of Cr.P.C. states that the arrested person needs to be bought before the court without any unnecessary delay. In accordance with the provisions of section 71 in regard with the police officer or other person executing a warrant of arrest, they shall without unnecessary delay and due to security purposes bring the person arrested before the Court before which he is required by law to produce such person. It has also been mentioned in the provision of Section 76 that in any case that such delay shall not exceed 24 hours. In the process of calculating the time period of 24 hours, the time necessary for the journey is to be excluded. The reason behind creating this right is to eliminate the possibility of police officials from extracting confessions or compelling a person to give information. In case of failure of production of an arrested person before a magistrate within 24 hours of the arrest, the police officials shall be held guilty of wrongful detention.

(h) Execution of Warrants

The warrants are executable throughout India. The Code of Criminal Procedure places no jurisdictional restriction with respect to execution of warrants. Section 77 of Cr.P.C. clearly postulates that a warrant may be executed anyware in Inaid. However this provisions is qualified by the provisions laid down u/ss 78, 79, 80 and 81 of Cr.P.C.

Sections 77 to 81 deal with jurisdiction with respect to execution of warrants. While Section 77 gives the functionaries the power to execute warrants anywhere in India, the other sections are merely procedural and lay down elaborate rules of dealing with the execution of warrants outside the local jurisdiction of the Court issuing it. This can be illustrated by a simple example. If, for example, the Metropolitan Magistrate issues an arrest warrant for an accused and the accused is in Patna, then the officers directed may go themselves and endorse the warrant by the Executive Magistrate of Patna district or the Metropolitan Magistrate can forward it to the Executive Magistrate or the District Superintendent of Police for execution. Section 77 is reproduced as under

***Section 77** Where warrant maybe executed: A warrant of arrest may be executed anywhere in India.*

Section 77 does not impose any restriction upon the power of the police officer. It only declares that every warrant issued by any Magistrate in India may be executed at any place in India. In **State of W.B. vs. J. K. More, AIR 1969 SC 1171** it was held that execution of the warrant is not restricted to the local limits of the jurisdiction of the Magistrate issuing the warrant or of the court to which he is subordinate. The court further observed that even when the accused is residing outside the country a magistrate may issue a warrant if he is satisfied about the prima facie evidence against him. If the accused is not in India assistance of the executive government has to be obtained.

In **Birendra Kumar Rai v. Union of India 1992 CrLJ 3866** it was observed that the term "any place in India" includes a place inside Jail and hence a detention order can be served inside the Jail.

(i) Procedure for execution of warrants Outside Jurisdiction:

Sections 78 to 81 of the Code prescribe the procedure to be adopted when a warrant of arrest is to be executed outside the local jurisdiction of the Court issuing it.

Section 78 reads as under:

*Section 78.**Warrant forwarded for execution outside Jurisdiction**—(1) When a warrant is to be executed outside the local jurisdiction of the Court issuing it, such court may, instead of directing the warrant to a police officer within its jurisdiction, forward it by post or otherwise to any Executive Magistrate or District Superintendent of Police or Commissioner of Police within the local limits of whose jurisdiction it is to be executed; and the Executive Magistrate or District Superintendent or Commissioner shall endorse his name thereon, and if practicable, cause it to be executed in the manner herein before provided.*

(2) The Court issuing a warrant under sub-section (1) shall forward, along with the warrant, the substance of the information against the person to be arrested together with such documents, if any, as may be sufficient to enable the Court acting under section 81 to decide whether bail should or should not be granted to the person.

The provisions of Section 78 are intended to provide adequate safeguards to a person to be arrested so that he is not arrested without a proper authority having applied his mind as to the legality of the warrant and authorised the arrest outside the jurisdiction of the Court which had issued the warrant. Such warrant is forwarded to the authorities within the local limits of whose jurisdiction it is to be executed instead of directing the warrant to a police officer. A person arrested far away from the place wherefrom warrant for arrest was issued had to be transported in custody to the magistrage issuing the warrant before he could be released on bail. Provision has

therefore been made under this section for the grant of bail by the magistrate within whose jurisdiction the person has been arrested.

Sub-Section (1) of Section 78 provides two alternatives to be adopted by a court issuing a warrant to be executed beyond the local limits of its jurisdiction.

(i) A Court may instead of directing such warrant to a police officer, forward the same by post of otherwise two any executive magistrate, Supretendent of Police or the Commissioner of Police within the local limit of whose jurisdiction it to be executed.

(ii) It may direct a warrant a police officer exercising powers within the local limits of his jurisdiction for execution.

If the first alternative is adopted, the magistrate of SP or Commissioner of Police may direct it to a police officer and the warrant may then be executed in accordance with the provisions of Section 74. In the second case Section 79 will come into play. The sub-section does not specify the route the warrant may take. The court receiving a warrant for the purpose of execution from another court is not required to enter into the legality of the warrant. The warrant which is sent to another magistrate should not be directed to anybody for execution by the issuing court. The name of the authority for actual execution of the warrant should be left to the court to which the warrant is sent for execution.

The specific provisions in section 78 to 81 prescribing in detail the procedure to be adopted for execution warrant beyond the local limits of the jurisdiction of the Court issuing the same must be deemed to limit and control section 74 of the Court. Such warrant is forwarded to the authorities within the local limits of whose jurisdiction it is to be executed instead of directing the warrant to a police officer.

Sub-section (2) is for the purpose of enabling the Court before whom such person is produced to exercise its discretion and release the person on bail. The Court issuing the warrant of arrest to be executed outside this local jurisdiction should forward along with the warrant the substance of information against the person to be arrested together with relevant documents. This will enable the Court before whom such person is produced to decide whether bail may or may not be granted. In **Hrushikesh Swain v. State of Orissa 1996 (4) crimes 478,** it was held that where the Magistrate merely mention the sections of the offence under sections 307 and 366 of the Indian Penal Code in the warrant without enumerating the substance of the accusation the warrant was hence defective and the mechanical rejection of bail was held not to be proper.

*Section 79 of CrPC. "**Warrant directed to police officer for execution outside jurisdiction**"— (1) When a warrant directed to a police officer is to be executed beyond the local jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement either to an Executive Magistrate or to a police officer not below the rank of an officer in charge of a police station, within the local limits of whose jurisdiction the warrant is to be executed.*

(2) Such Magistrate or police officer shall endorse his name thereon and such endorsement shall be sufficient authority to the police officer to whom the warrant is directed to execute the same, and the local police shall, if so required, assist such officer in executing such warrant.

(3) Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or police officer within whose local jurisdiction the warrant is to be executed will prevent such execution, the police officer to whom it is directed may execute the same without such endorsement in any place beyond the local jurisdiction of the Court which issued it.

Section 79 mandates that whenever a warrant is required to be executed outside the jurisdiction of the limits of the Court issuing the warrant, the officer executing such a warrant shall ordinarily take it for endorsement either to an Executive Magistrate or to a police officer not below the rank of an officer in charge of the police station within whose jurisdiction the warrant is to be executed. However, the section 79 subclause 3 contemplates a special circumstance whereby the police officer executing the warrant may not obtain an endorsement if he has reason to believe that obtaining such an endorsement would prevent the execution of the warrant by virtue of the delay which is likely to be occasioned in obtaining the endorsement. In **K. Rajaiyah @ K. Rajanna v. Government of Andhra Pradesh, 2007 CrLLJ 2031,** it was laid down that the police officer must bring the material on the record to demonstrate that obtaining such endorsement on the warrant would prevent the execution of the warrant.

Section 80 of CRPC. "Procedure on arrest of person against whom warrant issued"

When a warrant of arrest is executed outside the district in which it was issued, the person arrested shall, unless the Court which issued the warrant is within thirty kilometers of the place of arrest or is nearer than the Executive Magistrate or District Superintendent of Police or Commissioner of Police within the local limits of whose jurisdiction the arrest was made, or unless security is taken under section 71, be taken before such Magistrate or District Superintendent or Commissioner

Section 81 of CRPC. "Procedure by Magistrate before whom such person arrested is brought"

(1) The Executive Magistrate or District Superintendent of Police or Commissioner of Police shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court:

Provided that, if the offence is bailable, and such person is already and willing to give bail to the satisfaction of such Magistrate, District Superintendent or Commissioner, or a direction has been endorsed under section 71 on the warrant and such person is

ready and willing to give the security required by such direction, the Magistrate, District forward the bond, to the Court which issued the warrant: Provided further that if the offence is a non-bailable one, it shall be lawful for the Chief Judicial Magistrate (subject to the provisions of section 437), or the Sessions Judge, of the district in which the arrest is made on consideration of the information and the documents referred to in sub-section (2) of section 78, to release such person on bail.

(2) Nothing in this section shall be deemed to prevent a police officer from taking security under section 71

A Bail under the provisions of section 81 can be granted, where the person has been arrested in execution of warrant under section 78. However, where no arrest has been made the Magistrate having jurisdiction over the place of arrest cannot grant bail. The section does not contemplate an elaborate enquiry as to the identity of the person arrested; the Magistrate has to be satisfied prima facie that the person arrested is the person mentioned in the warrant. The word shall in subsection (1) is mandatory and not directory.

Therefore, if the person appears to be the person intended by the Court then the executive Magistrate or the district Superintendent of police or the Commissioner of police must direct his removal in custody to such Court subject to the proviso. The second proviso is new and is intended to mitigate the hardships of taking the person to the Court which issued the warrant against him. The provisions made in the second proviso relates to the post arrest and not pre-arrest. In **State of Manipur v. Vikas Yadav 2000 CrLJ 4229** it was held that this power is not available before the Judge while considering the pre-arrest bail under section 438 of the Code.

(j) Duration/Cancellation /Recall of Non-bailable Warrant

(i) Duration of Warrant of Arrest: Section 70(2) of the Code of Criminal Procedure 1973, prescribes that a warrant of arrest shall remain in force until it is cancelled by the court which issued it or until it is executed. As is evident from Section 70(2), a warrant does not lapse; it remains valid as long as the Magistrate does not explicitly revoke it. In view of section 70(2) of Cr. P.C., a warrant of arrest remains in force unless is cancelled by the Court which issued it or until it is executed. It is necessary for the High Court to ascertain the legality of the order passed by the learned Magistrate on the basis of the law as well as the facts of each case. The order of issuance of non-bailable warrant or order of proclamation undoubtedly can be challenged before the High Court and it can be canceled if found illegal under S. 482 of the Cr. P.C. or under writ jurisdiction.

(ii) Cancellation / Recall of the non-bailable warrant issued against the accused means reverting the order under which immediate custody without the right to bail had to be reverted. However, the merit of the case has to be kept in mind by the magistrate before recalling such warrants. When the accused persons as well as his counsel failed to appear before the Court or failed to file petition seeking condonation of the absence of the accused, the court has full power to

issue a non bailable warrant but where the accused appears before the same trial Court and files petition explaining the reasons for his non-appearance; it is the duty of the trial Court to consider such petitions without adjourning the petitions and reminding the accused concerned to a future date. The trial Court must properly consider such petitions on the same date and by suitable orders it has also been settled that the presence of accused is not mandatory for the cancellation/recall of the non-bailable warrant of arrest. As the Hon'ble Bombay High Court in **Arun Kumar v State of Maharashtra 2002 (1) CriLJ 242** held that, the appearance of the applicant / accused is not necessary for cancellation of warrant. This means that the magistrate will have to consider even when the counsel of the accused presents the case in the absence of the latter, the absence not in any way affecting the judgment.

In the case of, **Chundru Ammanna vs Asst. Commissioner of Labour and Ors 1961 CrLJ 221** the advocate of accused filed petition for recalling non-bailable warrant along with memo of appearance but Magistrate returned document with endorsement that memo had to be filed in presence of accused. It was held that such action of Magistrate was not justified as it deprived opportunity to accused to make representation. Hence non-bailable warrant issued against accused would liable to be canceled. Thus, the presence of the accused at the time of recall of the non-bailable warrant is not essential. Where the accused expresses desire to surrender himself and also seeks permission to appear before the court, the execution of Non-bailable warrant against him can be stayed in the interest of justice. Where a police officer executes a warrant already cancelled it is a case of unnecessary interference in the liberty of the citizen.

(k) Warrant of Arrest cannot be solely issued for the Production of Accused before the Police

In ordinary course, no warrant of arrest can be issued by a court or the Magistrate, only to assist the police officer in investigation and only to ensure that the person against whom warrant is issued by the court; appears before the court and is handed over to the police. Even Chapter VI Cr.P.C., where courts have been conferred with the powers to issue warrant of arrest is not concerned with the investigation of a crime, as such, by the police. This chapter, as it expressly proclaims, deals with the processes to compel appearance before a 'Court'. The Court, obviously, is not concerned with the accused person, as such, unless it has taken cognizance of the offence under Section 190 of Cr.P.C., which again is a stage after the completion of the investigation. It may further be mentioned that although, Section 73 of Cr.P.C. confers a power upon the Chief Judicial Magistrate and a Magistrate of First Class to issue warrants against any person who is 'evading arrest', this power has to be read in the contextual perspective of the provisions and in the nature of ejusdem generis to the other categories of persons mentioned preceding this category in the same section. A reading of this Section shows that the power conferred upon the Magistrate is not restricted to direct the warrant to a 'police officer'. The warrant issued under this Section can be directed to 'any person'. So, this power conferred upon the Magistrate is in the nature of

extra-ordinary power, not limited to direct the warrants to police officers only. Still further, this power is not of routine even qua the subjects of the warrant of arrest. This Section is in the nature of general and all-inclusive powers of courts in a criminal trial; to ensure smooth running of trial.

Under this Section the Magistrate can issue warrants of arrest against a person:

(a) Who is an escaped convict

(b) Proclaimed offender

(c) Person accused of 'non-bailable' offence and is 'evading arrest'.

Hence this Section envisages three specific categories of person against whom a Magistrate can issue warrant of arrest. First two categories mentioned at (a) and (b) above, evidently, relate to situation where the court has already taken cognizance of offence or has already convicted a person. The third category mentioned as (c) also does not contemplate a person whom the police wanted to arrest during the investigation. The category of persons whom the police can arrest without warrant during investigation and the category (c) envisaged under Section 73 above, are not co-extensive or the same thing.

In **State v. Dawood Ibrahim Kaskar, [(2000) 10 SCC 438],** it was observed that since warrant is and can be issued for appearance before the Court only and not before the police hence authorisation for detention in police custody is neither to be given as a matter of course nor on the mere asking of the police, but only after exercise of judicial discretion based on materials placed before him and thus it is not absolutely right to state that warrant of arrest under Section 73 of the Code could be issued by the courts solely for the production of the accused before the police in aid of investigation.

In **Gurjeet Singh Johar V. State of Punjab and Another CRM-M No.47872 of 2019 (O&M) dated: 08th November, 2019,** the Punjab and Haryana High Court relying on the decision in Dawood Ibrahim Kaskar (Supra) has observed that the police use the power of the Magistrate to issue warrant of arrest against an accused, only as a tool to avoid its responsibility to carry out the investigation to the logical end; and only for the purpose of getting such an accused declared as proclaimed offender. This methodology is normally adopted by the police just to get rid of the responsibility of putting a report before the Magistrate qua investigation, which otherwise is a mandate of law cast upon the police, or even to avoid arresting an accused in inconvenient cases or inconvenient circumstances. As a result, lots of persons get declared as proclaimed offenders; and forgotten altogether by the police thereafter. Hence, before the Magistrate/court has taken cognizance of any offence, the power of issuance of warrants of arrest under any provision of Cr.P.C., on an application of a police officer, cannot be invoked by the Magistrate as a routine matter. It is obvious that under the provisions of Cr. P. C. itself, the police have power to arrest a person without warrant even by following such a person at any place in India. Therefore, it is clear that only for arresting a person; the police do not require any warrant as such. Hence, it

would not lie in the mouth of the police to allege before the Magistrate, without there being any specific reasons or any barrier in their way, that the accused is evading arrest. During investigation; even if there is some specific legal or factual obstacle or barrier, which makes the arrest without warrant impossible, and if the police intend to seek warrant of arrest from the Magistrate for such arrest, under any provision of the Cr.P.C., the police are required to specify the obstacle, which the warrant issued by the court would remove and because of which such obstacle or the barrier in way of the police; the accused was succeeding in evading his arrest. Unless, there is any specific obstacle; because of which the police were not able to arrest; and which could not be removed by the police on their own and without the aid of the warrant of the court, the issuance of warrant of arrest by the Magistrate, only on assertion of the police that the accused was evading arrest, would be only a routine exercise, and would be only for the aid of the investigating officer, which could not be done by the Magistrate.

Further, under Section 204 (1)(b), after taking cognizance and for causing appearance of an accused before it, in a warrant case, the court is authorized to issue warrants against an accused. For ensuring such appearance, provisions have been made in Chapter VI, providing procedure for such warrants. Otherwise, court can never require the appearance of an accused before it, only to hand over that accused to the police. Doing otherwise would convert a court into the enforcement wing of the police, whereas the court, actually, is envisaged even under Cr.P.C., only as a check upon the excessive use of powers by the police even at the stage of investigation.

(l) Guidelines for issuance of Non-bailable Warrants

The issuance of non-bailable warrants involves interference with personal liberty of an individual. Arrest and imprisonment mean deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants. Only when in the larger interest of the Public and the State it becomes absolutely imperative to curtail freedom of a person for a certain period, should non-bailable warrants be issued. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilized society. Sometimes in the larger interest of the Public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period. It is of general notice that in many cases bailable and non-bailable warrants are issued casually and mechanically. The courts without properly comprehending the nature of controversy involved and without exhausting the available remedies issue non-bailable warrants disregarding the settled legal position clearly enumerated in a catena of cases.

As early as 1976, The Supreme Court in a Constitution Bench decision in the matter of **State of U.P. v. Poosu and another 1976 (3) SCC 1** had an occasion to consider the various factors before deciding on the question of issuing a warrant for securing the attendance of accused person by holding as under:

"Broadly speaking, the Court would take into account the various factors such as, the nature and seriousness of the offence, the character of the evidence, circumstances peculiar to the accused, possibility of his absconding, tampering with evidence, larger interest of the public and State".

In **Omwati v. State of UP & Another (2004) 4 SCC 425,** bailable warrants were issued against the appellant and thereafter by issuing non-bailable warrants the court put the complainant of the case behind bars without going through the facts of the case. It was observed that the unfortunate sequel of such unmindful orders has been that the appellant was taken into custody and had to remain in jail for a few days, but without any justification whatsoever and suffered because facts of the case were not considered in proper perspective before passing the orders. The court also observed that some degree of care is supposed to be taken before issuing warrants.

In **Inder Mohan Goswami v. State of Uttaranchal and others (2007)12 SCC 1**, it was observed that the warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. Their Lordships of the Supreme Court have held in unmistakable terms that issuance of non-bailable warrants actually interferes with personal liberty and therefore courts have to be extremely careful before issuing non-bailable warrant and laid down the principles, when non-bailable warrants should be issued which is stated as under:

"1) Non-bailable warrants should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired result. This could be when:

(a) it is reasonable to believe that the person will not voluntarily appear in court;

(b) the police authorities are unable to find the person to serve him with a summon;

(c) it is considered that the person could harm someone if not placed into custody immediately."

In the later part of judgement, Their Lordships cautioned the criminal court to refrain from issuing non-bailable warrant of arrest at first instance by directing as under:

"In complaint cases, a) at the first instance, the court should direct serving of the summons along with the copy of the complaint.

b) If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable-warrant.

c)In the third instance, when the court is fully satisfied that the accused is avoiding the courts proceeding intentionally, the process of issuance of the non- bailable warrant should be resorted to.

It was also held that Personal liberty is paramount; therefore, courts were cautioned at the first and second instance to refrain from issuing non-bailable warrants. Their Lordships

while concluding, emphasized the need of striking proper balance between individual personal liberty and societal interest/interest of public before issuing warrant by making following pertinent observation: *"The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straight jacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided."*

In the matter of **Raghuvansh Dewanchand Bhasin v. State of Maharashtra and Another 2012 (9) SCC 791,** Hon'ble SC laid down extensive and specific guidelines to be followed by courts before a non-bailable warrant of arrest against a person may be issued by them. Their Lordships held that power and jurisdiction of court to issue appropriate warrant has to be exercised judiciously, striking a balance between the need of law enforcement on the one hand and the protection of citizen from high handedness at the hands of the law enforcement agencies on the other. Paragraph of the case is as under:

"Be that as it may, it is for the court, which is clothed with the discretion to determine whether the presence of an accused can be secured by a bailable or non-bailable warrant, to strike the balance between the need of law enforcement on the one hand and the protection of the citizen from high handedness at the hands of the law enforcement agencies on the other. The power and jurisdiction of the court to issue appropriate warrant against an accused on his failure to attend the court on the date of hearing of the matter cannot be disputed. Nevertheless, such power has to be exercised judiciously and not arbitrarily, having regard, inter-alia, to the nature and seriousness of the offence involved; the past conduct of the accused; his age and the possibility of his absconding."

(m) Guidelines issued by the Hon'ble Supreme Court:

The Supreme Court has issued the following guidelines in **Raghuvansh Dewachand Bhasin** case to be followed when issuing non-bailable warrants of arrest. The court observing that in order to prevent such paradoxical situation and to check or obviate the possibility of misuse of an arrest warrant, in addition to the statutory and constitutional requirements to which reference has been made above, it would be appropriate to issue the following guidelines to be adopted in all cases where non-bailable warrants are issued by the Courts:

(a) All the High Court shall ensure that the Subordinate Courts use printed and machine numbered Form No.2 for issuing warrant of arrest and each such form is duly accounted for;

(b) Before authenticating, the court must ensure that complete particulars of the case are mentioned on the warrant;

(c) The presiding Judge of the court (or responsible officer specially authorized for the purpose in case of High Courts) issuing the warrant should put his full and legible signatures on the process, also ensuring that Court seal bearing complete particulars of the Court is prominently endorsed thereon;

(d) The Court must ensure that warrant is directed to particular police officer (or authority) and, unless intended to be open-ended, it must be returnable whether executed or un-executed, on or before the date specified therein;

(e) Every Court must maintain a register (in the format given below), in which each warrant of arrest issued must be entered chronologically and the serial number of such entry reflected on the top right hand of the process;

(f) No warrant of arrest shall be issued without being entered in the register mentioned above and the concerned court shall periodically check/monitor the same to confirm that every such process is always returned to the court with due report and placed on the record of the concerned case;

(g) A register similar to the one in clause supra shall be maintained at the concerned police station. The Station House Officer of the concerned Police Station shall ensure that each warrant of arrest issued by the Court, when received is duly entered in the said register and is formally entrusted to a responsible officer for execution;

(h) Ordinarily, the Courts should not give a long time for return or execution of warrants, as experience has shown that warrants are prone to misuse if they remain in control of executing agencies for long;

(i) On the date fixed for the return of the warrant, the Court must insist upon a compliance report on the action taken thereon by the Station House Officer of the concerned Police Station or the Officer In-charge of the concerned agency;

(j) The report on such warrants must be clear, cogent and legible and duly forwarded by a superior police officer, so as to facilitate fixing of responsibility in case of misuse;

(k) In the event of warrant for execution beyond jurisdiction of the Court issuing it, procedure laid down in Sections 78 and 79 of the Code must be strictly and scrupulously followed; and

(l) In the event of cancellation of the arrest warrant by the Court, the order cancelling warrant shall be recorded in the case file and the register maintained. A copy thereof shall be sent to the concerned authority, requiring the process to be returned un-executed forthwith. The date of receipt of the un-executed warrant will be entered in the aforesaid registers. A copy of such order shall also be supplied to the accused.

(n) Power of Magistrate to issue Warrant for Investigation of Non-cognizable Offences?

A non-cognizable offence is one wher the police has no power to arrest withoput warrant. The non-cognizable offences are minoit offences namely assault causing simple hurt etc. Section 155 of Cr.P.C. lays down the procedure for investigation of the non-cognizable case. The sction mandates that a police officer cannot register F.I.R. without the permission of the magistrate. A magistrate on the receipt of the report grants the permission to investigate the non-cognizable offences upon receipt of same the police officer conducts the investigation.

In Adesh Kumar gupta V.s. CBI, it was held that after receiving the complaint on non-cognizable offence the police officers incharge is required to record the said information in a book kept for such purpose and then refer the informant to Magistrate.

It is to be noted that section 155 Cr.P.C. does not prohibit the registration of the case. What is prohibited is to investigate the same without obtaining the order from a Magistrate.

In the case of **State v. Dawood Ibrahim Kaskar (2000) 10 SCC 438,** it was held that Section 73 confers a power upon a Magistrate to issue a warrant and that it can be exercised by him during investigation also, can be best understood with reference to Section 155 of the Code. As already noticed under this section a police officer can investigate into a non-cognizable case with the order of a Magistrate and may exercise the same powers in respect of the investigation which he may exercise in a cognizable case, except that he cannot arrest without warrant. If with the order of a Magistrate the police start investigation into a non-cognizable and non-bailable offence, and if, during investigation the Investigating Officer intends to arrest the person accused of the offence he has to seek for and obtain a warrant of arrest from the Magistrate. If the accused evades the arrest, the only course left open to the Investigating Officer to ensure his presence would be to ask the Magistrate to invoke his powers under Section 73 and thereafter those relating to proclamation and attachment. In such an eventuality, the Magistrate can legitimately exercise his powers under Section 73, for the person to be apprehended is "accused of a non-bailable offence and is evading arrest".

(o) Non Bailable Warrant Can Be Issued For The Execution Of Sentence.

A warrant of arrest can also be issued for the execution of sentence by virtue of operation of Section 418(2) Cr.P.C. Under Section 418(2) Cr.P.C. if the accused id not present in the court at the time when he sentenced to imprisonment , then in that case the court has to order for the arrest of that person by way of issuance of an arrest warrant for forwarding him to jail or any other place where he shall be confined and the sentence shall commence from the time of the arrest of the accused. The section applies to cases where has been imprisoned for life or for a term other than those mentioned in Section 413 Cr.P.C. The warrant issued is non-bailable empowering the authority to arrest the person under the said warrant. such a warrant ios necessary in case the sentence is pronounced in the absence of the accused.

This principle has also been reiterated in the case of **Ishwarbhai Hirabhai Chunara v. State of Gujarat. Special Criminal Application (QUASHING) NO. 9112 of 2016** decided on 22-02-2017 in the following words "It is thus quite clear that as soon as the sentence is pronounced, the accused is to be taken into custody on the strength of a warrant. In the view of the provisions of Section 418 Cr. P.C., the courts are duty bound to issue a warrant of arrest against whom judgement is passed. If the judgement of conviction is pronounced in the absence of the accused and immediately after pronouncing the judgement, the appellate Court can issue a non-bailable warrant for the arrest of the accused towards execution of the sentence. When the accused is not present at the time of pronouncing the judgement and if judgement is pronounced in his absence and because, it is a judgement of conviction, the appellate Court has to issue a non-bailable warrant for the arrest of the accused to undergo the sentence of imprisonment. Non-Bailable warrant is nothing but the warrant of arrest and a person can be sent jail after the issuance of such warrant. Issuance of such warrant is much required when the order of conviction is passed and the accused is not in custody".

The power of magistrate to issue Non Bailable Warrant is further widened in the case of **Sharad Jethalal Savla v. State of Gujarat** Criminal Misc. Application (for Direction) No. 19862 of 2015 Decided On 14.11.2016 it was held that the trial Court has committed no error in issuing a non-bailable warrant of arrest having noticed that the accused was not present at the time of pronouncement of the judgement and order of conviction and sentence in view of the provisions of Section 418 (2) of the Cr.P.C. which is a mandatory provision and also trial Court owes a duty to see that the order of sentence is executed, otherwise the accused would conveniently avoid the same.

2. ORDER OF PROCLAMATION

Even after issuance of warrant, the Court may find that the person concerned has either absconded or is concealing himself. This would mean that the Court cannot ensure the attendance of that person unless it adopted some stringent measure. If the warrant remains unexecuted there are two more remedies

(1) issuing a proclamation under section 82

(2) attachment and sale of property under section 83-86. These seemingly harsh measures are important as financial sanctions impel the person to come to the Court. Therefore, before an order of proclamation is issued, what the Court must ensure is that it has the reasons for issuing such an order. Section 82 of the Code of Criminal Procedure, 1973 deals with Proclamation for persons absconding. It is necessary to quote Section 82 of the Code in its entirety, which reads as under:

82. PROCLAMATION FOR PERSON ABSCONDING:

1. If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

2. The proclamation shall be published as follows:

(i)(a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village;

(c) a copy thereof shall be affixed to some conspicuous part of the Court-house;

(ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

3.A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause (i) of sub-section (2), shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

4.Where a proclamation published under sub-section (1) is in respect of a person accused of an offence punishable under section 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 of the Indian Penal Code (45 of 1860), and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect.

5.The provisions of sub-sections (2) and (3) shall apply to a declaration made by the Court under sub-section (4) as they apply to the proclamation published under sub-section (1) From perusal of sub section (1) of Section 82 of the Code, it is clear that the Court must have reasons to believe that the person, against whom warrant has been issued, has absconded or concealing himself so that the warrant cannot be executed.

Section 82 Cr. P. C consists of three sub-sections. Sub-section (1) provides for issuance of proclamation, whereas, sub-sections (2) & (3) deal with the procedure to be adopted for publication of proclamation directed to be issued in consequences of an order passed under sub-section (1). Further, sub-section (1) of Section 82 of the Code provides that the Court has to

publish the written proclamation requiring the person to appear on a specified date and specified place not less than 30 days from the date of such publication.

Thus, it is the duty of the Court to mention the specific place and the date where the person needs to present himself in compliance of the proclamation order. This date and place should be mentioned in the order itself. The provisions of sub-section (2) as to publishing of proclamation are to be strictly complied with. All the three modes prescribed by this sub-section must be adopted. The provisions of sub-section (2) of Section 82 Cr. P. C are imperative. The amendment to the Code in 2005 also brought in a few changes with regard to the order of proclamation. A new subsection (4) was added to Section 82 which mandated that when a person accused of an offence punishable by certain sections, including Section 302, fails to appear within the specified time and place as given by the order of proclamation, he would be declared a proclaimed offender. Section 174A was also included through the 2005 amendment which stipulated a punishment of maximum three years imprisonment with or without fine in case of proclamation issued under Section 82(1) and maximum seven years imprisonment with fine in case a proclaimed offender.

In **Savita Ben Govind Bhai Patel v/s State of Gujarat, 2004 Cri. L. L 3651,** it was observed that the scheme provided by Section 82 of the Code denotes a mandate, if Section 82 is analysed, it is necessary that:

1. The Court should have reason to believe that the person against whom a warrant has been issued by it, has absconded;
2. After recoding such satisfaction, the Court should require the concerned person to appear at a specified place and at a specified time, not less than 30 days.

In **Chokha vs. State of Rajasthan 2005 CriLJ 4708** the Rajasthan High Court held that the provisions of Section 82 of the new Code are mandatory in nature. In this case vide impugned order dated 27-7-2002, the trial Court passed order for issuing standing warrant and directed the S.H.O. Concerned for making entry regarding absconding of the petitioner. However, the High Court concluded that mandatory requirements of Section 82 of the new Code have not been complied with. There is nothing on the record of the trial Court to show that there was a written proclamation requiring the accused-petitioner to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation. Likewise, there is no mention in the record that the proclamation was published at the conspicuous place of the town or village of the accused-petitioner or some conspicuous part of his house or homestead or a copy of the same was affixed at the conspicuous part of the court-house. There was no publication of the proclamation in a newspaper having circulation in the area where accused-petitioner resides.

Again, there is no statement in writing by the Court that the proclamation was duly published. Thus, it was held that there is complete non-compliance of the mandatory provisions of Section 82 of the new Code and as such the impugned order cannot be sustained in the eye of law.

(a) Issuance of Non-bailable Warrant of Arrest : A Pre-condition for issuance of Proclamation

In terms of Section 73 of Cr. P. C, the Magistrate has jurisdiction and power to issue warrant of arrest, which can be directed against any (i) escaped convict, (ii) proclaimed offender, or (iii) against any person who is an accused of a non-bailable offence and is evading arrest. A person against whom warrant of arrest can be issued, must fall in either of the aforesaid three categories.

The process under Sections 82 & 83 of Cr. P. C cannot be issued unless it is established that a warrant had already been issued against the person wanted and that person was absconding.

In the case of **Pawan Kumar Gupta v. State of West Bengal 1973 CriLJ 1368,** the Calcutta High Court observed that simultaneous issue of a warrant of arrest and a proclamation is illegal and improper vitiating the consequential order of attachment and the ancillary orders passed. Prior to the issuance of proclamation, issuance of warrant of arrest by the Magistrate is sine qua non.

In **Sunil Kumar v/s State, 2002 Cri. L. J 1284,** it was held that the absence of any material to show that the Court has on any earlier occasion issued warrants of arrest order directing issuance of proclamation cannot be sustained. Simultaneous issuance of a warrant of arrest and a proclamation under Section 82(1) of Code of Criminal Procedure, is illegal and improper vitiating the consequential order of attachment and ancillary order passed. The Magistrate, before the issuance of process under Section 82 of Code of Criminal Procedure is statutorily under obligation to consider that there may be more than one reason for non-execution of warrant under consideration.

Only being an accused of a non-bailable offence is not a ground to issue warrant of arrest, as per the provisions of Section 73 of the Code. The said accused who is wanted in a case involving a non-bailable offence, must also be evading his arrest. The word 'and' used in Section 73 (1) of the Code is a conjunctive clause. Thus, both the conditions should simultaneously exist to enable the Court to issue warrant of arrest. This position of law should be considered by the Court while issuing a warrant of arrest. This means that a person not only should be an accused of an offence, non-bailable in nature, but also should be found evading his arrest. Where Court had issued only summons without issue warrant of arrest against the accused, the issuance of proclamation under section 82 CrPC was held not proper. The issuance of proclamation and attachment is not an automatic or a casual one. Before the issuance of such proclamation and attachment, the Court must apply its judicial mind and must arrive at a decision disclosing his reason to believe. The term reason to believe occurring in this section suggests that the Magistrate must be subjectively satisfied that the person has absconded or has concealed himself on the materials before him as was held in **KTMS Abdul Cader v. UOI 1997 CrLJ 1708.** An order of proclamation without sufficient cause would be illegal and therefore any consequent action arising out of that order like attachment would be deemed illegal as well. Therefore, much turns on the fact that whether the

Court's satisfaction that the person has absconded or is concealing himself is justified or not.

Thus, from the reading of Section 82 of the Code, it is clear that at first the Court has to have sufficient materials before him to reach to a conclusion to believe that a person, against whom warrant of arrest has been issued, is absconding or is concealing himself, and it is not possible for the authorities to execute the warrant of arrest. This satisfaction has to be recorded in the order while issuing processes under Section 82 of the Code. In this situation also, from the records of the case, the Court has to derive the aforesaid satisfaction. Non-recording of subjective satisfaction in the order will make the order bad and a non-speaking one. A non-speaking order involving a procedure, which attracts a penal offence (if the order is not complied with), cannot sustain in the eyes of law.

(b) Absconding Meaning

The meaning of the word 'absconding' has invited a lot of attention. Etymologically and ordinarily the term absconded means to hide oneself and it matters not whether a person departs from the place or remains in it, if he conceives himself, nor does the term apply only to the commencement of the concealment. It is obvious that the word has a sense of continuity to it. What is required is their evidence of the effect that he had known that he was wanted and was avoiding the arrest. A person cannot be said to have absconded if he was not present in the house for that day. Absconding would occur if a person would run away hastily or secretly so as to avoid the legal process. The words, "has absconded or is concealing himself so that such warrant cannot be executed" in Section 82 of the Code are significant. Every person who is not immediately available cannot be characterised as an absconder. The Court has to record its satisfaction that the accused has absconded or is concealing in order to avoid execution of the warrant. The provisions of Section 82 are mandatory and are to be construed strictly.

Division Bench case of in **Dip Narain Singh v. State of Bihar, 1981 Cri LJ 1672 (Patna)** a division bench of the Patna High Court express the view tht Section 82 requires that the court must, in the first instance, issue a warrant and it must put down its reasons for believing that the accused is absconding or concealing himself. Thus, in every case where the warrant is not executed, resort cannot be had to Section 82 and it may be necessary to examine the officer concerned who had gone to execute the warrant and to the measures adopted by him to serve the same. **(Kunwar Singh v. State, 1982 AIR SC 29).**

In **Vinod Kumar Khanna v. State, 35 (1988) DLT 167** the petitioner sought to challenge the order of proclamation by virtue of Section 482 of the Code. In that case, a notice of appearance was due to be served on the petitioner but since he was in a foreign country, the notice was served on an official of the company in which the petitioner was the chairman. The official had intimated that the petitioner would appear before the Investigating Officer but on his non-appearance a warrant of arrest was issued which also could not be executed. Thereafter, the

Court thought it prudent to issue a proclamation and then proceed for attachment under Section 83 of the Code. The petitioner contended that at no point of time had he evaded the warrant of arrest and that the warrant of arrest never came to his knowledge and he could not have been said to have absconded. This was invalidated by the Court as the facts did not point to such a conclusion. The petitioner had officials who were working in India and it was inconceivable that he would not be apprised of the notices and the subsequent warrant of arrest. Moreover, he had also proceeded to execute a power of attorney to dispose of his assets so that the attachment would not be carried out. All these facts pointed to the conclusion that the petitioner was well aware of the notices and the warrant of arrest and on evasion of the same, could be said to have absconded. Thus, as is evident from the case, knowledge of the order of the appearance, in whatever form, and then non-appearance is essential to constitute absconding.

In **Abdul Rahman v. State of Rajasthan 2007 Cri.LJ 3113,** the wherein Rajasthan High Court took a view that before declaring the accused as absconder the Court has to be satisfied that accused had left his permanent residence or he is avoiding service or there is no chance of arrest in near future. Para-6 of the same is quoted below;

> *"It is settled proposition of law that before declaring the accused as absconder, the Court has to be satisfied that accused had left their permanent residence or they are avoiding service or there is no chance of arrest in near future."*

(c) Defective Proclamation

The salutary provisions of proclamation under Section 82 have been enacted to protect an unaware person and to give notice to him that he is wanted in the crime to enable him to surrender to custody. Section 82(2) lays down rigorous conditions of the manner in which the proclamation has to be published. The publication includes, inter alia, the affixation of the proclamation at some conspicuous place of the house and homestead of the accused, as also at the notice-board of the court house. A proclamation which omits to mention the time within which and the place at which the absconders should present himself is a nullity. The proclamation must give a clear period of thirty days for the appearance of the accused, the provision as to 30 days being mandatory. Where the period given is less than thirty days proclamation would be invalid liable to be quashed. Mention of the lesser than that required under the section will make the proclamation in effective and the defect is not on curable under section 465. Section 82 CrPC mandates that the date of appearance of the accused should not be less than thirty days from the date of the publication of the proclamation. The proclamation under section 82. Clause 2 CR PC in addition to the ordinary mode of service can also be ordered to be published in a newspaper where the person is ordinarily residing. In such like cases, the trial Court should order the publication in an appropriate newspaper in addition to the other modes as provided under the section.

In **Sunil Kumar v. State 2002 Cr LJ 1284,** the petitioner was living in Muscat and the

court issuing process did not record satisfaction that the warrant could not be served against the accused petitioner but that he was concealing himself. It was apparent from the records that the summons was not even attempted to be served on the petitioner and the date fixed for the appearance of the accused was within ten days. Hence the proclamation order issued against the petitioner was found not in accordance with law.

(d) Mode of Publication of Proclamation for Person Absconding and Proof Thereof

Sub section (2) of Section 82 of the Code provides how the proclamation has to be published. Section 82(2)(i)(a)(b)(c) provides that the

(a) The Proclamation has to be publicly read in some conspicuous place of the town or village where the person ordinarily resides.

(b) The proclamation should also be affixed to some conspicuous part of the house of homestead where the person ordinarily resides.

(c) There is a requirement of fixing a copy of the proclamation at some conspicuous part of the court-house also.

Over and above the said procedure, a provision has been made in 82 (2)(ii) of the Code for a direction to publish the same in a newspaper. This part relating to publication in newspaper is not mandatory, but the previous procedures are. Sub section (3) of Section 82 of the Code is a very important provision, which requires the Court to record that the requirements of sub section (2)(i) of Section 82 of the Code has duly been complied with. This provision is also mandatory in nature.

The provisions of Section 82 of the Code of Criminal Procedure are to be strictly construed and to be followed as it affects the personal liberty of a citizen. The three clauses (a) (b) and (c) of subsection (2)(i) of section 82 are conjunctive and not disjunctive. The fact of valid publication depends upon the satisfaction of each of these clauses. Clause (ii) of sub-section (2) is optional and not an alternative to subsection (1), the latter is mandatory. Sub-section 3 of the section 82 is not in contra distinction with the Indian evidence act nor does it make the proclamation evidence that the warrant has been issued. The method of proving the warrant is not a requirement of the section, which merely deals with the proclamation itself and the mode of publishing it and the like. This section does not make the proclamation equivalent to notice the public of its contents where it is published. The Calcutta High Court relying upon the decision of Privy Council in **Quebec Railway Light, Head and Power Co. Ltd. v. Vandry AIR 1920 PC 181,** the Calcutta High Court further observed that the factum of a valid publication of the proclamation would depend on the conformance to each of the three clauses of Section 87(2) of the old Code. A non-conformance of any one of them would not be a mere irregularity but would vitiate ultimately the order. The principles of Interpretation of Statute rule out any redundancy in the three clauses. The Court further observed that Section 87(3) of the old Code does not rule out the requirements of the Evidence Act and does not in any event override the provisions of Sections 62, 64 and 65

thereof. The presumption in Section 87(3) of the old Code only arises when the requirements of the section have been complied with. Thus, a statement in the order that the writs of proclamation and attachment have been duly executed cannot give rise to the presumption. Form IV, which is part of Second Schedule of Code is the form in which proclamation is required to be issued. The said form provides for mentioning the place and date, for the person to appear in compliance of the order. This is a statutory form. This form is filled by the Office of the Court. Thus, the date and place, which is mentioned in the said form must also be reflected in the order-sheet. This will mean that the Court has fixed the place, time and the date and not the Bench Clerks or the Office Clerks, as it is the mandate of the law that the Court has to fix the place, time and the date of appearance. The Form IV, which is a statutory form, must be scrupulously followed and filled up as per the date, time, place fixed by the Court, which should be reflected in the order-sheet.

(e) Whether an Anticipatory Bail Application can be Maintainable once Process Under Section 82 Cr.P.C. has been Issued.

Another aspect which has to be taken note of, is that the Hon'ble Supreme Court in the **State of Madhya Pradesh v/s. Pradeep Sharma, (2014) 2 SCC 171,** after relying on other Judgments, has held that if a person is declared as proclaimed offender / absconder in terms of Section 82 of the Code, he is not entitled for relief of anticipatory bail. Thus, when the relief of anticipatory bail is curtailed, as a consequence of an order passed under Section 82 of the Code, declaring a person absconder, the said order cannot be passed in mechanical manner without recording satisfaction and reasons nor can the same be passed without following the procedure as laid down in the Code. In view of the aforesaid circumstances and the consequence one has to face, the Court has to be very cautious while issuing an order under Section 82 of the Code. In **Kumar Anubhav vs The State of Jharkhand The Jharkhand** High Court relied on the judgments of **Lavesh Vs. State (NCT of Delhi) (2012) 8 SCC 730** and **State of Madhya Pradesh Vs. Pradeep Sharma, (2014) 2 SCC 171,** held that once an accused has been declared as an absconder /proclaimed offender in terms of Section 82 Cr.P.C. he is denied the consideration of anticipatory bail.

(f) Whether the Court u/s 438 of the Cr.P.C. can look into the legality of Process u/ss 82, 83 of Cr.P.C.

In **Sheikh Anwar @ Sk. Anwar Vs. State of Jharkhand 2014 (4) JLJR,** Jharkhand High Court held that in view of the specific provision in the code of Criminal Procedure dealing with a specific subject, the other provisions of the code cannot be resorted to by the Courts. In an application under section 438 Cr.P.C. before a High Court recourse cannot be taken by challenging the illegality of issuance of process under section 82 Cr.P.C., which is an altogether different subject matter for which remedies are available in section 482 of the CrPC itself.

(g) "The Proclaimed Offender"

The notion of a Proclaimed Offender as it exists today did not always find a place in the Code. In the 1872 Code, there was no mention of a Proclaimed Offender. It was in Section 45 of the 1882 Code that the words were first found, only in respect of the duties of village officers to make a report. In 1894 an explanation clause was added to Section 45 thereby expanding the definition of Proclaimed Offender. This was the first instance when the list of sections currently found in Section 82(4) found a place in the Code. The 1898 Code retained the provisions of Section 45 with respect to Proclaimed Offenders in its amended form, which today is provisions of Section 40 of the Cr.P.C. 1973. Why was the definition of Proclaimed Offender expanded in 1894? The clause expanding the definition was in fact one in a set of identical clauses inserted to iron out jurisdictional issues which were faced by the Crown in prosecutions of certain offences. This is clear by reading the full clause: *"the expression proclaimed offender includes any person proclaimed as an offender by any court or authority in any territory in India to which this Code does not extend, in respect of any act which if committed in the territories to which this Code extends, would be an offence punishable with under any of the following sections of the Indian Penal Code, namely, 302, 304, 364, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 (both inclusive)"* Since the Cr.P.C. does not extend to all parts of India, it made sense to retain it post-independence. But why was this list of sections specifically inserted in Section 82 the answer is still uncertain. Although the proposal was seemingly made in the Criminal Procedure Code (Amendment) Bill of 1994 and included in a questionnaire prepared by the Law Commission, there is no discussion in the Report. These offences cannot be considered exhaustive of the set of grave offences under the IPC to argue that they merit a separate class. All facts seem to suggest that this list of offences is rather arbitrarily placed under Section 82(4) Cr.P.C.

(h) The Current Position

For reasons one cannot gather, Section 82 today creates two separate classes of proclamations: those for persons accused of offences specified under Section 82(4), and all other proclamations. This is supplemented by Section 174-A IPC, which reiterates that a higher punishment may be inflicted upon those declared Proclaimed Offenders under 82(4). There is no such declaration for disobeying the other proclamations issued under Section 82(1), which brings us to the issue at hand. Can persons other than those accused of offences listed under Section 82(4) be declared Proclaimed Offenders. The absence of any declarations outside of Section 82(4) was considered a problem by the Punjab & Haryana High Court, and in a lengthy decision **Deeksha Puri v. State of Haryana, Crl.M.C. 359/2012** decided on 16.10.2012 it concluded that the apparent labelling lacuna must be resolved by calling any persons disobeying a proclamation a Proclaimed Offender. Section 82(4) was inserted in 2006 to state that failure to appear after a proclamation entitles a

court to pronounce the person a "Proclaimed Offender" and make a declaration to that effect. Importantly though, 82(4) is limited to proclamations in respect of persons accused of offences punishable under Sections 302, 304, 364, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 of the Indian Penal Code. The consequences of a proclamation are twofold. One, a proclamation triggers Section 83 Cr.P.C., enabling a court to attach any property belonging to the proclaimed person which may be sold upon continued absence. Two, Section 174-A of the IPC (also inserted in 2006 by the same amending statute) makes it an offence to not appear following proclamations under Section 82 Cr.P.C. In 174-A IPC a distinction was made: disobeying a Section 82(1) proclamation was punishable with imprisonment up to 3 years or fine or both, but where a declaration under Section 82(4) was made a person could be punished with imprisonment up to 7 years with a mandatory fine. There is no such declaration for disobeying the other proclamations issued under Section 82(1), which brings us to the issue at hand. Can persons other than those accused of offences listed under Section 82(4) be declared Proclaimed Offenders.

On July 31, 2018, a Single Judge Bench of the Delhi High Court in **Sanjay Bhandari v. State (Criminal revision no. 223 of 2018)** specifically disagreed with the Punjab and Haryana High Court, and concluded that "Proclaimed Offender" is a term of art, that can only be used in respect of the categories of offences covered by Section 82(4), Cr.P.C. Persons who disobey proclamation notices in cases involving other offences are "Proclaimed Persons". For such persons, law enforcement cannot resort to the aggravated punishment clauses of Section 174-A of the Indian Penal Code. So why is this list of offences used in Section 82(4) - remains unanswered. The Delhi High Court in Sanjay Bhandari only engages with that list of offences to assert that it contains "serious offences" [Para 14], without telling us why these serious offences are part of the list, which excludes Section 376 IPC that punishes rape. With this conflict between different High Courts, will the matter reach the Supreme Court, or can the Parliament be suggested (wisely) to intervene and clarify the text?

3. ATTACHMENT

Sections 83-86 deal with attachment and the effects arising thereof. Section 83 empowers the Court to attach the property of any person concerned against whom a proclamation has been issued. This section has been devised to put additional pressure on the absconder by depriving him of his property, with a view to compel him to obedience Therefore, an order of attachment can only be made after an order of proclamation has been issued for justifiable reasons.

> *Section 83:* ***Attachment of property of person absconding****—(1) The Court issuing a proclamation under section 82 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable, or immovable, or both, belonging to the proclaimed person:*
>
> *Provided that where at the time of the issue of the proclamation the Court is*

satisfied, by affidavit or otherwise, that the person in relation to whom the proclamation is to be issued,

a.is about to dispose of the whole or any part of his property, or b.is about to remove the whole or any part of his property from the local jurisdiction of the Court, it may order the attachment simultaneously with the issue of the proclamation.

Section 83 (1) of the Code clearly provides that the Court, which is issuing proclamation under Section 82 of the Code, for the reasons to be recorded in writing, may order for attachment of moveable or immovable properties belonging to the accused. It is, thus, the mandate of the law that the reasons for issuing attachment order have to be recorded in the order itself. Non recording of the reasons will make the order invalid and unsustainable.

Further, from the aforesaid provision of law, it is clear that attachment order under Section 83 of the Code can be issued to attach the property belonging to the proclaimed person. Statement to the effect that the proclamation was duly published has to be made in terms of Section 82 (3) of the Code, which provides that the Court has to record a statement in writing to the effect that the proclamation was duly published on the specified date in the specified manner as provided in Clause (i) of sub section (2) to Section 82 of the Code.

This statement of the Court, which is to be recorded as per the statute, is conclusive evidence that the requirement of law has been complied with, which is a pre-requisite for declaring a person a proclaimed offender/person absconding. Without recording the aforesaid statement in writing to the effect that the requirement of Section 82 of the Code has been complied with, a person cannot be declared to be a proclaimed offender/absconder, an attachment order in terms of Section 83 of the Code cannot be issued.

Thus, before issuing any attachment order under Section 83 of the Code against a person absconding, the statement, as envisaged in terms of Section 82 (3) of the Code has to be on record. This is all the more necessary, as mentioned earlier, the said person can be tried and punished for a separate offence punishable under Section 174-A of the Indian Penal Code. There is an exception to this rule when both the processes, i.e., proclamation under Section 82 of the Code and attachment order in terms of Section 83 of the Code are issued simultaneously. The first proviso to Section 83 (1) of the Code provides for the circumstance and the situation where it is necessary to issue both the proclamation and attachment order simultaneously and how the same can be issued and the requirements thereof. The attachment order can be made simultaneously with a proclamation order on two occasions: *one, when the property is about to be disposed of and two, the property is about to be removed from the local jurisdiction of the Court.* It may however be noted that all though simultaneous issue of proclamation and attachment order are authorised by the section in certain cases this is an exception and not the rule.

The fact remains that in a case where processes in terms of Section 82 and 83 of the Code are issued separately, then without recording a statement, as envisaged under Section 82 (3) of the Code, attachment order under Section 83 of the Code cannot be issued. The absence of the said

statement will lead to a conclusion that there was nothing before the Court to suggest that the proclamation under Section 82 of the Code so issued, was properly served. Until and unless proclamation under Section 82 of the Code is properly served, attachment order under Section 83 of the Code cannot be issued.

In **Devendra Singh Negi Alias Debu vs State Of U.P. 1994 CriLJ 1783;** general guidelines for issuing processes was issued to all judges. [this judgment was also followed by the Allahabad High Court in a number of its judgments including in **Sushil Ansal vs. State of U.P: MANU/UP/0396/2010** it was held that Order of attachment of property under section 83 of the Code should not be passed in haste or without application of mind. The learned Magistrates should act under Section 83 with great circumspection. It may not be necessary to issue an attachment order straightway against the persons who are readily available at the place of their vocations such as Government servants, doctors, engineers, lawyers and businessmen having permanent place of business and the like unless there is tangible evidence or material to show that they have really absconded. It should be borne in mind by the learned Magistrate that a passive acquiescence to the wishes of the police in these matters tends to diminish the luster of their independence, dries up fragrance of the judicial process and. shake the confidence of the people. The process of attachment is not to be reduced to an instrument of punishing or wrecking vengeance. It cannot, however, be overlooked that quite often the attachments are attended with savage revenge and malevolence. If Section 83 is interpreted to mean that it confers arbitrary powers on the Magistrates to order an attachment at their sweet will or in a whimsical manner Section 83 of the Code might have to be struck down as violative of Articles 14 and 21 of the Constitution. The procedure laid down under Section 83 has to be followed strictly. Jurisdiction to pass an attachment order cannot be assumed unless a proclamation under Section 82 of the Code has been issued. The normal rule is that the Magistrate has to wait until the expiry of 30 days to enable the accused to appear in terms of the proclamation. The words "at any time after the issue of proclamation" are not to be interpreted in isolation. The key for gathering the intention of the law makers is to be found in Section 82 of the Code. Section 82 and 83 of the Code do not spell out dichotomous procedures, they are to be read in harmony. Thus, except in cases covered by the proviso to Section 83(1) the attachment order has to maintain a distance of not less than 30 days from the date of the publication Under section 82. These 30 days are to be computed from the date of the publication of the proclamation and the provisions in this respect are mandatory. **(See Gurappe Gugal v. State of Mysore, 1969 Cri LJ 826).** The words 'at any time' in Section 83 only mean that if after the issue of proclamation either of the two conditions mentioned in clauses (a) and (b) of the proviso to Section 83 come into existence, an order of attachment may be made without waiting for 30 days to expire. Even in such a case the Magistrate has to record his reasons.

In **Vimlaben Ajitbhai Patel v. Vatslaben Ashokbhai Patel, (2008) 4 SCC 649** it was observed that the provisions contained in Section 83 of the Code of Criminal Procedure were put on the statute book for certain purpose. It was enacted to secure the presence of the accused.

Once the said purpose is achieved, the attachment shall be withdrawn. Even the property which was attached, should be restored. The provisions of the Code of Criminal Procedure do not warrant sale of the property despite the fact that the absconding accused had surrendered and obtained bail. Once he surrenders before the court and the standing warrants are cancelled, he is no longer an absconder. The purpose of attaching the property comes to an end. It is to be released subject to the provisions of the Code. Securing the attendance of an absconding accused, is a matter between the State and the accused. The complainant should not ordinarily derive any benefit there from. If the property is to be sold, it vests with the State subject to any order passed under Section 85 of the Code. It cannot be a subject-matter of execution of a decree, far less for executing the decree of a third party, who had no right, title or interest thereon. The provisions of this code not being applicable to contempt proceedings, these sections cannot be availed of for securing the presence of alleged contemner or, in default, to attach his property. The object of attaching property of an absconder is not to punish him but to compel his appearance. If the property has not been confiscated or disposed of the title thereof continues to vest in the owner and thereafter in his heirs. Only the property of the absconder and not of some other person e.g. father of the absconder would be attached under section 83 CrPC

(a) Modes of Attachment

Sections 83 (2), (3) (4) (5) provide the procedure for attachment of different kinds of properties. If the property ordered to be attached is a debt or other movable property, the attachment is to be made—

(a) By seizure; or

(b) By appointment of a receiver; or

(c) By an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or

(d) By any combination of the above methods, as the Court thinks it. If the property which is ordered to be attached is immovable property, the attachment is to be made through the Collector of the District in the case of land on which revenue is payable to the State Government.

In all other cases, attachment of immovable property is to be made—

(a) By taking possession; or

(b) By appointment of a receiver; or

(c) By an order in writing prohibiting the payment of rent or delivery of property to the proclaimed person or to any one on his behalf; or

(d) By a combination of any of the above methods, as the Court thinks fit.

If the property which is ordered to be attached consists of live-stock or is of a perishable nature, the Court may order an immediate sale thereof, and also issue directions as regards the proceeds of such a sale. A land paying revenue to the state government can be attached by the District Collector only. When the land is attached and possession is taken over, the person taking it over becomes liable to pay the land revenue and the owner is exonerated. It is, therefore, seen that the collector the highest revenue officer of the district should, upon taking over possession record the fact of taking over possession by him or by any other person absolving the owner from the liability to land revenue. The moment possession is taken over, the owner is absolved from the payment of land revenue. In the instant case, it appears that there was no valid order of attachment as the land was revenue paying one and it should have been attached by the collector of the district not by the police officer When land is attached under this section, and actual possession thereof is taken by posting a constable on the spot, a person removing standing crops from such land would be guilty of an offence under S. 379 of Indian Penal Code.

The Court can attach both moveable and immoveable property but a curious wrangle arises when it comes to attaching joint family property. The Courts have laid down that the rights of the Government in case of attachment of a part of the joint family property are the same as any coparcener. As the coparcener derives an interest from the property, the Government too derives an interest and is therefore entitled to the income accruing from that part of the property.

(b) Will The Rights Of Tenants Be Affected If The Property Attached Has A Tenant And The Property Is Sought To Be Attached?

In **Vimlaben Ajitbhai Patel v. Vatslaben Ashokbhai Patel, (2008) 4 SCC 649** it was held that an order of attachment of a property has nothing to do with the right of tenancy. The right of a person as a tenant could not have been affected by reason of any order of attachment. The terms and conditions of tenancy, being governed by statute, the tenant cannot be evicted except in accordance with law.

(c) Claims And Objections To Attachment Sec 84-86 of Cr.P.C.

These section deals with the rights of the person other than proclaimed person in the property attached. Only the property of the absconder and not of some other person e.g father of the absconder would be attached under section 83 CrPC. In case of non-conformance with section 82 which must be regarded as procedure established by law, the order which follows, including an order under the present section becomes illegal.

Section 84 relates to claims and objections regarding attachments. If a person, other than the proclaimed person, has an interest in the property to be attached he may object to that attachment within six months. Section 85 talks about release of the attached property on appearance of the proclaimed person within the specified time and Section 86 lays down the rule regarding appeal from order rejecting application for restoration of attached property. If any claim or other

objection is made to the attachment of any property attached under the above provisions, within six months from the date of the attachment, by any person other than the proclaimed person, on the ground that such claimant or objector has an interest in such property and that such interest is not liable to be attached, such claim or objection is to be inquired into by the Court, and may be allowed or disallowed in whole or in part. If such claim is disallowed, the aggrieved person may, with one year from the date of the order, institute a regular suit to establish his right to such property. (S. 84)

This provision is similar to Rule 58 of the Order 21 of the Civil Procedure Code, 1908. An inquiry into a claim filed under this section would be a judicial inquiry within the meaning of S. 2(i) of the Code. It may be noted that a mere seizure of the property of an absconder by the police does not confer any rights on the Government, until proceedings are taken under S. 82 and S. 83 of the Code. Thus, in one case, where the police seized certain property of an absconder in August, but no proceedings were taken until December, it was held that an attachment of the property in October by a creditor in a civil suit would prevail, and the Magistrate cannot refuse to hand over the property in obedience to the order of the Civil Court.

The following remedies are available to an aggrieved person in this connection:

(i) Remedy by way of a claim or objection under S. 84 (see above).

(ii) An appeal can be filed under S. 86.

(iii) Under certain circumstances, a revision application will lie under S. 397.

The remedy of a person, whose property is attached, lies in filing claim under the code and not in instituting suit against the attachment. When remedy is provided in particular act and it shows that the jurisdiction of civil court impliedly barred, the civil court shall have no jurisdiction to try any suit in connection with that matter

(iv) Further, Claims and objections with regard attached property can be preferred only so long as that property continues to remain under attachment. **Chandra Shekhar v. State, 1978 CrLJ 540(All).**

It means once the attached property is disposed of then, there cannot be any objection and claim with regard to that property. An order passed by the court under section 84 CrPC.,in so far as it relates to the third-party rights of the claimant, is only an interlocutory order and not a final order. In **Amina Ahmed Dossa v. State of Orissa, AIR 2001 SC 656** it was held that remedy against the said order is by way of a civil suit and not appeal. The power under Section 482 is not be resorted to if there is specific provision in the code for the redress of grievances of the aggrieved party. Whether the wife and minor children of a person declared absconder under Section 82, can object to the attachment and sale of the property belonging to the absconder in proceedings under section83 and section 84, on the ground that they have a right to be maintained by the absconder in that case it was held that a husband's obligation to maintain his wife is a

personal obligation. The husband is bound to maintain his wife even though he has not got any property. Husband's obligation to maintain his wife is independent of any property owned by him. Likewise, it is also the personal obligation of a father to maintain his minor children irrespective of the property owned by him. The petitioner and her children, therefore, cannot be said to have an interest in the property sought to be sold in proceedings under section 83, in regard to their claim of maintenance.

(d) Release Sale And Restoration Of The Attached Property

Section 85(3) states that If the proclaimed person appears within prescribed period of time in proclamation then the attached property can be released. However, If the absconder appears or is apprehended and brought before the Court within two years from the date of the attachment of his property and satisfies the Court (i) that he did not abscond or conceal himself for the purpose of evading execution of the warrant, and (ii) that he had no such notice of the proclamation as could enable him to attend within the specified time, he can get the property back or its net proceeds if it has been sold. If the proclaimed person appears within the time specified in the proclamation, his property is released. If he does not do so within time, then his property will be at the disposal of the State Government. A bare reading of section 85 sub-section (3) is enough to hold that the onus of proving that the accused did not abscond for the purpose of avoiding execution of the warrant of arrest and that he had no notice of the proclamation issued, lies on the proclaimed offender, and rightly so, as these clearly are matters within the knowledge of the absconding accused. The expression 'shall be at the disposal of the government' is also used in the section 458. It means that the property passes under the absolute control of state government, to dispose of, or deal with it in whatever manner might seem most appropriate and convenient according to this provision. **[Golam Abed v. Toolseeram Bera, (1883) 9 Cal 861, 863.] In Narayan KondajiTemkar v. Govind Krishna Abhyankar AIR 1929 Bom. 200**, it was held that the words 'at the disposal of the State Government' apply from the moment the absconding accused fails to appear or from the date of attachment and held that the property would be at the disposal of the Government only from the date of attachment and not from the date of the accused absconded.

The property, unless it is perishable, is to remain under attachment for 6 months. At the end of the period, the property is to be sold, and the sale proceeds to wait for two years. In **Dattaji v. Narayanrao,(1922)25 Bom LR 228** it was laid down that if within two years the person satisfies the court as to the reason for his absence he can recover money; otherwise it stands forfeited to the government. But, in **Secretary of State v. Ahilyabai, (1937)40 Bom LR 422.** it was observed that a person having a claim to such property can enforce it by an independent action in a Civil Court so long as the property is not sold and remains in hands of Government.

In **Abdullah v. Jitu, (1900)22 All 216,219.** it was observed that Sub-section (3) of Section 85 prescribes a remedy where there is good and legal publication, but offers no facility for the

contesting of the legality of the proclamation. It contemplates and requires proof that the offender did not abscond or conceal himself for the purpose of avoiding arrest and that he had no such notice of the proclamation as to enable him to attend within the time specified. The proof that the accused person has not absconded should be offered or given within 2 years of the date of the attachment. It is not enough to show that within that period the accused person appeared voluntarily or was apprehended or brought before the court.

In **N D Gaddi reddy v. State, 1979 CrLJ 1107 (Del),** it was held that, a wife who is entitled to maintenance from absconder whose property has been attached, cannot apply for release of property (section 28 of the Hindu Adoptions and Maintenance Act,1956).

In **Dyanand v state AIR 1976 P&H190, 194 (DB)** it was held that no provision in the code bars the jurisdiction of a civil court trying and adjudicating upon claim of an heir of a deceased absconder for restoration of the property in which the title originally vested in the absconder and at the time of suit vests in his heir and if the property is still held by the government.

(e) Appeals Against Rejection To Restore Attached Property

The intention for attachment of property under Section 83 of Code, was to compel absconding accused or person concealing himself from being arrested in execution of warrant to appear before Court.

The Property attached under section 83 of Code, vests with Government from date of attachment. If period provided under section 83 of Code, stands over, absconding accused would not be entitled to file application for getting property released, under section 85(3) of Code.

According to Section 86 of the code any person referred to in sub-section (3) of section 85, who is aggrieved by any refusal to deliver property or the proceeds of the sale thereof may appeal to the Court to which appeals ordinarily lie from the sentences of the first-mentioned Court. Any person whose application for the delivery of property or the proceeds of the sale thereof has been rejected by any Court may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court. The provision is there to safeguard the interest of the person to whom the property belongs. This is a way to safeguard the right to property of a person.

Conclusion & Suggestions

All human beings have the right to enjoy respect for their liberty and security. It is axiomatic that, without an efficient guarantee of the liberty and security of the human person, the protection of other individual rights becomes increasingly vulnerable and often illusory. Yet, as is evidenced by the work of the international monitoring organs, arrests and detentions without reasonable cause, and without there being any effective legal remedies available to the victims concerned, are commonplace. In the course of such arbitrary and unlawful deprivations of liberty, the detainees are frequently also deprived of access both to lawyers and to their own families, and also subjected to torture and other forms of ill-treatment.

It is essential, therefore, that the legal rules that exist to remedy and prevent these kinds of human rights violations be adhered to by all the stake holders of the justice delivery system particularly magistrates. The notion of "security" also covers threats to the personal security of non-detained persons. States cannot be passive in the face of such threats, but are under a legal obligation to take reasonable and appropriate measures to protect liberty and security of person Arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. ... [T]his means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances. Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.

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Topic No. – 04

Bail on the merit of the case vis a vis bail as a matter of right under the Cr.P.C. (including default bail u/s 167(2) of the Cr.P.C..)

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Introduction:

Dispensation of justice, in our shastras, has been equated with the divine. The expectations therefore, on those entrusted with this noble duty, are beyond normal and testing. These expectations stem from the hope that the judge or the adjudicator would exercise the act of balancing the opposite claims in the most reasonable manner. The delicate balance between punishment and exoneration is akin to a double-edged sword, an improper use of which is bound to unleash serious consequences. The act of balancing between the two extremes is of paramount importance. It is because of this that the statue of the Lady Justice holds the scales in her right hand, which represent virtues like balanced consideration, equality in the eyes of the law and objectivity. The scales underscore the importance of weighing a decision carefully and taking time to measure outcomes. This act of balancing is not only the final act, which is the deliverance of judgment, but is one which comes into play in between at various stages of a trial through which the process of adjudication travels. The exercise of the discretion of grant of bail is one such crucial stage where this fine act of balancing gets manifested.

Definition of Bail:

The term "bail" has not been defined in the CrPC. So, its origin is required to be traced from other sources. It has originated from an old French verb- bail, which means to give or to deliver. Bail refers to the provisional release of the accused in a criminal case in which the court is yet to announce the judgment. During the course of a criminal trial, the prudent exercise of this discretion ensures the availability of the fundamental right of personal liberty even to the accused. The provisions as contained in our criminal jurisprudence pave way for grant of this privilege, both on the merits of the case and as a matter of right. Broadly speaking, while for bailable offences there is a clear-cut provision for grant of bail as a matter of right, the rest of the offences call for a judicious consideration of the material on record, and all attending circumstances before recording reasons for granting bail, or otherwise. The legal history is replete with instances where the Hon'ble Supreme Court and High Courts have reiterated their anxiety about the importance of recording cogent reasons for exercise of this discretion, either in favour of, or against an accused, and terming it as indispensable for upholding the virtues of the justice delivery system. In legal parlance, according to the **Black's Law Dictionary** it has been defined as - ***"procuring the release of a person from legal custody by undertaking that he/she shall appear at the time and place designated and submit him/herself to the jurisdiction and judgment of the court".***

Provisions relating to Bail:

The offences of I.P.C. and other special enactments of our country have been placed in two categories- bailable and non- bailable according to the 1st Schedule of CrPC and their definitions are contained under section 2(a) of the CrPC.

Section 436 CrPC deals with the provision of bail in respect of bailable offences and on a plain reading of it one can understand that bail is a matter of right in such offences and the concerned person is legally entitled to be released from custody if he /she furnishes the required bond for appearance before the police / court, as and when required in connection with that case. So, the question of bail in such offences does not call for any further discussion in this article.

When the dialogue is about those offences which are non-bailable in nature, the merit of the case takes center-stage. When the courts have to take into consideration the materials which are brought before it by the rival parties and, after a careful scrutiny of the same they have to arrive at a conclusion whether or not to grant bail, that situation defines grant of bail on the merit of the case. The matter of granting bail in respect of non- bailable offences falls under the grey area and it requires a detailed and comprehensive discussion. In this context I am tempted to quote the observations of Hon'ble Justice Krishna Iyer of the Supreme Court which is as under:—

> *"The subject of bail belongs to a blurred area of criminal justice system and largely hinges on the "hunch of the bench", otherwise called judicial discretion. The Code is cryptic on this topic, and the court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden on public treasury, all of which insist that a developed jurisprudence for bail is integral to a socially sensitized judicial process* ***(Gudikanti Narsimhulu V Public Prosecutor.[1]***

The provision for grant of bail in a non-bailable offence by magisterial courts is contained under section 437 CrPC[2], the relevant part of which reads as under:—

> **Section 437.** (1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of session, he may be released on bail, but:
>
> (i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;
>
> (ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more

1. AIR 1978 SC 430
2. https://devgan.in/crpc/section/437/

occasions of [a cognizable offence punishable with imprisonment for three years or more but not less than seven years:]

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court:]

Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor.]

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, [the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail], or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abatement of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), [the Court shall impose the conditions (a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter, (b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence, and may also impose, in the interests of justice, such other conditions as it considers necessary.]

(4) An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2), shall record in writing his or its 6[reasons or special reasons] for so doing.

Similarly the provision for grant of bail in a non- bailable offence by a Court of Session or High Court is contained u/s 439 CrPC, the relevant portion of which reads as under:—

Section 439. A High Court or Court of Session may direct-

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section.

A plain reading of the aforesaid provisions convey loudly that in respect of a non- bailable offence the concerned court has the discretion to grant or refuse bail. So, in such offences the accused cannot claim bail as a matter of right.

As a natural corollary now, the next point which arises for discussion is that **what should be the norms for a uniform and judicious exercise of aforesaid discretion** by the Judges having different mindsets dealing with different types of cases. These norms have been laid down in many judicial pronouncements out of which some may be usefully reproduced hereinafter.

There is a legal phrase - *"bail is a rule and jail is an exception"*, which came out of a decision of Hon'ble Justice Krishna Iyer reported in **State of Rajasthan Vs. Balchand[3].** It should be given a serious consideration that in which context it was said and what does it really mean. So far as I understand, it was said keeping in view the following aspects:—

- That according to our criminal jurisprudence a person is presumed to be innocent until held guilty. So, his personal liberty should not be curtailed before the charge against him is proved lawfully.
- That Article 21 of our Constitution mandates that no person shall be deprived of his life and personal liberty except according to procedure established by law.
- That Article 19(1) (d) of our Constitution mandates that all citizens shall have the right to move freely throughout the territory of India.
- That Article 11(1) of the Universal Declaration of Human Rights also lays down that everyone charged with a penal offence has a right to be presumed innocent until proved guilty according to law in a public trial at which he had all the guarantees necessary for his defence.

So, the court is required to exercise its discretion in deciding bail matter in a non- bailable offence keeping in mind all the provisions of law mentioned above. The order should be brief, reasoned and speaking.

The Hon'ble Supreme Court in the case of **State of Maharashtra vrs. Sitaram Popat Vetal [4],** decided on 23rd August, 2004, has given certain guidelines to be taken into consideration before granting bail in non- bailable offences which may be usefully cited hereunder in this context:

3. AIR 1977 SC 2447

4. Crl. Appeal No. 921 of 2004

- The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.
- Reasonable apprehension of tampering of the witnesses or apprehension of threat to the complainant.
- Prima facie satisfaction of the court in support of the charge.

Further in the aforesaid case the Hon'ble Supreme Court has said that courts must deny bail only under three conditions:—

- The person charged with the crime is likely to flee.
- The accused is likely to tamper with evidence or influence witnesses.
- The accused is likely to repeat the same crime if granted bail.

It is crystal clear from the aforesaid guidelines given by the Hon'ble Supreme Court that the merit of the case, gravity of the offence and supporting evidences available on the record of the case/ police case diary should also be considered in the disposal of a prayer for bail in non-bailable offences. In this context the Hon'ble Supreme Court has further ruled in the reported case of **State of Rajasthan Vs. Balchand**[5] *(supra)* that the gravity of the offence is likely to induce the petitioner to avoid the course of justice. So, it must weigh with us when considering question of bail. The jurisdiction to grant bail has to be exercised on the basis of well settled principles having regard to the circumstances of each case and not in an arbitrary manner.

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, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of accused and the trial, reasonable apprehension of the witnesses being tampered with the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting bail the Legislature has used the words reasonable grounds for believing¡ü instead of ¢wthe evidence¡ü which means the court dealing with grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce supporting materials.

In **Prahlad Singh Bhati Vs. NCT, Delhi & Anr**[6] the Hon'ble Supreme Court dwelled upon the question of a Magistrate granting bail in case of an offence under Section 302 of the IPC. It held that the Magistrate can grant bail only when there is no reasonable ground to believe that the accused is guilty of offence punishable with sentence of death or life imprisonment, unless the accused is covered by the provisos to Section 437 (1) of the Code.

Further it is essential to mention here that criminal antecedent of the accused is also an important factor in granting or refusing bail in a non- bailable offence because the antecedent

5. AIR 1977 SC 2447
6. (2001) 4 SCC 280

points out whether the accused is a habitual criminal or not. There may be instances where the court comes across an accused, who carries behind him criminal antecedent of such a nature which may be difficult to ignore. Such antecedent may give rise to a reasonable presumption that once out on bail, the accused may intimidate the witnesses, or may try to tamper with evidence, or may indulge in any act which may adversely affect the trial of the case.

To sum up this part of the topic it can be said that the accused cannot claim bail as a matter of right in non- bailable offences, but with the following exceptions:—

Firstly, that if the accused is in custody during the period of investigation of the case and the investigation is not completed within a period of 60 days or 90 days, as the gravity of the case may be, then he becomes entitled to bail according to the provision of default bail contained under section 167(2) CrPC, the relevant part of which reads as under:

Section 167(2): The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that--

(a) the Magistrate may authorize the detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody under this paragraph for a total period exceeding

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter.

Secondly, if the case of the accused falls within the ambit of section 436A CrPC which reads as under:

Section 436A. Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Explanation **-** In computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded.

The right to get default bail according to section 167 (2) CrPC is an indefeasible right of the accused which cannot be taken away as held recently by Hon'ble Supreme Court in **S. Kasi V the Inspector of Police, Samaynalluru, PS Madurai District, TN**[7] which is a reportable case.

Moreover there is no hard and fast rule as far as grant of bail or refusal to grant bail is concerned. Each case has its own merits and demerits. Granting or refusal to grant bail would depend upon facts and circumstances of each case. **(P.V. Narsimha Rao vrs. CBI)** reported in **1996(39) DRJ 564: 1997 (65) DLT 398.**

In **State of U.P. through CBI Vs. Amarmani Tripathy**[8] the Hon'ble Supreme Court discussed the scope of its interference under Article 136 of the Constitution of India. It was held that the general rule that the Supreme Court will not ordinarily interfere in matters relating to this is subject to the exception where there are special circumstances and when the basic requirements for grant of bail are completely ignored by the High Court.

Anticipatory Bail

There is one more provision for bail contained under section 438 of the CrPC, which is called as anticipatory or pre-arrest bail, which reads as under:—

Section 438. (1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including—

7. Crl. Appeal no.452 of 2020 arising out of SLP (Crl.) No. 234/2020), decided on 19.06.2020
8. (2005) 8 SCC 21

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).

This power to grant anticipatory bail has been conferred upon the High Court or the Sessions Court to an applicant who has reason to believe that he may be arrested for a non-bailable offence. The term anticipatory bail has not been defined in the Code, but as per observation made in **Balchand Jain Vs. State of M.P.**[9]**,** anticipatory bail means "bail in anticipation of arrest". The expression anticipatory bail is a misnomer inasmuch as it is not as if bail is presently granted by the Court in anticipation of arrest. When a competent court grants anticipatory bail, it makes an order that in the event of arrest, a person shall be released on bail. There is no question of released on bail unless a person is arreste and, therefore, it is only on arrest that the order granting anticipatory bail becomes operative. The Court went on to observe that the power of granting anticipatory bail is somewhat extraordinary in character and it is only in "exceptional cases" where it appears that a person might be falsely implicated, or a frivolous case might be launched against him, or there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misused his liberty while on bail that such power may be exercised. The power being rather unusual in nature, it is entrusted only to the higher echelons of judicial service, i.e, a Court of Sessions and the High Court. Thus, the ambit of power conferred by section 438 of the Code was held to be limited.

It is very clear on a reading of the aforesaid provision of CrPC that anticipatory or pre-arrest bail under section 438(2) CrPC can be granted only by a Sessions Court or High Court. This limitation was put by the legislature only because the power conferred on courts exercising criminal jurisdiction under section 438(2) CrPC is extraordinary in nature. There was no equivalent provision under the CrPC, 1898 (old CrPC). It was recommended by the **Law Commission of**

9. 1977 AIR 366; 1977 SCR (2) 52

India in its 41st report, and was finally introduced in the Code of Criminal Procedure, 1973 on the basis of the 48th report of the Law Commission of India, para 31. This provision was introduced for protecting the liberty of a citizen from mala fides or arbitrary arrest.

In **Gurbaksh Singh Sibbia Vs. State of Punjab[10],** the Constitution Bench of the Hon'ble Supreme Court observed that the Legislature has conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail since it felt, firstly, that it would be difficult to innumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon are somewhat free hand in the matter of grant of relief in the nature of anticipatory bail. The Bench also laid down certain guidelines required to be kept in mind while dealing with an application for grant of anticipatory bail, which were reiterated in **Savitri Agarwal & Ors. Vs. State of Maharashtra & Anr.[11],** which may be briefly reproduced as follows:—

(i) Though the power to grant anticipatory bail is described as of an extraordinary character, it does not justify the conclusion that it must be exercised in exceptional cases only. However, discretion should be exercised with due care and circumspection.

(ii) The court must satisfy itself that the applicant has reason to believe that he is likely to be arrested for a non-bailable offence and that belief must be founded on reasonable grounds, and that mere "fear" is not belief. Such belief must be capable of being examined by the Court objectively.

(iii) Differing with observations made in **Balchand Jain's case** *(supra),* it was held that there is no warrant for reading into section 438, the conditions subject to which bail can be granted under section 437 (1) of the Code.

(iv) No blanket order of anticipatory bail should be passed, rather the offence or offences in respect of which the order will be effective should be specified, and appropriate conditions can be imposed.

(v) The filing of First Information Report (FIR) is not a condition precedent to the exercise of power under Section 438, and that imminence of a likely arrest founded on a reasonable belief can be shown to exist even a an FIR is not yet filed.

(vi) Anticipatory bail can be granted even after an FIR is filed so long as applicant has not been arrested, but not after his arrest.

(vii) An interim bail order can be passed under Section 438 without notice to the Public prosecutor, but notice should be issued forthwith and the question of bail should be re-examined in light of respective contentions of parties.

(viii) Though it is not necessary that operation of an order passed under Section 438 be

10. 1980 AIR 1632; 1980 SCR (3) 383

11. AIR 2009 SC 3173

limited in point of time but the court may, if reasons exist, limit the operation of the order to a short period until after the filing of FIR in respect of the matter covered by the order, and the applicant may be directed to obtain regular bail within short period after filing of FIR.

Conclusion:

In a nutshell it can be epitomized that discretion of grant of bail is something which courts of all echelons need to exercise in their day-to-day functioning. It is true that there cannot be a straitjacket formula which can ensure exercise of such discretion in the most reasonable and prudent manner possible, but the broad guidelines which have been laid down by the Hon'ble Supreme Court and the High Courts, from time to time, certainly broaden our horizons towards understanding the various nuances involved in dealing with bail matters and steer us in the proper direction. It is equally true that every case is peculiar in its facts and circumstances, and no amount of Artificial Intelligence can compare with the reasoning and prudence as displayed by a Judge. Therefore, in order to ensure the most judicious disposal of bail matters, it is imperative that the judicial mind should be applied keeping in perspective the facts and circumstances of each case, and within the broad confines of the legal pronouncements.

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Provisions under the Cr.P.C.. For procuring appearance of the accused; how to secure the appearance of an accused residing outside the territorial jurisdiction of court (i.e. out of district / state/country)?

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Provisions under the Cr.P.C.. For procuring appearance of the accused; how to secure the appearance of an accused residing outside the territorial jurisdiction of court (i.e. out of district/state/country)?

INTRODUCTION

The Fair trial is constitutionally protected right under Article 21 of the Constitution of India. The attributes of fair trial include, presumption of innocence, right to be defended by a lawyer, trial of accused person in his presence. Trial in presence of accused enables him to make proper defence. Cr.P.C. lays down several provisions that ensured that the accused is well represented before a court throughout the trial. Section 303 of the Code of Criminal Procedure, 1973(CrPC) and Article 22(1) of the Constitution of India provide right to the accused person, to be defended by a pleader of his choice. Section 304, CrPC provides that in a trial before the Court of Session, if the accused is not represented by a pleader, and the court believes that accused does not have sufficient means to engage a pleader, a pleader shall be assigned for defence of accused, at the expense of the State.

Section 273 of the Code of Criminal Procedure, 1973 (CrPC) requires that, except as otherwise expressly provided, all evidence to be taken in presence of accused or when his personal attendance is dispensed with, in presence of his pleader. Section 299 and Section 317 of the Code are exceptions to Section 273, which describe the circumstances when Courts are justified in recording evidence in absence of accused. Therefore, unless the personal attendance of accused is dispensed with under section 273 and evidence is recorded as per provisions of Section 299 and 317 CrPC, Section 273 contemplates recording of evidence in presence of accused. Except the circumstances as described above, the recording of evidence in absence of accused is a serious mistake which can be rectified only by retrial/de novo trial. Hence, presence of accused before court is necessary for ensuring fair trial and natural justice. There is huge pendency of criminal cases in the courts due to nonappearance of accused at different stages of the criminal proceedings. In some cases, non-appearances of accused are due to ignorance of pending proceedings against them but in other cases non-appearances are deliberate to evade the trial. Without procuring presence of accused starting and conclusion of trial is unfeasible. Non-appearance of accused severely affects inquiry, trial and execution of warrant of conviction and causes hurdle in smooth functioning of courts and disposal of cases.

PROCESSES TO COMPEL APPEARANCE OF THE ACCUSED PERSONS

Chapter VI of the Code of Criminal Procedure, 1973 (CrPC) deals with the processes to compel appearance of accused or any person before a court.

The Chapter VI of the CrPC. comprises four parts:

Part-A-Summons (sections 61 to 69),

Part- B, Warrant of arrest (sections 70 to 81),

Part- C, Proclamation and attachment (sections 82 to 86) and Part –D, Other rules regarding process (sections 87-90).

Further, Section 105, Chapter VII, Part-D of the CrPC., deals with reciprocal arrangement regrading processes.

Summons, warrant of arrest, proclamation requiring the appearance of an accused and order of attachment are the modes provided in CrPC, to compel appearance of accused persons. The Court has discretion to issue summons or bailable warrant or non bailable warrant to compel appearance of accused. For procuring appearance of accused the Court may in its discretion issue summons or bailable warrant, even in the case of non bailable offences or graver offences. But merely because in non bailable or graver offence cases summons and bailable warrant is issued, does not entitle accused to be released on bail as a matter of right. The only purpose of issuance of process is to procure appearance of accused

Provisions for procuring appearance of an accused as provided in CrPC are as under;

CHAPTER VI, CrPC.

Part A-Summons (Sections 61 to 69)

Summons are issued by the Court against the person, whose appearance is necessary before the Court, to answer the offence he is charged with. Section 61 provides the form of summons and Section 62 says how summons is to be served. Section 63 talks about service of summons upon corporate bodies and societies and Section 64 provides that if a person cannot be found even after due diligence, a copy of summons can be served upon male member of family residing with the person summoned. Section 65 lays down substituted mode of service of summons, in a case, if a person cannot be served with the summons as provided under Section 62, 63 and 64. Section 66 says that in case summons is to be served to government servant, the court shall send the summons to head of the office in which such person is employed, which will serve upon the summons. Section 67 deals with service of summons at any place outside its local jurisdiction.

61. Form of summons.—Every summons issued by a Court under this Code shall be in writing, in duplicate, signed by the presiding officer of such Court or by such other officer as the High Court may, from time to time, by rule direct, and shall bear the seal of the Court.

Form 1 of the Second Schedule of the Code, provides the format of the summons to an accused person.

62. Summons how served. — (1) Every summons shall be served by a police officer, or subject to such rules as the State Government may make in this behalf, by an officer of the Court issuing it or other public servant.

(2) The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.

(3) Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

63. Service of summons on corporate bodies and societies—Service of a summons on a corporation may be effected by serving it on the secretary, local manager or other principal officer of the corporation, or by letter sent by registered post, addressed to the chief officer of the corporation in India, in which case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

Explanation.— In this section, "corporation" means an incorporated company or other body corporate and includes a society registered under the Societies Registration Act, 1860 (21 of 1860).

64. Service when persons summoned cannot be found—Where the person summoned cannot, by the exercise of due diligence, be found, the summons may be served by ***leaving one of the duplicates for him with some adult male member of his family residing with him,*** and the person with whom the summons is so left shall, if so, required by the serving officer, sign a receipt therefor on the back of the other duplicate.

Explanation—A servant is not a member of the family within the meaning of this section.

65. Procedure when service cannot be effected as before provided.—If service cannot by the exercise of due diligence be effected as provided in section 62, section 63 or section 64, the ***serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides;*** and thereupon the Court, after making such inquiries as it thinks fit, may either declare that the summons has been duly served or order fresh service in such manner as it considers proper.

66. Service on Government servant.—(1) Where the person summoned is in the active service of the Government, the Court issuing the summons shall ordinarily send it in duplicate to the head of the office in which such person is employed; and such head shall thereupon cause the summons to be served in the manner provided by section 62, and shall return it to the Court under his signature with the endorsement required by that section. (2) Such signature shall be evidence of due service.

67. SERVICE OF SUMMONS OUTSIDE LOCAL LIMITS—Section 67 of the codes says:

> "When a Court desires that a summons issued by it shall be served at any place ***outside its local jurisdiction,*** it shall ordinarily send such summons in duplicate ***to a Magistrate within whose local jurisdiction the person summoned resides, or is, to be there served."***

68. Proof of service in such cases and when serving officer not present.—(1) When a summons issued by a Court is served outside its local jurisdiction, and in any case where the officer who has served a summons is not present at the hearing of the case, an affidavit, purporting to be made before a Magistrate, that such summons has been served, and a duplicate of the summons purporting to be endorsed (in the manner provided by section 62 or section 64) by the person to whom it was delivered or tendered or with whom it was left, shall be admissible in evidence, and the statements made therein shall be deemed to be correct unless and until the contrary is proved. (2) The affidavit mentioned in this section may be attached to the duplicate of the summons and returned to the Court.

Section 69 is not relevant for present purpose as it deals with service of summons to witness by post.

NON-ATTENDANCE IN OBEDIENCE TO AN ORDER OF PUBLIC SERVANT

Section 174 of the Indian Penal Code,1860 prescribes six-month imprisonment or fine upto Rs 1000/- or both, if any person intentionally does not attend in obedience to an order from Court, after issuance of summons, notice, order or proclamation to attend in person or by agent. Section 195 CrPC prescribes that no Court shall take cognizance of any offence punishable under sections 172 to 188(both inclusive) of the Indian Penal Code,1860, except a complaint in writing by the public servant.

PART- B, WARRANT OF ARREST, SECTIONS 70 TO 81 CrPC:

If summons is effected upon accused and even after being duly served, he fails to appear or offence is of serious nature, the court can take recourse of warrant of arrest for procuring appearance of the person accused. Section 70 provides form of warrant. Section 72 provides that normally warrant of arrest to be directed to police office for execution. But, if immediate execution is required and police officer is not available, warrant may be directed to any other person for execution.

Sections 78 to 81 provide for execution of warrant against accused outside local jurisdiction in accordance with procedure laid down in Sections 79 and 80 of the Code.

70. Form of warrant of arrest and duration.—(1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court and shall bear the seal of the Court.

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

Form 2 of the Second Schedule of the CrPC, provides the format of warrant of arrest.

In the **Raghuvansh Dewanchand Bhasin v. State of Maharashtra, (2012) 9 SCC 791: (2012) 4 SCC (Cri) 679** Hon'ble Apex Court issued guidelines to be adopted in all cases where

non-bailable warrants are to be issued by the courts, para 28.3 and 28.4 of the judgment are as under:—

"28.3. The presiding Judge of the Court (or responsible officer specially authorized for the purpose in case of High Courts) issuing the warrant should put his full and legible signatures on the process, also ensuring that Court seal bearing complete particulars of the Court is prominently endorsed thereon;

28.4. The court must ensure that warrant is directed to a particular police officer (or authority) and, unless intended to be open-ended, it must be returnable whether executed or unexecuted, on or before the date specified therein;"

Therefore, warrant should bear full legible signature of presiding officer of court, particulars and seal of court. Further, Section 70(2) CrPC says that a warrant of arrest shall remain in force until it is cancelled by the issuing court or until it is executed.

The Court must ensure that warrant of arrest must be returned executed/ unexecuted on or before specified date on warrant, unless warrant issued is open ended.

71. Power to direct security to be taken.—(1) Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.

(2) The endorsement shall state— (a) the number of sureties; (b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound; (c) the time at which he is to attend before the Court.

(3) Whenever security is taken under this section, the officer to whom the warrant is directed shall forward the bond to the Court.

Although, Sections 70, 71, Form 2 of the Second Schedule of the CrPC do not use the expression bailable or non bailable warrant but, section 71 of the CrPC specifies the endorsements which can be made on warrant to make aware the executing authority and person against whom warrant issued that the warrant is of bailable nature. Section 71 authorizes the court issuing a warrant for the arrest of any person to make the warrant bailable warrant. Power is vested in court to issue bailable or non bailable warrant, judiciously depending upon facts and circumstances of the case. If bailable warrant is issued for attendance of accused, it must bear date and time when accused has to attend the court. If at the time of execution of bailable warrant the accused gives required security and is released accordingly, he is bound to appear in

the court on the date and time specified in the warrant. The purpose of security is ensuring attendance of accused before court.

In **Raghuvansh Dewanchand Bhasin v. State of Maharashtra reported in (2012) 9 SCC 791: (2012) 4 SCC (Cri) 679,** it has been held by Hon'ble Apex Court:

"Be that as it may, it is for the court, which is clothed with the discretion to determine whether the presence of an accused can be secured by a bailable or non-bailable warrant to strike the balance between the need of law enforcement on the one hand and the protection of the citizen from highhandedness at the hands of the law-enforcement agencies on the other. The power and jurisdiction of the court to issue appropriate warrant against an accused on his failure to attend the court on the date of hearing of the matter cannot be disputed. Nevertheless, such power has to be exercised judiciously and not arbitrarily, having regard, inter alia, to the nature and seriousness of the offence involved; the past conduct of the accused; his age and the possibility of his absconding."

12. In **Inder Mohan Goswami v. State of Uttaranchal [(2007) 12 SCC 1: (2008) 1 SCC (Cri) 259],** Hon'ble Apex Court, in paras 53-55 held:—

"53. Non-bailable warrant should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired result. This could be when:

- *it is reasonable to believe that the person will not voluntarily appear in court; or*
- *the police authorities are unable to find the person to serve him with a summon; or*
- *It is considered that the person could harm someone if not placed into custody immediately.*

54. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summons or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the criminal complaint or FIR has not been filed with an oblique motive.

55. In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the court's proceeding intentionally, the process of issuance of the non-bailable warrant should be

resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants."

72. Warrants to whom directed.—(1) A warrant of arrest shall ordinarily be directed to ***one or more police officers;*** but the Court issuing such a warrant may, if its immediate execution is necessary and ***no police officer is immediately available, direct it to any other person or persons,*** and such person or persons shall execute the same.

(2) When a warrant is directed to more officers or persons than one, it may be executed by all, or by any one or more of them.

73. Warrant may be directed to any person.—(1) The Chief Judicial Magistrate or a Magistrate of the first class may direct a warrant to ***any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non-bailable offence and is evading arrest.***

(2) Such person shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enters on, any land or other property under his charge.

(3) When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under section 71.

As per Section 73(1) it is clear that warrant of arrest can be issued against i. escaped convict or ii. against a proclaimed offender or iii. against any person who is accused of a non-bailable offence and is evading arrest. If a person accused of a non-bailable offence is not evading arrest, he can be arrested by police under Section 41 of CrPC and a warrant of arrest under Section 73 of CrPC. would not be required against him.

74. Warrant directed to police officer.—A warrant directed to any police officer may also be executed by any other police officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed.

75. Notification of substance of warrant.—The police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant.

76. Person arrested to be brought before Court without delay.—The police officer or other person executing a warrant of arrest shall (subject to the provisions of section 71 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person: Provided that such delay shall not, in any case, exceed Twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

77. Where warrant may be executed.—A warrant of arrest may be executed at any place in India. The Schedule II of the CrPC. does not put any restriction upon police power to execute warrant of arrest in any place in India.

SECTIONS 78 TO 81 PROVIDE FOR EXECUTION OF WARRANT AGAINST ACCUSED OUTSIDE LOCAL JURISDICTION IN ACCORDANCE WITH PROVISIONS OF SECTION 79 and 80.

78. Warrant forwarded for execution outside jurisdiction.—(1) When a warrant is to be executed outside the local jurisdiction of the Court issuing it, such Court may, ***instead of directing the warrant to a police officer within its jurisdiction, forward it by post or otherwise to any Executive Magistrate or District Superintendent of Police or Commissioner of Police within the local limits of whose jurisdiction it is to be executed;*** and the Executive Magistrate or District Superintendent or Commissioner shall endorse his name thereon, and if practicable, cause it to be executed in the manner hereinbefore provided.

(2) The Court issuing a warrant under sub-section (1) shall forward, along with the warrant, the substance of the information against the person to be arrested together with such documents, if any, as may be sufficient to enable the Court acting under section 81 to decide whether bail should or should not be granted to the person.

79. Warrant directed to police officer for execution outside jurisdiction.—(1) When a warrant directed to a police officer is to be executed beyond the local jurisdiction of the Court issuing the same, he shall ordinarily take it for ***endorsement either to an Executive Magistrate or to a police officer not below the rank of an officer in charge of a police station, within the local limits of whose jurisdiction the warrant is to be executed.***

(2) Such Magistrate or police officer shall endorse his name thereon and such endorsement shall be sufficient authority to the police officer to whom the warrant is directed to execute the same, and the local police shall, if so required, assist such officer in executing such warrant.

(3) Whenever ***there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or police officer within whose local jurisdiction the warrant is to be executed will prevent such execution, the police officer to whom it is directed may execute the same without such endorsement in any place beyond the local jurisdiction of the Court which issued it.***

80. Procedure on arrest of person against whom warrant issued.—When a warrant of arrest is executed outside the district in which it was issued, the person arrested shall, unless the Court which issued the warrant is within thirty kilometers of the place of arrest or is nearer than the Executive Magistrate or District Superintendent of Police or Commissioner of Police within the local limits of whose jurisdiction the arrest was made, or unless security is taken under section 71, be taken before such Magistrate or District Superintendent or Commissioner.

81. Procedure by Magistrate before whom such person arrested is brought.—(1) The Executive Magistrate or District Superintendent of Police or Commissioner of Police shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court:

Provided that, if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, District Superintendent or Commissioner, or a direction has been endorsed under section 71 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate, District Superintendent or Commissioner shall take such bail or security, as the case may be, and forward the bond, to the Court which issued the warrant:

Provided further that if the offence is a non-bailable one, it shall be lawful for the Chief Judicial Magistrate (subject to the provisions of section 437), or the Sessions Judge, of the district in which the arrest is made on consideration of the information and the documents referred to in sub- section (2) of section 78, to release such person on bail.

(2) Nothing in this section shall be deemed to prevent a police officer from taking security under section 71.

The Second Schedule of the CrPC., Form 3 provides the format of bond and bail bond after arrest under a warrant.

Part-C.—PROCLAMATION AND ATTACHMENT, SECTIONS 82 TO 86.

Proclamation

Purpose of proclamation and attachment is to compel the appearance of a person, who is evading arrest even after issuance of warrant against him. Provisions of proclamation and attachment are provided in Chapter VI, Part C of the CrPC. Proclamation under Section 82 can be issued by a Court only in respect of a person, against whom a warrant has been issued by it and court has satisfied itself that, accused has absconded or is concealing himself to avoid the service of warrant.

82. Proclamation for person absconding.—(1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has ***absconded or is concealing himself so that such warrant cannot be executed,*** such Court may publish a written proclamation requiring him to appear at a specified place and at a specified ***time not less than thirty days from the date of publishing*** such proclamation.

(2) The proclamation shall be published as follows:

(i) (a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village;

(c) a copy thereof shall be affixed to some conspicuous part of the Court- house;

(ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause (i) of sub-section (2), shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

(4) Where a proclamation published under sub-section (1) is in respect of a person accused of an **offence punishable under section 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 of the Indian Penal Code (45 of 1860)**, and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, **pronounce him a proclaimed offender and make a declaration to that effect.**

(5) The provisions of sub-sections (2) and (3) shall apply to a declaration made by the Court under sub-section (4) as they apply to the proclamation published under sub-section (1).

The Second Schedule of the CrPC., Form 4 provides the format of proclamation requiring the appearance of accused person.

Under section 82(1) CrPC declaration of proclaimed offender shall be made only with regard to a person accused of an offence punishable under the sections 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 of the Indian Penal Code (45 of 1860), mentioned in sub section (4) of section 82 Cr. P.C and a person accused of other less serious offences can be declared as proclaimed person and not proclaimed offender.

NON–APPEARANCE IN RESPONSE TO A PROCLAMATION UNDER SECTION 82 CRPC-

In order to restrict the tendency of the accused/criminal not to attend the court in response to proclamation, by 2005 amendment Section 174A was added in the Indian Penal Code, 1860, which provides for imprisonment for a term which may extended to three years with or without fine in case a person/accused fails to appear as required under Section 82(1) CrPC and imprisonment for a term of upto seven years with fine in case he has been declared a proclaimed offender under section 82(4) CrPC. The offence under section 174- A of the Indian penal code is cognizable and non- bailable. Exhorting registration of FIR under Section 174-A is also coercive step to compel appearance of accused in the court.

ATTACHMENT

If warrant of arrest is returned unserved as accused could not be found and thereupon proclamation is duly issued and published requiring the accused to appear and answer charge, yet accused fails to put his appearance before court, order for attachment of his (proclaimed person's) movable or immovable property as envisaged under section 83 CrPC. is to be passed. Further, if court is satisfied that person in relation to whom proclamation is to be issued is about to dispose of or remove his property from the local jurisdiction of court, order of attachment can be passed simultaneously at the time of issuance of proclamation.

83. Attachment of property of person absconding.—(1) The Court issuing a proclamation under section 82 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person:

Provided that where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise, that the person in relation to whom the proclamation is to be issued, —

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local jurisdiction of the Court, it may order the attachment simultaneously with the issue of the proclamation.

(2) Such order shall authorize the attachment of any property belonging to such person within the district in which it is made; and it shall authorize the attachment of any property belonging to such person without such district when endorsed by the District Magistrate within whose district such property is situate.

(3) If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made—

(a) by seizure; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to the State Government, be made through the Collector of the district in which the land is situate, and in all other cases—

(a) by taking possession;

(b) by the appointment of a receiver;

(c) by an order in writing prohibiting the payment of rent on delivery of property to the proclaimed person or to any one on his behalf;

(d) by all or any two of such methods, as the Court thinks fit.

(5) If the property ordered to be attached consists of live-stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under the Code of Civil Procedure, 1908 (5 of 1908).

The Form 7, Second Schedule of the CrPC. provides the format of order of attachment to compel the appearance of an accused.

The Form 8 Second Schedule of the CrPC. provides the format of order authorizing an attachment by District Magistrate or Collector.

Section 84 deals with claims and objections to attachment made under Section 83 CrPC. Sections 85 talks about release, sale and restoration of attached property and Section 86 enumerates provisions of appeal from order rejecting application for restoration of attached property.

D.—Other rules regarding processes, Sections 87-90

Section 87 of the CrPC., empowers court to issue warrant of arrest for appearance of any person in lieu of, or in addition to, summons.

87. Issue of warrant in lieu of, or in addition to, summons.—A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person, issue, **after recording its reasons in writing, a warrant for his arrest—**

(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees **reason to believe that he has absconded or will not obey the summons;** or

(b) if at such time **he fails to appear and the summons is proved to have been duly served** in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

88. Power to take bond for appearance.—When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court, or any other Court to which the case may be transferred for trial.

Section 88 of the code empowers the court to require bond for appearance of any person present in court, against whom court is empowered to issue summons or warrant. Section 88 is not mandatory and it is matter of judicial discretion. Section 88 is subject to conditions of Sections 436 and 437 of the CrPC and hence depending upon the facts and

circumstances of the case and seriousness of offence, court may refuse to exercise power under section 88 of the CrPC.

Hon'ble Patna High Court in ***Anand Deo Singh v. State of Bihar, 2000 SCC OnLine Pat 311: (2000) 2 PLJR 686],*** *in para 18, has held;*

> *"18. In my considered view, Section 88 of the Code is an enabling provision, which vests discretion in the Magistrate to exercise power under the said section asking the person to execute a bond for appearance only in bailable cases or in trivial cases and it cannot be resorted to in cases of serious offences. Section 436 of the Code itself provides that bond may be asked for, only in cases of bailable offences."*

89. Arrest on breach of bond for appearance.—When any person who is bound by any bond taken under this Code to appear before a Court, does not appear, the officer presiding in such Court may issue a warrant directing that such person be arrested and produced before him. Section 90 says that provisions of this Chapter generally applicable to summonses and warrants of arrest.

SERVICE OF SUMMONS TO AN ACCUSED, EXECUTION OF WARRANT FOR ARREST OF ACCUSED PERSON Etc., OUTSIDE THE LOCAL JURISDICTION OF A COURT

Chapter-VII, Section -105 and Chapter-VII A of the CrPC deals with the provisions related to service of summons to an accused person, execution of warrant for arrest of accused person etc., within the local jurisdiction of a Court in any State or area in India outside the said territories and in any country or place outside India.

Section 105 and Chapter VIIA of CrPC, Section 59 and Section 61 of the Prevention of Money-Laundering Act, 2002, Section 10 of the Fugitive Economic Offenders Act, 2018, etc., provide for service of summons, notices and judicial processes in "contracting State" (any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise). The summons, notices and judicial processes is to be sent by the Court of competent jurisdiction to Internal Security (IS)-II Division, Ministry of Home Affairs (MHA), which further sends the summons, notices and judicial process to the foreign country concerned either directly or through Indian Mission/Embassy/Diplomatic Channels for service on the person through the Competent Authorities in the foreign country.

105. Reciprocal arrangements regarding processes.—(1) Where a Court in the territories to which this Code extends (hereafter in this section referred to as the said territories) desires that—

(a) a summons to an accused person, or

(b) a warrant for the arrest of an accused person, or

(c) a summons to any person requiring him to attend and produce a document or other thing, or to produce it, or

(d) a search-warrant, issued by it shall be served or executed at any place,

(i) within the local jurisdiction of a Court in any State or area in India outside the said territories, it may send such summons or warrant in duplicate by post or otherwise, to the presiding officer of that Court to be served or executed; and where any summons referred to in clause (a) or clause (c) has been so served, the provisions of section 68 shall apply in relation to such summons as if the presiding officer of the Court to whom it is sent were a Magistrate in the said territories;

(ii) in any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country or place for service or execution of summons or warrant in relation to criminal matters (hereafter in this section referred to as the contracting State), it may send such summons or warrant in duplicate in such form, directed to such Court, Judge or Magistrate, and send to such authority for transmission, as the Central Government may, by notification, specify in this behalf.

(2) Where a Court in the said territories has received for service or execution—

(a) a summons to an accused person, or

(b) a warrant for the arrest of an accused person, or

(c) a summons to any person requiring him to attend and produce a document or other thing, or to produce it, or

(d) a search-warrant, issued by—

(i) a Court in any State or area in India outside the said territories;

(ii) a Court, Judge or Magistrate in a contracting State,

it shall cause the same to be served or executed] as if it were a summons or warrant received by it from another Court in the said territories for service or execution within its local jurisdiction; and where—

(i) a warrant of arrest has been executed, the person arrested shall, so far as possible, be dealt with in accordance with the procedure prescribed by sections 80 and 81,

(ii) a search-warrant has been executed, the things found in the search shall, so far as possible, be dealt with in accordance with the procedure prescribed by section 101:

Provided that in a case where a summons or search-warrant received from a contracting State has been executed, the documents or things produced or things found in the search shall be forwarded to the Court issuing the summons or search-warrant through such authority as the Central Government may, by notification, specify in this behalf.

CHAPTER VIIA RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

105A. Definitions.—In this Chapter, unless the context otherwise requires,

(a) ***"contracting State" means any country or place outside India*** in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise;

(b) …….

(c) ……

(d) .....

105B. Assistance in securing transfer of persons.—(1) Where a Court in India, in relation to a criminal matter, desires that a **warrant for arrest of any person to attend** or produce a document or other thing **issued by it shall be executed in any place in a contracting State, it shall send such warrant in duplicate in such form to such Court, Judge or Magistrate through such authority, as the Central Government may, by notification, specify in this behalf and that Court, Judge or Magistrate, as the case may be, shall cause the same to be executed.**

(2) Notwithstanding anything contained in this Code, if, in the course of an investigation or any inquiry into an offence, an application is made by the investigating officer or any officer superior in rank to the investigating officer that the attendance of a person who is in any place in a contracting State is required in connection with such investigation or inquiry and the Court is satisfied that such attendance is so required, it shall issue a summons or warrant, in duplicate, against the said person to such Court, Judge or Magistrate, in such form as the Central Government may, by notification, specify in this behalf, to cause the same to be served or executed.

(3) Where a Court in India, in relation to a criminal matter, has received a warrant for arrest of any person requiring him to attend or attend and produce a document or other thing in that Court or before any other investigating agency, issued by a Court, Judge or Magistrate in a contracting State, the same shall be executed as if it is the warrant received by it from another Court in India for execution within its local limits.

(4) Where a person transferred to a contracting State pursuant to sub-section (3) is a

prisoner in India, the Court in India or the Central Government may impose such conditions as that Court or Government deems fit.

(5) Where the person transferred to India pursuant to sub-section (1) or sub- section (2) is a prisoner in a contracting State, the Court in India shall ensure that the conditions subject to which the prisoner is transferred to India are complied with and such prisoner shall be kept in such custody subject to such conditions as the Central Government may direct in writing.

105K. Procedure in respect of letter of request.—Every letter of request, summons or warrant, received by the Central Government from, and every letter of request, summons or warrant, to be transmitted to a contracting State under this Chapter shall be transmitted to a contracting State or, as the case may be, sent to the concerned Court in India in such form and in such manner as the Central Government may, by notification, specify in this behalf.

105L. Application of this Chapter.—The Central Government may, by notification in the Official Gazette, direct that the application of this Chapter in relation to a contracting State with which reciprocal arrangements have been made, shall be subject to such conditions, exceptions or qualifications as are specified in the said notification.

Where a Court of competent jurisdiction desires that summons, warrants, other documents issued by it is to be served or executed **in any country or place outside India,** it may send such summons or warrant in duplicate to Internal Security(IS)-II Division, Ministry of Home Affairs (MHA), which would further send the same to the foreign country concerned either directly or through Indian Mission/Embassy/Diplomatic Channels for service on the person through the Competent Authorities in the foreign country.

Government of India, Ministry of Home Affairs vide letter dated 04.12.2019 issued a comprehensive guideline regarding service of summons/notices/judicial documents etc. on the persons residing abroad.

EXTRADITION OF FUGITIVE

Extradition is a process by which one State upon request of another State, surrenders/ transfers a person accused or convicted of an offence to the latter. In India, Extradition of fugitive/ person accused is done as per The Extradition Act, 1962, Extradition Treaty or other Extradition Arrangement or International Conventions signed by India with the country concerned. After filing of charge-sheet and cognizance of offence by the court of competent jurisdiction, Extradition request for an accused/ fugitive to face trial in the case, can be made by the court on the basis of evidence made available in the charge sheet. The Ministry of External Affairs (MEA) is the Central Authority for the extradition requests. MEA has issued guidelines for requirement of documents and information for extradition requests. After filing of Charge- sheet and cognizance of offence, the concerned Court making request for extradition of person, is required to make request to MEA in the form of affidavit, in first person along with all supporting documents and information as per MEA guidelines.

REFERENCES/MODE OF CITATION FOR WEBSITE/ELECTRONIC SOURCES

1. Atma Ram vs. State of Rajasthan, (2019) 20 SCC 481
2. Chapter VI, Code of Criminal Procedure,1973
3. Chapter VII and VIIA Code of Criminal Procedure,1973
4. Chapter XIV, Code of Criminal Procedure,1973
5. Second Schedule of Code of Criminal Procedure,1973
6. Section 174, Section 174- A of the Indian Penal Code,1860
7. Code of Criminal Procedure,1973, Indian Penal Code, 1860, The Constitution of India.
8. Raghuvansh Dewanchand Bhasin vs. State of Maharashtra, (2012) 9 SCC 791: (2012) 4 SCC (Cri) 679
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Topic No. – 06

The requirement of physical presence of the accused in court during inquiry/investigation, trial and judgment; whether the physical presence of accused is required for compromise of cases u/s 320 of Cr.P.C. and plea bargaining?

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The requirement of physical presence of the accused in court during inquiry/investigation, trial and judgment; whether physical presence of accused is required for compromise of cases u/s 320 of Cr.P.C. and plea bargaining?

1) Introduction:

Refined societies are conscious of their people's rights and strive to ensure that brute state power and cunning mechanization may not be used to victimise innocent and poor. To secure this end and follow the principles of natural justice, the Code of Criminal Procedure, 1973, contains provisions mandating the presence of the accused at various stages of criminal proceedings so that he may adequately defend himself. With the passage of time, it has come to light that the requirement of physical presence of accused during trial has turned out to be more of a bane than a boon.

Under the Indian Criminal Justice system an accused is presumed to be innocent until proven guilty. However, unduly long trials and the insistence on the presence of the accused during the trial is an ordeal not lesser in any way than conviction and incarceration.

Moreover insisting on the physical presence of the accused leads to unnecessary delay in trial. Practical reality shows that a large majority of pending cases are lingering for the appearance of the accused.

Under such circumstances, it would be propitious to reconsider the question of necessity of physical presence of the accused during trial, investigation, enquiry, etc. in the light of legal provisions, evolving technology and latest case laws.

2) Physical presence of accused during Investigation:

The presence of the accused during investigation may be required for any of the following purposes:

(A) For recording his statement under section 161 CrPC.

(B) For test identification parade.

(C) For conducting scientific tests such as Narco- Analysis Test, DNA Tests, etc.

(D) For recording his confession.

(2.1) For recording the statement under section 161 CrPC:

Section 161 empowers the police officer investigating the case to record the statement of the witnesses. Before 2008 Amendment section 161 read as under: —

*"161. **Examination of witnesses by police.**—(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.*

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records."

In the case of **Pakla Narayan Swami Vs. Emperor[1],** it was held that the words "any person" in section 161 would include the person then or ultimately the accused. Therefore, statement of accused can be recorded under section 161 CrPC.

This view was again reiterated in the case of **Mahabir Vs. State of Bihar[2].**

In the case of **Nandini Satpathy vs PL Dani[3],** the Hon'ble Supreme Court held that :

"any person supposed to be acquainted with the facts and circumstances of the case includes an accused person who fills that role because the police suppose him to have committed the crime and must, therefore, be familiar with the facts."

Thus from these case laws it is evident that the statement of the accused can be recorded under section 161. Prior to the 2008 Amendment, for the purpose of recording the statement, the accused was required to be present before the investigating officer. However in 2008 a proviso was added to section 161 which provided that *statement made under this sub-section may also be recorded by audio-video electronic means.*

Thus after the 2008 Amendment physical presence of the accused is not required for recording his statement under section 161 CrPC

(2.2) For the purpose of identification:

According to section 9 of Indian Evidence Act, facts which establish the identity of anything or person whose identity is relevant, are relevant in so far as they are necessary for that purpose.

Identification of the accused is one of the most crucial aspect of a criminal trial where the

1. AIR 1939 PC 47
2. (1972) 1 SCC 748
3. (1978) 2 SCC 424

identity is disputed. Test identification parade is conducted to enable the investigating officer confirm the identity of the accused and test the veracity of the witness claiming to have identified the accused.

In the case of **State of Maharashtra v Suresh**[4] it was observed that "The object of conducting a Test Identification Parade is twofold. First is to enable the witness to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them during the commission of the crime. Second is to satisfy the investigating authorities that the prisoner whom they suspect is the one that the witness has seen."

For test identification parade persons resembling the accused in facial and body structure are lined up and the witness is asked to identify the accused, generally in the presence of a magistrate. Traditionally the accused is required to be physically present at the time of test identification parade.

However in **D. Gopalakrishnan vs. Sadanand Naik and Ors**[5]**.** it was held that *"during the course of the investigation, if the witness had given the identifying features of the assailants, the same could be confirmed by the investigating officer by showing the photographs of the suspect and the investigating officer shall not first show a single photograph but should show more than one photograph of the same person, if available. If the suspect is available for identification or for video identification, the photograph shall never be shown to the witness in advance."*

Thus it is evident from the above case law that identification of the accused can be done through video as well as photographs. Requirement of physical presence of the accused for the purpose of identification is now obliterated. Test identification parade has been substituted by video parades using complex software. In Britain, for example, VIPER (Video Identification Parade Electronic Recording) and PROMAT (Profile Matching) are used for facilitating identification of accused. These systems have database of images which are sequentially used for the identification.

2.3) For conducting scientific tests and medical investigation:

Many a times, for proper investigation certain scientific tests may be required to be conducted on the accused. Sections 53 and 53 A of CrPC are relevant in this regard. Section 53 provides:—

> *"Section 53 :* ***Examination of accused by medical practitioner at the request of police officer:—****(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical*

4. (2000) 1 SCC 471

5. AIR 2004 SC 4965

practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonable necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

Explanation.—In this section and in sections 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 finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) "registered medical practitioner" means a medical practitioner who possess any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956(102 of 1956) and whose name has been entered in a State Medical Register."

Section 53 A provides that:

53A. ***Examination of person accused of rape by medical practitioner.****—(1) When a person 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, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.*

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:--

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling.

(v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section."

Thus both these section provide that where the accused is arrested for committing an offence of rape or an offence of such a nature as would lead to a reasonable inference that his medical examination may provide evidence of the commission of an offence, then it would be lawful to conduct such medical examination and force may be used to subject him to such examination.

Since the sections themselves provide that these examinations may be conducted when the accused is arrested therefore the physical presence of the accused during investigation is required for these examinations.

In the case of **Ritesh Sinha vs State of Uttar Pradesh[6],** the Hon'ble Supreme court has held that the accused may be forced to give his voice sample. Thus the presence of the accused may be required during the stage of investigation to collect his voice samples as well.

2.4) For recording the confession of the accused:

Presence of the accused may also be required during investigation for the purpose of recording his confession u/s 164 CrPC.

By the Code of Criminal Procedure Amendment Act, 2008, a new proviso was added to subsection 1 of section 164 which provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence.

Thus now there is no need of physical presence of accused for the purpose of recording his statement under section 164 CrPC.

3) Requirement of Physical presence of the accused during enquiry u/s 202:

An enquiry under section 202 CrPC is conducted by the magistrate where after the receipt of

6. (2019)8SCC1

the complaint of which he is authorised to take cognizance, the magistrate thinks it fit to postpone the issue of process and either enquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

The scope of enquiry or investigation under section 202 of CrPC is different from investigation under 156 CrPC. Investigation under section 156 CrPC is conducted pre cognizance where enquiry under section 202 is conducted post cognizance. More over in investigation under section 156 CrPC the police officer may record the statement of the accused under section 161 CrPC but under section 202 CrPC the defence version is not to be taken.

With reference to enquiry under section 202 CrPC Hon'ble Supreme Court in **Chandra Deo Singh vs Prokash Chandra Bose**[7] has held that that *"an accused person does not come into the picture at all till process is issued. Even though he may be allowed to be represented by counsel he has no right to take part in the proceedings nor has the Magistrate jurisdiction to permit him to do so. The Magistrate cannot put questions at the instance of a person named as accused but against whom no process has been issued nor can he examine any witnesses at the instance of that person."*

Thus there is no requirement of physical presence of the accused during enquiry under section 202 CrPC.

4) Presence of accused during trial

Criminal Procedure Code contains provisions to ensure that the rights of the accused are not scuttled during the trial and he gets fair chance of defending himself. Protection of valuable rights of the Accused during trial is the solemn duty of the court. To secure this end, the Code of Criminal Procedure provides that:

(1) Charge or summary of accusation should be explained to the accused

(2) Evidence should be recorded in his presence (Section 273 CrPC)

(3) All the evidence appearing against him should be put to him while recording his statement under section 313 CrPC.

However, as already seen, insisting on the physical presence of the accused throughout the trial leads to unnecessary harassment and undue delay in trial.

Therefore it is important to have a look at various provisions in CrPC that provide exemption from appearance to the accused. These provisions are:

(1) Section 205 CrPC which empowers the magistrate to dispense with personal attendance of accused.

7. 1963 AIR 1430

(2) Section 317 CrPC which makes provision for enquiries and trial being held in the absence of accused in certain cases

(3) Section 206 CrPC which provides for special summons in case of petty offences.

4.1) Dispensing personal attendance of the accused u/s 205 and 317 CrPC:

Section 273 of CrPC provides that that all the evidence taken in course of trial or other proceeding must be recorded in presence of the accused. However Section 205 CrPC and section 317 CrPC are two specific sections which carve out the exception to this general rule. These sections empower the court to dispense with the personal attendance of the accused. Before proceeding further it would be pertinent to reproduce the provisions of both the sections here:

*"205. **Magistrate may dispense with personal attendance of accused.**—(1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.*

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided."

Thus it is evident from the plain reading of section 205 CrPC that the magistrate may dispense with personal attendance of the accused only when summons have been issued in the case. However, it does not mean that power under section 205 CrPC cannot be exercised in a warrant case.

In **Ram Harsh Das vs. State of Bihar**[8] it has been held that

"Section 205 of the Code does not speak of summons and warrant cases, rather it speaks that whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader. Thus, from a bare reading of both the provisions, it is clear that the Magistrate can exercise a power under Section 205 of the Code even in warrant-cases also, provided he has issued summons under Section 205(1) of the Code instead of warrant. Legislature never intended that power to dispense with personal appearance cannot be exercised in a warrant case. However, a rider has been put that this power has to be exercised only when the Magistrate on being satisfied that the summons should be issued instead of a warrant, issues summons".

Section 317 provides that:—

*"317. **Provision for inquiries and trial being held in the absence of accused in certain cases.**—(1) At any stage of an inquiry or trial under this Code, if the Judge or*

8. 1998 (1) PLJR 502

Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.

Though both these sections provide for dispensing the personal attendance of the accused, they have different scope and purposes. Main difference between sections 205 and section 317 are:

(1) Power under section 205 can be exercised only by a magistrate whereas power under section 317 can be exercised by a magistrate as well as a Sessions Judge.

(2) Power under section 205 can be exercised only when summons have been issued in the first instance whereas there is no such restriction in the case of section 317.

(3) An application under Section 205 can be entertained generally on first appearance of the accused and before the trial has commenced whereas power under section 317 can be exercised at any stage of enquiry or trial.

Scope of Section 205

No categorisation of cases where the power is to be exercised under Section 205 of the Code can be made but generally, Purdanashin women, old and sick persons, factory workers and labourers, busy business people or public functionaries are to be given the benefit of the said provision unless they are facing prosecution in serious offences like murder, rape, misappropriation of money, harassment to women etc.

In **SV Mazumdar & Ors. v. Gujarat State Fertilizer Co. Ltd. & Anr**[9] the Hon'ble Supreme Court observed as under:—

" It has to be borne in mind that while dealing with an application in terms of Section 205 of the Code, the court has to consider whether any useful purpose would be served by requiring the personal attendance of the accused or whether progress of the trial is likely to be hampered on account of his absence. We make it clear that if at any stage the trial court comes to the conclusion that the accused persons are trying to delay the completion of trial, it shall be free to refuse the prayer for dispensing with personal attendance."

9. (2005)4 SCC 173

In **Anand Swarup Agrawal vs. The State of Bihar[10],** the Hon'ble Patna High Court held that in appropriate cases the Magistrate can dispense with the personal attendance of the accused provided that:

(i) He is represented by a counsel in that case and

(ii) He gives an undertaking to the satisfaction of the court that he would not dispute his identity as the particular accused in the case and he has no objection in taking evidence in his absence.

(iii) The learned magistrate has also to bear in mind the nature of the case as also the conduct of the person summoned. The court may also impose conditions to secure the presence of the accused as and when required.

In the case of **Saket Kumar Singh Vs The State of Bihar[11],** Hon'ble Patna High Court has held that benefit of section 205 may be given even in cases where warrant has been issued without recording of the satisfaction of the court that summons were duly served upon the accused.

Following conclusions can be culled out from various case laws discussed above:—

(a) Generally benefit of section 205 CrPC can be given to an accused in non serious offences which do not involve moral turpitude or extreme depravity.

(b) In granting relief under section 205 CrPC, the court must consider the nature of offence, the conduct of the accused and comparative hardship that may be caused vis a vis the benefit of insisting on the physical presence of the accused.

(c) Benefit of section 205 CrPC can be granted if the accused lives very far from the place of occurrence, is sick or of very old age or is a pardanishin lady or is an extremely busy person etc. The list is illustrative and not exhaustive. No strait jacket formula can be laid down for listing cases in which personal attendance of the accused can be dispensed with under section 205 CrPC.

(d) A petition under section 205 is generally maintainable when summons have been issued in the first instance. However, the petition may be entertained even in cases where warrant has been issued without recording the satisfaction of the court about the due service of summons.

(e) In appropriate cases relief under section 205 CrPC may be granted even where the first appearance of the accused is made through a Counsel[12].

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10. 2015(3)PLJR93

11. 2019(1)PLJR549

12. Bhaskar Industries Ltd Vs Bhiwani Denims and Apparels Ltd. AIR2001SC3625

(f) The accused seeking exemption from appearance must give an undertaking that he will not contest his identity.[13]

4.2) Other Provisions dealing with exemption from appearance of the Accused:

(1) **Section 206 CrPC** empowers the magistrate taking cognizance of a petty offence to issue summons to the accused requiring him either to appear in person or by pleader before the Magistrate on a specified date, or if he desires to plead guilty to the charge without appearing before the Magistrate, to transmit before the specified date, by post or by messenger to the Magistrate, the said plea in writing and the amount of fine specified in the summons or if he desires to appear by pleader and to plead guilty to the charge through such pleader, to authorise, in writing, the pleader to plead guilty to the charge on his behalf and to pay the fine through such pleader: Provided that the amount of the fine specified in such summons shall not exceed one thousand rupees.

For the purposes of this section, "petty offence" means any offence punishable only with fine not exceeding one thousand rupees, but does not include any offence so punishable under the Motor Vehicles Act, 19391, or under any other law which provides for convicting the accused person in his absence on a plea of guilty. [206 (2)]

(2) **Section 253 CrPC** provides that an accused to whom a summons has been issued under section 206, may plead guilty without appearing before the magistrate by transmitting to the magistrate a letter containing his plea and also the amount of fine specified in the summons.

(3) Another provision which needs to be taken note of in this context is section 309 CrPC. Though this section primarily deals with adjournments but clause (c) of fourth proviso added to subsection (2) of this section by the 2008 Amendment Act carves out exception to the general rule that evidence should always be recorded in presence of the accused. The section provides that where a witness is present in court but a party or his pleader is not present or the party or his pleader though present in court, is not ready to examine or cross-examine the witness, the court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.

4.3) Requirement of Physical presence of the accused at the time of stating the substance of accusation under section 251:

Section 251 provides that when in a summons case the accused appears or is brought before a magistrate, the particulars of offence of which he is accused shall be stated to him and he shall be asked whether he pleads guilty or has any defence to make but it shall not be necessary to frame a formal charge.

From the plain reading of this section it is evident that appearance of the accused is necessary

13. ibid

for substance of accusation to be stated. A question however may arise as to whether substance of accusation can be explained to the accused through his pleader.

In this regard, Hon'ble Patna High Court in **Thakur Rabindra Kumar vs. The State of Bihar and Ors.**[14] observed that:

> *"A glance at the aforesaid provisions (sections 251 & 253 CrPC) makes it abundantly clear that guilt can be pleaded by the pleader also on behalf of the accused and on pleading of guilt the Magistrate in his discretion can convict the accused in his absence. If the pleader can plead guilty at the stage of statement on substance of accusation by the court, there is no reason to say that substance of accusation cannot be explained to the pleader appearing on behalf of the accused. In the case in hand, the petitioner has already appeared through pleader. Hence, there is no hurdle in the progress of trial in absence of the physical presence of the petitioner as held by the learned Magistrate as well as the revisional Court."*

Similarly in the case of **S.C. Jain vs. The State of Bihar and Ors**[15]**,** it was observed by Hon'ble Patna High Court that:

> *"Section 251 of the Code, in my view, merely requires answer to the question as to whether the accused pleaded guilty or claimed to be tried on the charges and this part can be complied with even by a pleader on behalf of the accused. In a warrant case, personal attendance of the accused may be a must but in a summons case, in my opinion, it is not essential that such formality can be done only by the accused and not by his pleader. The Division Bench of this court has considered this aspect of the matter in great detail and come to the conclusion that at this stage the accused is not expected to say anything more. Their lordships observed "It is not a case, as is to be found under section 342, that the court is required to question the accused person directly and the answers given by the accused have to be recorded in the words as spoken by the accused. The section merely permits an answer on the question as to whether the accused pleaded guilty or claimed to be tried on the charges."*

In both these cases personal appearance of the accused was already dispensed with under section 205 CrPC.

Thus in the light of the ratio of both the above Judgments it can be concluded that where the personal attendance of the accused has been dispensed with, the court may state the substance of accusation to the pleader of the accused.

4.4) Requirement of physical presence of accused at the time of evidence:

Section 273 CrPC provides that;

14. 2019 (4) PLJR10

15. 1984 () PLJR169

"Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader…"

Thus from the bare reading of section 273, it is evident that where the physical presence of the accused has been dispensed, evidence can be recorded in the presence of his pleader. This dispensing of the personal attendance can either be under section 205 CrPC or under section 317 CrPC.

Moreover as seen earlier, clause (c) to fourth proviso of section 309 CrPC inserted by 2008 amendment Act empowers the court that when the witness is present in court but a party or his pleader is not present or is not ready to examine or cross examine the witness, the court may record the statement of the witness and pass such orders as it thinks for dispensing with the examination in chief or cross examination of the witness as the case may be.

Thus now in the light of this proviso to section 309 CrPC, the court may record the statement of the witness even in absence of the accused and his pleader.

4.5) Requirement of physical presence of the accused at the time of statement under section 313 CrPC:

Section 313 makes it obligatory upon the court to put all the circumstances appearing against the accused to him in order to enable him to explain those circumstances personally. Section 313 (1) provides that

"(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the court—

(a) may at any stage, without previously warning the accused put such questions to him as the court considers necessary;

(b) shall after the witnesses for the prosecution have been examined and before he is called on for his defence question him generally on the case"

The use of the term personally itself makes it evident that to explain such circumstances the accused has to be personally present in the court.

However an exception to this general rule is provided by the proviso to clause (b) of sub section 1. As per this proviso in a summons case where the court has dispensed with the personal attendance of the accused, it may also dispense with the examination under clause (b)

Further by Code of Criminal Procedure (Amendment) Act, 2008 a new sub section (5) has been added to section 313 which provides that filing of written statement by the accused shall be sufficient compliance of this section.

The import of section 313 (5) CrPC came up for consideration before the Hon'ble Delhi

High Court in **United Phosphorus Ltd. Vs Sunita Narain & Others[16].** In this case the Hon'ble Delhi High Court upheld the order of the Magistrate by which the accused was permitted to file written statement in compliance of section 313 (5) CrPC.

Even before the 2008 amendment, Hon'ble Supreme Court in the case of **Basavaraj R. Patil v. State of Karnataka[17],** made the following observations:

> *"24. We think that a pragmatic and humanistic approach is warranted in regard to such special exigencies. The word "shall" in Clause (b) to Section 313(1) of the Code is to be interpreted as obligatory on the court and it should be complied with when it is for the benefit of the accused. But if it works to his great prejudice and disadvantage the court should, in appropriate cases, e.g., if the accused satisfies the court that he is unable to reach the venue of the court, except by bearing huge expenditure or that he is unable to travel the long journey due to physical incapacity or some such other hardship, relieve him of such hardship and at the same time adopt a measure to comply with the requirements in Section 313 of the Code in a substantial manner. How could this be achieved?*
>
> *25. If the accused (who is already exempted from personally appearing in the court) makes an application to the court praying that he may be allowed to answer the questions without making his physical presence in court on account of justifying exigency the court can pass appropriate orders thereon, provided such application is accompanied by an affidavit sworn to by the accused himself containing the following matters:*
>
> *(a) A narration of facts to satisfy the court of his real difficulties to be physically present in court for giving such answers.*
>
> *(b) An assurance that no prejudice would be caused to him, in any manner, by dispensing with his personal presence during such questioning.*
>
> *(c) An undertaking that he would not raise any grievance on that score at any stage of the case.*
>
> *26. If the court is satisfied of the genuineness of the statements made by the accused in the said application and affidavit it is open to the court to supply the questionnaire to his advocate (containing the questions which the court might put to him under Section 313 of the Code) and fix the time within which the same has to be returned duly answered by the accused together with a properly authenticated affidavit that those answers were given by the accused himself. He should affix his signature on all the sheets of the answered questionnaire. However, if he does not wish to give any answer to any of the questions he is free to indicate that fact at the appropriate place*

16. 2011 Cri LJ 2077

17. 2000 (8) SCC 740

in the questionnaire (as a matter of precaution the court may keep photocopy or carbon copy of the questionnaire before it is supplied to the accused for an answer.) If the accused fails to return the questionnaire duly answered as aforesaid within the time or extended time granted by the court, he shall forfeit his right to seek personal exemption from court during such questioning."

The ratio laid down in Basavraj's case was again confirmed in the case of **Keya Mukherjee vs. Magma Leasing Limited and Ors (2008) 8 SCC 447.**

Thus, in light of the above discussion, we may conclude that in cases of exigencies, the accused's physical presence may be dispensed with even for recording of statement under section 313 CrPC and the accused may be permitted to file his written statement as sufficient compliance of the provision.

5) Requirement of the physical presence of the accused at the time of compromise u/s 320 CrPC:

Section 320 CrPC provides for compounding of offences. Table attached with section 320 (1) lists the offences which can be compounded without the permission of the court by persons mentioned in column 3 of the table. Table attached with section 320 (2) lists the offences which can be compounded with the permission of the court by the persons mentioned in Column 3 of the table. Sub section 3 of section 320 provides that abetment of compoundable offence or attempt to commit a compoundable offence is also compoundable.

Sub Section 4 clause (a) of section 320 provides that where the person who would otherwise be competent to compound an offence is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may with the permission of the Court compound such offence. Clause (b) of this sub section provides that if the person competent to compound the offence is dead then legal representative of such person may compound the offence.

Sub section (5) of section 320 provides that where the accused has been committed for trial or when an appeal is pending against his conviction then composition shall not be allowed without the leave of the committing Court or the appellate Court, as the case may be.

Sub Section (6) provides that High Court or Sessions court may in exercise of its revisional powers permit the composition of offences.

Sub section (7) of section 320 provides that no offence shall be compounded where the accused is liable to enhanced punishment or to a different kind of punishment because of previous conviction.

Sub section 8 provides that compounding of offence shall have the effect of acquittal whereas sub section 9 provides that no offence shall be compounded except as provided under section 320.

Thus from the reading of section 320 it is evident that only the persons mentioned in column 3 of table of sub section (1) and sub section (2) are entitled to compound the offence. As per this section accused does not have any role in composition of the offence. Thus there is no requirement of the presence of the accused at the time of compounding of offence under section 320 CrPC. In fact this section does not even mention the term compromise anywhere. It only talks about compounding. The term compromise does not occur even once in the entire Code of Criminal Procedure, 1973. In this perspective it is important to understand the meaning of the term compounding.

In the case of **Y.P. Baiju vs State Of Kerala And Ors**[18] the meaning of the term compound was discussed in detail and it was observed that the word compound means forbear from prosecution for various consideration. It may be for material considerations such as receipt of money or compensation or such forbearance may arise out of piety and forgiveness. It was further held in this case that since compounding is different from compromise therefore it is a unilateral act and there is no need of insisting on presence of accused at the time of compounding.

In the case of **Navnitbhai Ratibhai Adhyaru vs. State of Gujarat**[19]**,** the Hon'ble Gujarat High Court laid down the following conclusions with respect to compounding of offences:

"(1) Composition under Section 320, Cr. PC is a unilateral act.

(2) The victim (person shown in column 3 of Section 320(1) and 320(2)) can himself make an application for composition.

(3) It is not necessary for the court to insist on a joint application for composition. The victim can of course make a joint application along with the accused.

(4) It is not necessary for the court to insist on the personal appearance of the accused before court to consider an application for composition under Section 320, Cr. PC…"

Thus it is evident that generally there is no need to insist on the personal attendance of the accused at the time of compounding of offence under section 320 of CrPC.

6) Physical presence of the accused at the time of Judgment:

Section 353 CrPC deals with Judgments and the manner of their pronouncement. Section 353 (5) provides that if the accused is in custody, he shall be brought up to hear the Judgment pronounced.

Section 353 (6) provides that if the accused is not in custody, he shall be required by the court to attend to hear the judgment pronounced except in the following circumstances:

18. 2008 Cri LJ 928

19. 2018 Cri LJ 2680

(a) Where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted.

(b) Where there are more accused than one and one or more of them do not attend the court on the date on which the judgment is to be pronounced, the court may announce the judgment notwithstanding their absence

Thus from the plain reading of section 353, it would be evident that the Judgment has to be pronounced in the presence of the accused except in the two cases mentioned earlier.

However section 353 (7) provides that no judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any party or his pleader on the day of delivery of judgment.

Taking into consideration the effect of section 353 (7) and the principles of natural justice, the Hon'ble Patna High Court in a case[20] held that:—

"Once after the evidence has been recorded, the statement of accused persons recorded, final arguments of both the parties are heard and a date is fixed for delivery of judgment, if on that date the accused person is not present and the judgment is delivered holding him guilty and convicting him, it cannot be said that any prejudice was caused to the accused or there was failure of justice.

... If after hearing the parties, the judgment is reserved then if on the date when the judgment is fixed for being delivered, the accused person is not present, the judgment can be delivered and should be delivered. If the accused is found guilty then necessary steps be taken thereafter to secure his presence."

Thus physical presence of the accused at the time of pronouncement of Judgment can be dispensed with, depending upon the discretion of the court on the basis of the circumstances of the case.

7) Securing presence of accused through Video Conferencing:

"We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree. it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark'

The above lines by Hon'ble Mr. Justice PN Bhagwati from the case of **National Textile Workers' Union v. P.R. Ramakrishnan**[21] are a timely reminder for all of us to keep ourselves abreast of the latest technological development and incorporate them in our functioning.

20. The State of Bihar and Ors. vs. Girija Singh and Ors. 2012(2)PLJR 848

21. MANU/SC/0025/1982 : (1983)ILLJ45SC ,256.

When the world is experimenting with tools of Artificial intelligence, Judiciary cannot afford to dabble in archaic ways. Tools of video conferencing have now become an integral part of the functioning of Indian Judiciary and it would be opportune to consider the legal provisions relating to appearance of accused through video conferencing during various stages of criminal trial.

7.1) Use of Video Conferencing during investigation:

Use of video conferencing facility can be used during the stage of investigation as substitute for physical presence of the accused in following ways:

(a) The statement of the accused can be recorded by audio- video electronic means[22].

(b) The confession of the accused can be recorded through audio video electronic means in the presence of the advocate of the accused.[23]

(c) The magistrate may extend the detention of the accused in Judicial custody on production of the accused either in person or through medium of electronic video linkage[24].

7.2) Framing of Charge through Video Conferencing:

Charges are framed against the accused so that he may know the offence for which he is being tried. They are framed under section 228 CrPC in Sessions triable cases, under section 240 in warrant triable cases based on police report and section 246 in warrant triable cases instituted otherwise than on police report.

The charge is required to be read out and explained to the accused and the court is required to ask the accused whether he pleads guilty or has any defence to make. The accused is required to be present before the court at the time of framing of charges. None of these sections contain any specific provision about explaining of charge through Video Conferencing. However, the State of Chattisgarh has amended section 228 and section 240 CrPC and has provided that the charge may be explained to the accused *"present in person or through the medium of electronic video linkage and being represented by his pleader in the Court."*

Even though no such amendment has been made in any other state to enable the accused to be present through video conferencing at the time of framing of charge but several states have framed rules for conduct of trials through video conferencing including explaining charges through video conferencing. In the case of **VK Sasikala Vs Chief Enforcement Officer[25],** Hon'ble Madras High Court had permitted the accused to answer the charges through video conferencing.

22. Proviso to Section 161 (3) inserted by Code of Criminal Procedure Amendment Act 0f 2009

23. Proviso to section 164(1) inserted by Code of Criminal Procedure Amendment Act 0f 2009

24. Clause (b) of proviso to Section 167 (2)

25. 2018 SCC OnLine Mad 3450

Position in Bihar:

In the State of Bihar, no amendment has been made in the Code of Criminal Procedure to enable the accused to answer the charges through video conferencing. However, rule 3 of Video Conferencing Rules, 2020, provides that video conferencing facilities may be used at all stages of judicial proceedings and proceedings conducted by the court.

Rule 11.1 further provides that the court may frame charges in a criminal trial under CrPC by video conferencing.

Thus in this light, the accused may be permitted to answer the charge through video conferencing.

7.3) Recording the statement under section 313 through video conferencing:

Section 313 CrPC does not contain any specific provision for recording statements under section 313 CrPC through video conferencing. However, in the case of **Basavraj R Patil Vs. State of Karnataka[26],** the Hon'ble Supreme Court held that section 313 had to be considered in light of the revolutionary changes in communication and transmission technology and the marked improvement in facilities for legal aid in the country. It was held by the majority that it was not necessary that in all cases, the accused must answer by personally remaining present in court.

In the matter of **State of Haryana v. CBI and another[27]** and in **Sant Gurmeet Ram Rahim Singh Insan versus CBI and another[28]** Decided on January 28, 2014, Hon'ble Punjab & Haryana High Court held that:

> *"There is no force in the contention of learned Counsel for CBI that by recording statement of accused under Section 313 Cr.P.C. by video conferencing, accused could not deem to be present in person before the court, rather even by video conferencing, accused would be before the court and the questions would be put directly by the court to the accused who will answer the questions of the court by video conferencing. Hence, it is not such a case in which presence of accused is being dispensed with for recording statement under Section 313 Cr.P.C. and is being sought to be recorded through counsel. Rather, instead of accused being present physically before the court, he would be present before the court by way of video conferencing."*

Rule 11.2 of Rules for video conferencing for Courts 2020 framed by Hon'ble Patna High Court provide that the court may, in exceptional circumstances, for reason to be recorded in writing, record the statement of the accused under section 313 CrPC through video conferencing.

Thus it is evident that statement of the accused under section 313 CrPC can be recorded using video linkage.

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26. 2000CriLJ4604

27. Crl. Misc. No. M-32694 of 2013 (O&M)

28. Crl. Misc. No. M-41746 of 2013 (O&M)

7.4) Plea Bargaining and Video Conferencing:

The provisions relating to plea bargaining were introduced in the Code of Criminal Procedure by the Amendment Act of 2006. Sections 265-A to 265 L deal with the provisions relating to plea Bargaining. Plea bargaining may be defined as a negotiation between the prosecution and the accused whereby the accused pleads guilty in exchange for a lenient sentence.

Before considering the question of requirement of the physical presence of the accused for plea bargaining, it is pertinent to view various provisions relating to plea bargaining:

(a) It applies in respect of an accused against whom police report under section 173 CRPC has been forwarded in respect of an offence other than an offence punishable with death, life imprisonment or imprisonment for a term exceeding 7 years or against whom cognizance has been taken on complaint in respect of such offences as aforesaid. (265A)

(b) It does not apply to cases where the offence affects the socio- economic condition of the country or has been committed against a woman or a child below the age of fourteen years. (265A)

(c) An application for plea bargaining may be made by the accused to the court where the case is pending for trial. The application shall be accompanied by an affidavit of the accused stating that the application is made voluntarily after understanding the nature and extent of punishment for the offence. (265 B)

(d) Thereafter the court shall issue notice to the accused and prosecutor or the complainant as the case may be, to appear on the date fixed. [265 b (4)]

(e) On the date so fixed the court shall examine the accused in camera to ensure that the application is made voluntarily and if it is voluntary then it shall give time to the accused and the prosecution/complainant to work out a mutually satisfactory disposition. [265 B (4) (a)]

(f) If satisfactory disposition of the case cannot be worked out then the court shall proceed with the case in accordance with the procedure prescribed in CrPC (265 D)

(g) If satisfactory disposition has been worked out then the court shall prepare a report of such disposition and thereafter the court shall award the compensation to the victim and hear the parties on quantum of punishment, releasing the accused on probation of good conduct or after admonition under section 360 or dealing with the accused under the provisions of the Probation of Offenders Act or any other law for the time being in force. (265 D & 265 E (a))

(h) Where minimum punishment has been provided for the offence committed by the accused, the court may sentence the accused to half of such punishment [265 E (c)]

(i) In a case where the offence is not covered under probation of offenders Act or where no minimum sentence is prescribed the court may sentence the accused to one fourth of the punishment provided or extendable for such offence. [265 E (d)]

(j) Section 265 H provides that for the purpose of plea bargaining the court shall have all the powers vested in respect of bail, trial of offences and other matters relating to the disposal of a case in such court under this Code.

Thus from the above provisions, it is evident that presence of the accused may be required for plea bargaining for the following purposes:

(i) To enable the court to ensure that the application for plea bargaining has been made voluntarily by the accused

(ii) To enable negotiations between the prosecution and the defence

(iii) For the purpose of delivering the Judgment and awarding the sentence etc.

None of these functions are such that can't be carried out through audio-video electronic means. In fact the test of voluntariness is also required in the case of recording of confession of accused under section 164 CrPC and that section itself provides that confession of the accused can be recorded through audio video electronic means. Likewise, as already seen, for the purpose of Judgment as well the physical presence of the accused is not required. Negotiations between the parties can also be carried out through video conferencing.

Moreover section 265 H provides that while dealing with plea bargaining petitions the court shall have all the powers which it has in other matters. Since the Courts have the power to conduct trial through video conferencing therefore there is no reason why video conferencing should not be used for plea bargaining.

Thus requirement of physical presence of the accused during plea bargaining can be met by ensuring his presence through video conferencing.

8. Conclusion:

Procedural travails which an accused has to face before a criminal Court are, for many, a sentence far worse than the conviction. Requirement of physical presence of the accused on every date and the fear of prompt cancellation of bail bond at the slightest infraction keeps the accused on edge throughout the trial. A large majority of trials in India end up in acquittal but the loss and agony suffered by the accused during the trial is an ignominious travesty of justice.

To remedy this situation the legislature has introduced various provisions for dispensing the physical presence of the accused. Advancements in technology have also come as a welcome aid to make our system friendlier to the victim as well as accused. The need of the hour is judicious use of these provisions and technology by the Courts and lawyers so that effective and expeditious justice may be dispensed without unnecessary harassment to any party.

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Topic No. – 07

Connotations of proper search & seizure under Cr.P.C.; consequences of faulty search and seizure in a trial.

By

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Topic : Connotations of proper search & seizure under Cr.P.C.; consequences of faulty search and seizure in a trial.

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CHAPTER 1

INTRODUCTION

One of the basic principles of criminal jurisprudence which governs our criminal law is that every man is supposed to be innocent unless proved guilty beyond reasonable doubts. The principles of criminal justice envisage the safeguards to person and personal liberty. Before the commencement of the Indian Constitution the administration of criminal justice was fully governed by the provisions of the Criminal Procedure Code, 1898 and the Indian Evidence Act, 1872. These are mainly concerned with the security of the state and public peace and not with individual liberty. After the independence, Part III of the Indian Constitution enshrined the long-cherished desires of the people of India in the form of fundamental rights. Articles 20, 21 and 22 of the Indian Constitution precisely incorporates the respect for human personality and security of life and liberty. If human rights were not embodied in the Constitution and the law, or even if guarantees are not respected, no citizen would be safe, against tyranny and authoritarianism of the governmental actions.

A search and seizure is a legal procedure whereby police or other authorities and their agents, who suspect that a crime has been committed, do a search of a person's property and confiscate any relevant evidence of the crime. The power of search and seizure which vests in the executive authorities of the state came to be recognized in the interest of community at large and for the sake of safety of the society in particular. It directly affects the personal liberty and right to privacy of an individual. The personal liberty includes the right of privacy, the contours of which has been recently defined by the Hon'ble Supreme Court of India in the landmark judgment of **K.S. Puttaswamy vs. Union of India**[1] which recognized right to privacy as a fundamental right enshrined under Article 21 of the Constitution of India.

In normal practice there is sometimes violation of constitutional or legal rights which can be easily avoided if the people are conversant with the rights and there is a greater awareness and the law and the magistracy is also keenly sensitive to the rights of the people. A police officer or any other authorized person carrying out a procedure such as search or seizure is supposed to know the rules and Acts relating to it to work effectively and efficiently. These functions require specialized knowledge of skill and procedure prescribed by law.

OBJECT OF THE TOPIC.

The objective of this topic is to cover all sections related to search and seizure as provided in

1. (2017) 10 SCC 1.

Criminal Procedure Code, 1973 (hereinafter referred as Cr.P.C) and in various laws in India, the procedure to be followed while conducting search and seizure and also to bring into light the consequences of faulty search and seizure in trial. It will further highlight various provisions which deals with evidence and its application under Cr.P.C. It also discusses about the circumstances under which search warrant can be issued, its analysis, seizure and power to impound. It largely extends to comprehending the sections under the Criminal Procedure Code which provide for the procedures that are important to be complied with to make it legal and also to bring into light the practical issues related with search and seizure in day-to-day proceedings, the destiny of the trial in case of illegal seizures.

HISTORICAL BACKGROUND OF SEARCH AND SEIZURE

In England the privacy of citizens was more important than the application and enforcement of law and order. "Every Man's house is his castle" was a maxim in common law, which shows that the judiciary attached so much sanctity to privacy of general man. But gradually the Judges felt that it was necessity of the State to conduct search and seizure but at the same time stressed to keep check and balance between privacy of general man and search and seizure. The search warrant was not known to the early common law but it slowly crept into the law by practice and its use was at first confined to search for stolen goods.

In America the Fourth amendment was made only to protect the interests of the people. It was intended to provide safeguards for issuing warrants which was issued only on probable cause which was shown by oath and it must particularly describe the place to be searched and things to be seized.

In India the power of search and seizure for prevention and investigation of offences was for the first time conferred under the Code of Criminal Procedure and later various laws were passed by the British Government containing the provisions of search and seizure. Sea Customs Act 1878, Land Customs Act, 1924 and Central Excise and Salt Act, 1944 are few of the important Acts. Since the Search and Seizure is a process which is exceedingly arbitrary in character stringent statutory conditions were imposed on the exercise of the power. In addition, the abuse of search warrants in England and in American Colonies led to the adoption of Constitutional provisions prohibiting unreasonable searches and seizures, which is the most important right of a citizen of India, and limiting the conditions under which warrant may be issued. The provisions of search and seizure embodied in previous Constitutional era are the foundation of post Constitutional era. Various judgments of the Hon'ble Apex Court affirm, that after the promulgation of the Constitution, the courts have tried to make a check and balance between the necessity of the State and Fundamental Rights and have also tried to stress on the safeguards to be followed.

CHAPTER 2

SEARCH

Search is an integral part of investigation and is generally covered in the Chapter VII by Sections 97-103 and Chapter XII by Section 165 of Cr.P.C. A search implies a prying into hidden places by the government machinery for that which is concealed or has been hidden or intentionally put out of way for the purpose of discovering evidence of the crime. A search is a coercive method in which the sanctity and privacy of a citizen's home or premises is invaded. A search and seizure is only a temporary interference with a right to hold the premises searched and the articles seized. It is well established that search should have a nexus with the crime and it should not be random. Search can be done of a place or of an arrested person as provided in Criminal Procedure Code, 1973.

Section 47 – Search of place entered by person sought to be arrested: This gives duty to the person who or whose premises need to be searched by the person holding the warrant of arrest or any police officer having authority to arrest, to allow free ingress thereto and afford all reasonable facilities for a search. If the police is not allowed in, they are allowed to break open the door. There is also an allowance for a 'no-knock break-in' to take place; this is to take the person by surprise.

A search memo is prepared and submitted to the Magistrate. The Magistrate sends the memo to the owner or the occupier of the place. This owner or occupier may not be the accused. Therefore, the accused may, at times, not get the memo at all, until the trial.

Section 51- Search of arrested person:

This section makes provision regarding search of arrested person and making an inventory of articles found upon him. Whenever a person who is arrested can't legally be admitted to bail, or is unable to furnish bail, the police officer making arrest (or the police officer to whom the arrested person is made over after arrest by a private person) may search such a person and place in safe custody all articles, other than necessary wearing apparel, found upon him. A receipt showing the articles so seized shall be given to such a person. The sub clause (2) of the section further provides that where the arrested person is a woman, the search shall be made by another woman with regard to decency.

It is pertinent to mention here that before making a personal search of the accused, the searching officers and others assisting him should give their personal search to the accused before searching the person of the accused. This rule is meant to avoid the possibility of implanting an object to be shown in search. Further it was held in **Mahadeo vs State**[2] that if the recovery memo is not signed by the accused, the search is not illegal.

2. 1990 Cr.L.J 858/All.

TYPES OF SEARCH

There are two types of search which are enacted in Criminal Procedure Code. First, search made under warrant which is broadly provided under Sections 93, 94, 95 and 97 of Cr.P.C. Second, Search made without Warrant which is dealt in Sections 103, 153,165 and 166 of Cr.P.C.

WHAT IS A SEARCH WARRANT?

A search warrant is a written order which is issued by a Judge/ Magistrate or a Court to a police officer or any other person authorizing them to conduct the search of a place either generally or for specied items or documents or for persons who have been wrongfully detained for the purpose of evidence of a crime. The search and seizure of documents from the accused does not amount to infringement of fundamental rights under Article 20(3) of the Constitution. The Hon'ble Court in **Kalinga Tubes Ltd. vs. Suri**[3] has cautioned the police officer to use search warrant with a little precaution and care and not to abuse their power. It is, therefore, necessary that the power to issue search warrant should be exercised with all care and circumspection. According to the provisions of the Code of Criminal Procedure 1973 search warrants may be issued under sections 93, 94, 95 and 97. An analysis of these sections has been attempted below.

When the search warrant is issued and by whom?

There are six circumstances under which a search warrant can be issued.

1. Where any court has reason to believe that a person to whom summons or orders under Section 91 or a requisition under sub-section (1) of section 92 is addressed will not produce the document or things as required. [Section 93(1)(a)]

2. Where the thing or document in question is not known to the court to be in the possession of any person. [Section 93(1)(b)]

3. Where the court considers that the purposes of any inquiry, trial or other proceeding will be served by general search or inspection. [Section 93(1)(c)].

4. Any District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class gets any information and after inquiry of the same, thinks it necessary or has reason to believe that any place is used for the deposit or sale of stolen property or for the deposit, sale or production of any objectionable article or any such objectionable article which is deposited in any place, he may by the way of search warrant authorize any police officer above the rank of a constable to enter, search or take in possession any stolen property or any objectionable articles to which this section applies.[Section 94]. He has also to record the grounds of his belief. The order must show the application of mind of Magistrate before ordering the search of the place. The same view was also observed by Hon'ble High Court of Andhra Pradesh in **Dinesh Auto Finance vs. State**[4]**.**

3. AIR 1953 Ori 153.

4. 1988 Cri LJ 1876.

It is to be noted that there are essential differences between Section 93 and Section 94 of Code of Criminal Procedure which are listed below?

(i) Section 93 authorizes any court to issue a search warrant. Court includes all Magistrates and all Sessions judges. Section 94, on the other hand empowers only a District Magistrate, Sub-Divisional Magistrate, or a Magistrate of the first class to issue a warrant for searching a place suspected to contain stolen property etc.

(ii) Section 93 empowers the court to issue a warrant for searching of any document or thing, while under Section 94 a warrant can be issued only for searching a place used:

(a) For the deposit or sale of stolen property; or

(b) For the deposit or sale or production of any objectionable article.

(iiii) Section 93 authorizes a court to issue a search warrant on receipt of information of the commission or suspected commission of a particular offence. Section 94 authorizes the Magistrate mentioned above upon information to issue a warrant for searching a suspected place of deposit of stolen property or any objectionable article.

(iiv) A power to seize and take possession is not expressly given under Section 93, whereas under Section 94 such a power is expressly vested in the police officer searching under a warrant issued under this section.

(iv) Section 93 does not confer any power to take into custody while the police officer is entitled under Section 94 to take into custody any person found in such a place and suspected to have been privy to the deposit, sale, etc. of such property.

(ivi) Under Section 93 search warrant could be issued on failure of the party to produce an article or thing on summons while Section 94 contemplates only a surprise search for the recovery of articles.

(ivii) A search-warrant under Section 93 can be issued to any person by virtue of Sections 99 and 72 of the Code. But Section 94 expressly restricts the right to a police officer above the rank of a constable.

1. Any Magistrate may, by a warrant, authorize any police officer not below the rank of a Sub-Inspector to enter upon and search for such copies, in any premises where there is a sufficient reason for suspicion, of any newspaper, book or document, wherever printed, which contains any matter, the publication of which is punishable under Sections 124-A, 153-A, 153-B, 292, 293 or 295-A of Indian Penal Code,(45 of 1860) and the State Government had, by notification stating the reasons for such action, declared every copy of such newspaper, book, or document, to be forfeited to the government. [Section 95].

In the case of **Anand Chintamani Dighe vs. State of Maharashtra**[5]**,** a notification for the

5. 2002(1) Bom CR 57.

forfeiture of the book in all forms entitled "Mee Nathuram Godse Boltoy" (I am Nathuram Godse speaking) including Gujarati translation "Gandhi Ke Godse" was seized under Section 95 by the State Government for reasons that circulation of the said book would disturb public tranquility, promote disharmony or feelings of enmity, hatred or ill will among different groups or communities.

2. If any District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class has reason to believe that any person is confined under such circumstances that it amounts to an offence, he may issue a search warrant to a person to search for the person so confined. If the person is found, the person shall be immediately taken before a Magistrate who shall make such order as appears to be proper. [Section 97].

It is to be noted that Section 77 of the Cr.P.C, which states that the warrant of arrest may be executed at any place in India, is applicable to search by virtue of Section 99 of Cr.P.C which deals with direction, etc., of search-warrants. The provisions of Sections 38, 70, 72,74,77,78 and 79 of the code may apply to all search warrants issued under Sections 93, 94, 95 or 97 of the Cr.P.C.

For a Magistrate to issue a search warrant it is not necessary that he should be sitting as a court i.e., some proceeding under the Code should have been initiated before him. The form of the warrant (Form No. 10 in Sch.II) contemplates the issue of a search warrant before proceedings of any kind are initiated.

When Search of a place is done without warrant?

1. Search in presence of Magistrates: Any Magistrate may direct a search in his presence of any place for the search of which he is legally competent to issue a search warrant. [Section 103]

2. Search for false weights and measure: Any police officer in charge of a police station may enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept there without a warrant. The police officer must have a valid reason to believe that there is presence of false weights, measures or instruments in that place. It also provides that if he finds such weights, measures or instruments to be false, he has the option of seizing them or giving information of such seizure to the Magistrate within his jurisdiction. [Section 153]

3. Search by police officer during investigation: Whenever an officer in charge of a police station or any police officer making an investigation has reasonable grounds to believe that anything necessary for the purposes of an investigation into any offence which he is authorized to investigate may be found in any place within the local limits of the police station and that such thing cannot be obtained without undue delay, he can search even without a search warrant.[Section 165(1)] But prior to search he has to record the reasons in writing for cause of such search and the thing for which such search is to be made. The police officer shall conduct the search in person. Section 165(3) further provides that where a police officer is unable to conduct the search in person, and there is no other person competent to carry out the search at the time, then he may

after recording in writing his reasons for so doing, require any officer subordinate to him to make the search. The senior authorizing for the same has to give the subordinate officer an order in writing, specifying the place of search, the reason for which the search is made and thereafter the subordinate may search for such thing in such place. Section 165(5) further states that the copies made by the police officer undertaking search shall be sent to the nearest Magistrate empowered to take cognizance of the offense and the Magistrate shall on application of the Owner or Occupier of the place searched provide him, free of cost a copy of the same.

Section 165(4) says that all the general conditions regarding the search warrant will be applied to this section as contained in Section 100.

In **State vs. Rehman[6],** the Hon'ble Apex Court has held that, "as search is a process exceedingly arbitrary in character, stringent statutory conditions are imposed on the exercise of the power".

Further in the matter of a search under Section 165 the Hon'ble Court was further pleased to lay down the following safeguards —

(i) The empowered officer must have reasonable grounds for believing that anything necessary for the purpose of investigation into an offence may be found in any place;

(ii) He must be of the opinion that such thing cannot be otherwise, got without undue delay;

(iii) He must record in writing the grounds of his belief; and

(iv) He must specify in such writing so far as possible the thing for which the search is made.

Provision of Section 165 Cr.P.C is enacted to enable police to make search when there is urgency and when it is not permissible to follow lengthy process in securing search warrant from Magistrate. The provision is not restricted to search of what is stolen or believed to be stolen and it permits the police officer to make search for anything necessary for the purposes of investigation into any offence.

4. Search in the limits of another police station: An officer in charge of a police station or a police officer not below the rank of sub-inspector making an investigation may require an officer of another police station whether in the same or different district to cause a search to be made in any place within the limits of the former officer's jurisdiction. [Section 166(1)].

The officer shall carry out the search according to the provisions of Section 165 and forward the thing found on such search to the police officer at whose request the search is made. [Section 166(2)].

But where there is reason to believe that the delay occasioned by such a procedure might

6. AIR 1960 SC 210.

result in evidence being destroyed the investigating officer shall make the search himself or cause the search to be made in which case, he shall forthwith send the notice of the search together with a copy of list prepared under Section 100 Cr.P.C to the nearest Magistrate. [Section 166(3)]

On the application of the owner of the premises of the place searched, he shall be provided a free copy of the said notice that was sent to the Magistrate. [Section 166(5)]

PROCEDURES TO BE FOLLOWED DURING SEARCH AND SEIZURE UNDER SECTION 100 OF CRIMINAL PROCEDURE CODE.

Section 100 primarily provides for the provision relating to searches and it lays down the procedure to be followed by the police officer and also enumerates the duties of the police officer and the occupants of the premises. The object of this section is two-fold, first it gives the investigating agencies the right of free ingress in case of closed premises on the production of warrant of search. Second, it ensures that the search is conducted fairly and there is no 'planting' of evidence by the police. Section 100 Cr.P.C being the umbrella law for search, the general provisions and principles enunciated by Hon'ble Courts, in a catena of case laws relating to search will apply.

The investigating police officer while conducting search has to bear in mind the following procedures and follow them accordingly:

1. Whenever any place which is liable to be searched is closed, any person who is residing in, or being in charge of, on demand of the officer or other person may allow him free ingress thereto and afford all reasonable facilities for search, either in case of warrant or without warrant.

2. The police officer or other person executing the warrant for conducting the search is empowered to enter the place and in order to effect an entrance into such a place, can break open an outer or inner door or window of any house or place if ingress into such place cannot be obtained.

Safeguard provided in Section 47(2) in favor of a pardanashin woman would also apply in case of search. It is not considered contrary to principle of law that if in exercise of power or the performance of official duty, improper or unlawful obstruction or resistance occurs there must be the right to use reasonable means to remove the same.

3. The presence of a lady officer in the search team is not negotiable.

4. Where a person is suspected of concealing about his person any article for which the search should be made, he can be searched. It is necessary to prevent the object of search getting frustrated. [Section 100(3)]

Where the search is made of a female then in order to protect her modesty, it will be carried out by another female with strict regard to decency.

5. The police officer shall call two or more independent and respectable inhabitants of the

locality where the place to be searched is situated. If he cannot find any such person or no such inhabitant of the locality is available then a person from the other locality available who is willing can also be called upon to be a witness (Panch witness) to such search. The police officer may even issue an order in writing to them. The respectability of witness is more important rather than his locality. The object is to guard against the unfair dealings on the part of persons authorized to search and ensure that anything incriminating which may be said to have been found in the premises searched was really found there and not introduced by the members of the search party.

A person who without reasonable cause refuses or neglects to attend and witness a search when called upon to do so by an order in writing delivered or tendered to him shall be deemed to have committed an offence under Section 187 of the Indian Penal Code, 1860. [Section 100(8)]

It is pertinent to note that Hon'ble Supreme Court has defined "independent witness" as any person who is disinterested in the outcome of the case and "Respectable" as any person whose integrity is of higher scale in the eyes of common people of the society.

6. The search should be conducted in daylight. If information is received after dusk that it is necessary to conduct immediate search of a house and it is apprehended that delay till daybreak might result in evidence being concealed or destroyed, the house should be sealed and guarded and if that is not possible, search should be conducted during the night even.

7. The investigating officer and the panch witnesses should mutually search each other before commencing the search.

8. It is necessary that before entering the premises to be searched, the exterior of the place should be inspected to see whether facilities for introducing property from outside exist.

9. Women should be allowed to withdraw while search and seizure is done.

10. The police officer is required to keep a record in writing of the things seized during the search and of the places in which they are respectively found, in the presence of the witnesses. The panch witnesses who are present at the time of search under this section are not required to attend the court as a witness of the search unless specially summoned by it.

11. The occupier whose place is searched or any other person on his behalf shall in every case be permitted to attend the search. However, when their presence may cause delay so as to frustrate the purpose of the search it may be permissible to dispense with their presence.

12. A list of all things seized in the course of search and of the places in which they are respectively found shall be prepared by the police officer making the search and it shall be signed by the panch witnesses. Here the signature of the accused on the search is not required under law.

13. A search list shall be prepared in quadruplicate and all the copies shall be signed by the police officer making the search and by the witnesses to the search. One of the copies shall be given to the Owner or Occupant of the house, another shall be sent to the Magistrate and the third

copy along with the case diary shall be sent to the superior officer to whom case diaries are sent. And the fourth copy shall be kept as station record.

14. During the whole process of search, indiscriminate search and damage to property should be avoided and it should be systematic and thorough.

The provisions of section 100(4) Cr.P.C are only directory and failure to comply with the provisions are not invariably fatal to the case of the prosecution. In **State of Punjab vs Balbir Singh**[7] it has been held by the Hon'ble Apex Court that:—

> *"6. At this juncture we may also dispose of one of the contentions that failure to comply with the provisions of Cr.P.C in respect of search and seizure would also vitiate the trial. This aspect has been considered in a number of cases and it has been held that the violation of the provisions particularly that of Sections 100, 102, 103 or 165 Cr.P.C strictly per se does not vitiate the prosecution case. If there is such violation, what the courts have to see is whether any prejudice was caused to the accused and in appreciating the evidence and other relevant factors, the courts should bear in mind that there was such a violation and from that point of view evaluate the evidence on record."*

It therefore emerges that non-compliance of these provisions i.e. Sections 100 and 165 Cr.P.C would amount to an irregularity and the effect of the same on the main case depends upon the facts and circumstances of each case. Whereas in such a situation, the court has to consider whether any prejudice has been caused to the accused and also examine the evidence in respect of search in the light of the fact that these provisions have not been compiled with and further consider whether the weight of evidence is in any manner affected because of the non-compliance. It is well settled that the testimony of a witness is not to be doubted or discarded merely on the ground that he happens to be an official but as a rule of caution and depending upon the circumstances of the case, the courts look for independent corroboration.

It thus emerges that when the police, while acting under the provisions of Cr.P.C. as empowered therein and while exercising surveillance or investigating into other offences, had to carry out the arrests or searches they would be acting under the provisions of Cr.P.C. At this stage if there is any non-compliance of provisions of S.100 or S.165, that by itself cannot be a ground to reject the prosecution case outright. That fact of such non-compliance would have a bearing on the appreciation of evidence of the official witnesses and other material depending upon the facts and circumstances of each case.

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7. 1994 SCC (3) 299

CHAPTER 3

SEIZURE

The act of seizing is well known as a seizure. Seizure follows search. It is an action coupled with force in which an object or person is suddenly taken over, grabbed, removed, or overwhelmed. It contemplates a forcible dispossession of the owner and it is not a voluntary surrender. For a legal seizure there should be reasonable belief in mind of the seizing officer about the liability of the goods for confiscation.

LEGAL PROVISION OF ADMITTING SEIZED ARTICLES UNDER INDIAN EVIDENCE ACT.

As per Section 3 of Indian Evidence Act, 1872 evidence includes both oral and documentary evidence. Seized articles does not come under oral or documentary evidence but is covered under real evidence which is often called physical evidence as it consists of material items involved in a case, objects and things which judge can physically hold and inspect. It is usually admitted because it tends to prove or disprove an issue of fact in a trial. Second proviso of Section 60 of the Indian Evidence Act states that if oral evidence refers to the existence or condition of any material thing other than a document, the Court may require the production of such material thing for its inspection and thereby seized article can be admitted into evidence if it is relevant.

In all situations of search and seizure, the investigating police should follow the procedures laid down under Sections 100 and 165 of Cr.P.C.

SAFEGUARDS TO BE FOLLOWED BY POLICE OFFICERS:

There are various powers with the officers empowered to conduct a search and seizure but at the same time the Act provides for proper safeguards that there should not be violation of jurisdiction and power. The following measures should be followed by them:

1. The power to search and seize must be prescribed specifically in the statute and the officer concerned has to act according to the rules framed and procedure laid down.
2. There should be existence of reasonable belief before search and seizure.
3. When the police officer leaves for action they need to make an entry about this movement in the station diary.
4. A list of all things taken into possession shall be prepared and a copy thereof should be delivered to such person who has been or whose place has been searched and of the items seized.
5. Separate search list should be made for each person and each place.

6. The police officer should not leave the process of investigation solely on his subordinates, especially those who are untrained.
7. Reporting to senior responsible officer is mandatory, so that no officer acts in an arbitrary way.

Further Section 102 provides the power of police officer to seize certain property: A police officer can seize any property which is alleged or suspected to have been stolen or which is found under such circumstances that it may create suspicion of commission of an offence. [Section 102(1)]. It further states that a subordinate, who works under a police officer in charge of a police station, shall report the seizure to that officer. [Section 102(2)]. It also provides that every police officer exercising his duty under sub-section (1) is required to report the seizure to the nearest Magistrate falling within his jurisdiction and in case the property seized is such that it cannot be taken to the court, he may give custody of that property to any person after executing a bond undertaking to produce the property before the court as and when required so as to give effect to the further orders of the court regarding its disposal. [Section 102(3)].

Further a proviso has been inserted to sub clause (3) of the section by amendment in 2005 that if the seized property is of perishable nature and value of such property is less than five hundred rupees and if the person entitled to the possession of such property is unknown or absent, the police is empowered to sell such property by auction under the orders of the Superintendent of Police and the provisions of sections 457 and 458 shall apply to the net proceeds of such sale.

If anything related to the case at hand or the offence is recovered during the search, police officer can take possession of such a thing and has to prepare a memo of recovery where he has to provide the list of recovered or seized items. He also has to specify the nature and characteristics of the items like perishable nature, brand, size, quantity. Non-perishable items can be stored at the 'malkhana' of the police station. In case of perishable items, it can be sold by auction as stated above. Under this section immovable property cannot be seized. Oral evidence regarding what took place at the time of search and seizure is not excluded under Section 91 of the Indian Evidence Act.

Power to impound the document etc., produced

Any Court may, if it thinks fit, impound any document or thing produced before it under this Code. The Court takes the legal custody of documents, goods, vehicle, etc., produced before it after being seized. [Section 104]

Disposal of things found in search beyond jurisdiction

When in the execution of a search warrant beyond the jurisdiction of the Court which issued the search warrant, any of the things for which search is made are found, such things along with the list prepared of the seized things shall be immediately taken before the Court issuing the warrant,

unless such place is nearer to the Magistrate having jurisdiction therein than to such court, in which case the list and the things shall be immediately taken before such Magistrate, and unless there be good cause to the contrary, such Magistrate shall make an order authorizing them to be taken to such Court. [Section 101]

REMEDIES AGAINST ILLEGAL SEARCH WARRANT

1. For quashing an illegal search warrant and for return of the seized thing/document a Writ petition under Article 226 of the Constitution can be instituted.

2. A Revision under Section 401 of Cr.P.C. can be instituted and an order Under Section 93 can be set aside if it is proved that the Magistrate had not applied his mind judicially.

3. A suit for damages can be filed against the person executing the illegal warrant and thereupon a search was carried out in contravention of law which constituted an actionable trespass.

CONSTITUTIONAL VALIDITY OF SEARCH AND SEIZURE

The law relating to 'search and seizure' is subject to the Constitutional guarantees, which is mother of all laws. The entire procedure specified in the Code of Criminal Procedure, 1973 is based on the principle of justice and fairness. Time and again the law of 'search and seizure' has been challenged before the Courts for being violative of the Fundamental Rights guaranteed to the citizens, especially, Article 19(1) (f) and Article 20(3). In **M.P. Sharma vs. Satish Chandra**[8] along with the above issue another issue was that search and seizure of documents as per Sections 94 and 96 of the Cr.P.C. was a compelled production within the meaning of Article 20 of the Constitution. It was held by the 8-Judges Bench of the Hon'ble Supreme Court of India that the drafters did not intend to subject the power of search and seizure to a fundamental right of privacy and that the provision for search warrant under Section 96(1) of the Code of Criminal Procedure was not violative of Article 19(1) (f) of the Constitution. The Hon'ble Court further opined that the Constitution of India does not include language similar to the Fourth Amendment of the US Constitution and found no justification to import into it a concept of totally different fundamental right to privacy by the process of strained construction. However, the first part of the Fourth Amendment is accepted by the adoption of fundamental rights under Articles 14, 19 and 21. It was further held by their Lordships that, having regard to the historical background regarding Indian criminal procedural law concerning searches, interposition of the judicial functions while ordering searches and the person to whom the orders regarding searches are made, such searches were not tantamount to testimonial compulsion to the accused person and for that reason there was no invasion of fundamental right guaranteed by Article 20(3) of the Constitution of India.

In every case of arrest the person arresting shall communicate to the arrested person, without delay, the grounds of his arrest. This is fundamental right of the arrested person under Article 22,

8. AIR 1954 SC 300.

which gives him an opportunity to remove any mistake, misapprehension or misunderstanding, if any, in the mind of the person arresting. It also enables him to apply for bail, for a Writ of habeas corpus or to make other expeditious arrangement for his defense.

Again in **V. S. Kuttan Pillai vs. Ramakrishnan[9],** constitutional validity of search warrant was in issue. It was held by the Hon'ble Court that a search of the premises occupied by the accused does not amount to compulsion on him to give evidence against himself and hence was not violative of Article 20(3) of the Constitution of India.

In **Pooran Mal vs. Director of Inspection (Investigation)[10]** it was held that the provisions relating to search and seizure in Section 132 of the Income Tax Act 1961 and Rule 112 cannot be regarded as violative of article 19(1)(f) or 19(1)(g) of the Constitution.

Recently in **K.S. Puttaswamy vs. Union of India[11],** A 9-Judge Bench of the Hon'ble Supreme Court held that right to privacy is a fundamental right enshrined under Article 21 of the Constitution thus overruling its previous judgments in **M.P.Sharma vs. Satish Chandra[12]** and **Kharak Singh vs. State of U.P.[13]** case where it was held that 'right to privacy is not protected by the Constitution'. With the recent development on privacy rights, we have moved a step towards the fourth amendment of the US Constitution which says "People have a right to be secure in their persons, houses, papers and effects against unreasonable searches and seizure".

In **Dnyaneshwar v. State of Maharashtra[14],** The Hon'ble Bombay High Court held that the act of the police officers entering the house of the person to be searched in the night when his family was sleeping which included two ladies and the children, amounted to the intrusion into their privacy and therefore State was liable to pay compensation for the illegal search as it was violation of fundamental right to privacy.

The approval of Privacy as a fundamental right is bound to have a widespread impact on existing laws of search and seizure. An individual can now seek remedy for breach of privacy both against the state as well as another individual. Right to privacy, like other fundamental rights, is not absolute and can be invaded based on fair, just and reasonable procedure. The Constitutional guarantees do not forbid reasonable searches and seizure but forbids only unreasonable searches and seizures. What constitutes a reasonable search and seizure in any particular case is purely a judicial question determinable from a consideration of the circumstances involved.

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9. AIR 1980 SC 185.
10. AIR 1974 SC 348.
11. (2017) 10 SCC 1.
12. AIR 1954 SC 300.
13. AIR 1963 SC 1295.
14. 2019 SCC Online Bom 4949.

CHAPTER 4

SEARCH AND SEIZURE PROVISIONS UNDER VARIOUS LAWS IN INDIA

'Search and Seizure' provisions are embodied in various legislations in India in order to provide powers to the competent authority to collect evidence in relation to the crimes committed. It is difficult to enlist all the legislations in which 'search and seizure' provisions are found, however, a few legislations which are very vastly used all over India is enumerated below highlighting the authority and their powers of conducting search and seizure.

THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES, ACT, 1985.

The Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act) was made to consolidate and amend the law relating to narcotic drugs. The search and seizure under NDPS, has to be conducted following all procedures as provided under Chapter V of the Act. It is special legislation having overriding effect over Cr.P.C and Evidence Act to the extent there is special provisions in NDPS Act. But it is not a self-contained Code and Cr.P.C and Evidence Act otherwise apply. Any mistake in conduct of the search and seizure operation renders the whole search nugatory as the benefit of doubt is given to the accused.

Who issues the Search Warrant?

A search warrant may be issued by a Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed. [Section 41(1) of NDPS Act]

Any such officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including the para-military forces or the armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under Chapter IV or that any narcotic drug, or psychotropic substance in respect of which any offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence has been kept or concealed in any building, conveyance or place, may authorize any officer subordinate to him but superior in rank to a peon, sepoy, or a constable, to arrest such a person or search a building, conveyance or place whether

by day or by night or himself arrest a person or search a building, conveyance or place.[Section 41(2)]

Power of entry, search, seizure and arrest without warrant or authorization:

a. Enter into and search of any such building, conveyance or place;
b. In case of resistance, break open any door and remove any obstacle to such entry;
c. Seize such drug or substance and all materials used in the manufacture thereof and any conveyance;
d. Detain and search, and, if he thinks proper, arrest any person.

It can be exercised by the aforesaid officers between sunrise and sunset. [Section 42(1)].

In **Karnail Singh vs. State of Haryana**[15] it was held that if the authorities fail to comply with the provisions of the Section 42(1) and (2) then the case fails. If the authority commits a delay in sending the information, as prescribed in Section 42, and the delay is unexplained then the case again fails. But if the delay is explained then the compliance will be said to have been done.

Conditions under which search of persons shall be conducted:

(i) A person to be searched under the aforesaid sections, if required, has to be taken without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate by the officer duly authorized under Section 42.

(ii) Until such person is brought before the senior officer, he may be detained. If the senior officer sees no reasonable ground for search, he may discharge the person, but otherwise may direct a search be made in front of him.

(iii) A female has to be searched by a female. [Section 50]

In **State of Punjab vs. Baldev Singh**[16] the Constitutional Bench held that Section 42 or section 50 applies only when the empowered officer or the police had prior information of the offence being committed under NDPS Act. The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles.

Further, in **State of Punjab vs. Balbir Singh**[17] it was laid down that Section 50 of the Act does not apply to the search of the vehicle, or any other article.

Contraband seized as a result of search and seizure made in contravention of Section 50 cannot be used to fasten the liability of unlawful possession of the contraband on the person from whom the contraband had allegedly been seized in an illegal manner. "Unlawful possession" of the

15. (2009) 8 SCC 539.
16. (1999) 6 SCC 172.
17. (1994) 3 SCC 299.

contraband is the sine quo non for conviction under the Act and that fact has to be established by the prosecution beyond a reasonable doubt. The safeguards mentioned in Section 50 are intended to serve a dual purpose – to protect the person against false accusation and frivolous charges as also to lend credibility to the search and seizure conducted by the empowered officer as held in **Beckodan Abdul Rahiman vs. State of Kerala[18].**

Report of arrest and seizure:

Whenever any person makes any arrest or seizure under this Act he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior. [Section 57]

INCOME-TAX ACT, 1961.

Search and Seizure.

Where the Director General or Director or the Chief Commissioner or Commissioner or Additional Director or Additional Commissioner or Joint Director or Joint Commissioner in consequence of information in his possession, has reason to believe that—

a. Any person to whom a summon u/s 131(1) of the Act or a notice u/s 142(1) of the Act was issued to produce, or caused to be produced, any books of account or other documents, has omitted or failed to produce, such books of account or other documents as required by such summon or notice; or

b. any person to whom a summon or notice as aforesaid has been or might be issued will not, or would not, comply the same; or

c. any person is in possession of any money, bullion, jewelry or other valuable article or thing and such money, bullion, jewelry or other valuable article or thing represents either wholly or partly income or property, which has not been, or would not be, disclosed for the purposes of the Income Tax Act, order search to be conducted. [Section 132]

An authorization to search can be given both in the cases of actual tax evasion and apprehended tax evasion for which a "sufficient cause" exists with the income tax authorities. However, Sec. 132 does not seek to substitute the process of assessment and final quantification of tax liability under Sections 143 or 147.

Seizure: The bullion, jewelry or other valuable article or thing, being stock-in-trade of the business, found as a result of such search shall not be seized but the authorized officer shall make a note or inventory of such stock-in-trade of the business. The seizure of asset is for the satisfaction of tax liability in respect of which the person concerned is in default or is deemed to be

18. (2002) 4 SCC 229.

in default and for satisfaction of any anticipated liability which may arise upon a reassessment in respect of the undisclosed income. The Hon'ble Punjab High Court in **N.K. Textile Mills vs. CIT**[19] held that this section does not allow a sweeping search or seizure of documents or things irrespective of their relevancy to or usefulness for some proceedings under the Income Tax Act. Search and seizure is obviously a serious infringement on the rights of citizens and hence, the authorities are required to demonstrate utmost caution while ordering such search. It is clear that search warrants cannot be issued indiscriminately.

Procedure for Search and seizure:

A search warrant is issued by the competent authority after approval by the Director General of Income Tax (Investigation), calling upon the authorized officer to carry out search and seizure operations. The search is conducted as per the procedure laid down in Rule 112 of the Income Tax Rules. A Panchnama, in which two persons witnesses before the authorized officers, is prepared at the conclusion of the search giving, in a specified format, all the details of the search operation including a list of all the books of accounts, other documents, money, bullion, jewelry and any other valuable article or thing found at the premises during the search along with a list of the statements recorded under Section 132 (4).

THE CENTRAL EXCISE ACT, 1944.

Searches and arrests how to be made: All searches made under this Act or under any rules made thereunder and all arrests made under this Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure, relating respectively to searches and arrests made under that Code. [Section 18]

Disposal of persons arrested: Every person arrested under this Act shall be forwarded without delay to the nearest Central Excise Officer empowered to send persons so arrested to a Magistrate, or, if there is no such Central Excise Officer within a reasonable distance, to the officer-in-charge of the nearest police station. [Section 19]

Punishment for vexatious search, seizure etc., by Central Excise Officer:

Any Central Excise or other officer exercising powers under this Act or under the rules made thereunder who without reasonable ground of suspicion:

(a) Searches or causes to be searched any house, boat or place; and

(b) Vexatiously and unnecessarily detains, searches or arrests any person and also seizes the movable property of any person, on presence of seizing or searching for any article liable to confiscation under this Act; and

(c) Commits, any other act to the injury of any person without having reason to believe that such act is required for the execution of his duty shall, for every such offence, be punishable with fine which may extend to two thousand rupees. [Section 22]

19. 1966 62 ITR 58 PH.

BIHAR PROHIBITION AND EXCISE ACT, 2016.

Power to enter, inspect, search and seize:

The Excise Commissioner or the Collector or any block level officer and above of the District authorized by the Collector or any Excise Officer or any police officer not below the rank of Sub Inspector; or any other officer or agency or force, armed or otherwise, authorized for this purpose by the State Government may, without warrant, subject to such restrictions as may be prescribed by the State Government, enter , inspect ,search any place at any time, day or night, and seize any document, sample, equipment, conveyance, animal, commodity, intoxicant, material, raw material or any other item of concern.

[Section 73]

Power to arrest or detain without warrant: Any of the above-mentioned officers may arrest or detain, without warrant, any person and/or detain any vehicle, animal, means of conveyance, at any time of day and night, found committing an offence or attempting to commit an offence punishable under any provision of this Act and thereafter report to the Collector. [Section 74]

Production of Persons arrested: Any person arrested under this Act shall be produced before the Court within twenty-four hours. [Section 80]

Duty of police to accept seized articles and arrested person: Every officer-in-charge of a police station shall take charge of and keep in safe custody, pending the order of the Court or the Collector, all articles seized or persons arrested under this Act which may be delivered to him and shall allow the excise officer who may accompany such articles, to affix his seal to such articles and to take samples of and from them. [Section 81]

Reports of arrests, seizures and searches: Every Police Officer upon making any arrest, search or seizure shall submit a report to the Collector and to the excise officers empowered under this Act within twenty-four hours. [Section 82]

Penalty on excise officer or police officer for making vexatious search, seizure, detention or arrest: Any excise officer, police officer or any other person who vexatiously and without reasonable ground for suspicion

(a) Enters or searches or causes to be entered or searched any closed place under color of exercising any power conferred by this Act; or

(b) Seizes the movable property of any person on the pretext of seizing or searching for any article liable to confiscation under this Act; or

(c) Searches, detains or arrests any person; or

(d) In any other way exceeds his lawful powers under this Act, shall be liable to imprisonment for a term which may extend to three years, or with fine which may extend to one lakh rupees or with both. [Section 50]

PREVENTION OF MONEY-LAUNDERING ACT, 2002

The object of the Act is to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto. Money Laundering refers to the conversion or "Laundering" of money which is illegally obtained, in order to make it appear to originate from a legitimate source. The Act provides provisions for search, seizure and also for vexatious search which is provided below:

Search and seizure:

(1) Where the Director or any other officer not below the rank of Deputy Director authorized by him for the purposes of this section, on the basis of information in his possession, has reason to believe, which shall be recorded in writing, that any person

(i) Has committed any act which constitutes money-laundering, or

(ii) Is in possession of any proceeds of crime involved in money-laundering, or

(iii) Is in possession of any records relating to money-laundering, or

(iv) is in possession of any property related to crime, he may authorize any officer subordinate to him to:

(a) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such records or proceeds of crime are kept;

(b) break open the lock of any door, box, locker, safe, Almira or other receptacle for exercising the powers conferred by clause (a) where the keys thereof are not available;

(c) Seize any record or property found as a result of such search;

(d) Place marks of identification on such record or property, if required or make or cause to be made extracts or copies therefrom;

(e) Make a note or an inventory of such record or property;

(f) Examine on oath any person, who is found to be in possession or control of any record or property, in respect of all matters relevant for the purposes of any investigation under this Act:

Provided that no search shall be conducted unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 157 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person, authorized to investigate the offence mentioned in the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or in cases where such report is not required to be forwarded, a similar report of information received or otherwise has been submitted by an officer authorized to investigate a scheduled offence to an officer not below the rank of Additional Secretary to the

Government of India or equivalent being head of the office or Ministry or Department or Unit, as the case may be, or any other officer who may be authorized by the Central Government, by notification, for this purpose.]

(1A) Where it is not practicable to seize such record or property, the officer authorized under sub-section (1), may make an order to freeze such property whereupon the property shall not be transferred or otherwise dealt with, except with the prior permission of the officer making such order, and a copy of such order shall be served on the person concerned.

The authority seizing any record or property under sub-section (1) or freezing any record or property under sub-section (1A) shall, within a period of thirty days from such seizure or freezing, as the case may be, file an application, requesting for retention of such record or property seized. [Section 17]

Search of persons:

(1) If an authority, authorized in this behalf by the Central Government by general or special order, has reason to believe, which is to be recorded in writing, that any person has secreted about his person or in anything under his possession, ownership or control, any record or proceeds of crime which may be useful for or relevant to any proceedings under this Act, he may search that person and seize such record or property which may be useful for or relevant to any proceedings under this Act.

(2) The authority, who has been authorized shall, immediately after search and seizure, forward a copy of the reasons so recorded along with material in his possession, to the Adjudicating Authority in a sealed envelope,

(3) Where an authority is about to search any person, he shall, if such person so requires, take such person within twenty-four hours to the nearest Gazetted Officer, superior in rank to him, or a Magistrate: Provided that the period of twenty-four hours shall exclude the time necessary for the journey undertaken to take such person to the nearest Gazetted Officer, superior in rank to him, or Magistrate's Court.

(4) Before making the search the authority shall call upon two or more persons to attend and witness the search, and the search shall be made in the presence of such persons and thereafter the authority shall prepare a list of record or property seized in the course of the search and obtain the signatures of the witnesses on the list.

(5) No female shall be searched by anyone except a female.

(6) The authority shall record the statement of the person searched in respect of the records or proceeds of crime found or seized in the course of the search.

(7) The authority who seizes any record or property shall, within a period of thirty days from such seizure, file an application requesting for retention of such record or property, before the Adjudicating Authority. [Section 18]

Punishment for vexatious search: Any authority or officer exercising powers under this Act without recording reasons in writing:

(a) Searches or causes to be searched any building or place; or

(b) detains or searches or arrests any person, shall for every such offence be liable on conviction for imprisonment for a term which may extend to two years or fine which may extend to fifty thousand rupees or both. [Section 62]

Code of Criminal Procedure, 1973 shall apply:

The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, in so far as they are not inconsistent with the provisions of this Act, to arrest, search and seizure, attachment, confiscation investigation, prosecution and all other proceedings under this Act. [Section 65]

THE WILDLIFE (PROTECTION) ACT, 1972.

The objective of the Act is to provide for the protection of wild animals, birds and plants and also for matters connected therewith or ancillary thereto. Chapter VI of the Act deals with prevention and detection of offences.

Power of entry, search, arrest and detention:

(1) Notwithstanding anything contained in any other law for the time being in force, the Director or any other officer authorized by him in this behalf or the Chief Wild Life Warden or the authorized officer or any forest officer or any police officer not below the rank of a sub-inspector, may, if he has reasonable grounds for believing that any person has committed an offence against this Act. -

(a) require any such person to produce for inspection any captive animal, wild animal, animal article, meat, trophy, uncured trophy specified plant or part or derivative thereof in his control, custody or possession, or any license, permit or other document granted to him or required to be kept by him under the provisions of this Act;

(b) stop any vehicle or vessel in order to conduct search or inquiry or enter upon and search any premises, land, vehicle or vessel, in the occupation of such person, and open and search any baggage or other things in his possession;

(c) seize any captive animal, wild animal, animal article, meat, trophy or uncured trophy, or any specified plant or part or derivative thereof, in respect of which an offence against this Act appears to have been committed, in the possession of any person together with any trap, tool vehicle, vessel or weapon used for committing any such offence and, unless he is satisfied that such person will appear and answer any charge which may be preferred against him, arrest him without warrant, and detain him:

Provided that where a fisherman residing within ten kilometers of a sanctuary or National

Park, inadvertently enters on a boat, not used for commercial fishing, in the territorial water in that sanctuary or National Park, a fishing tackle or net on such boat shall not be seized.

(2) It shall be lawful for any of the officers to stop and detain any person, whom he sees doing any act for which a license or permit is required under the provisions of this Act, for the purposes of requiring such person to produce the license or permit and if such person fails to produce the license or permit, as the case may be, he may be arrested without warrant, unless he furnishes his name and address, and otherwise satisfies the officer arresting him that he will duly answer any summons or other proceedings which may be taken against him.

(3) Any person detained, or things seized under the foregoing power, shall forthwith be taken before a Magistrate to be dealt with according to law.

(4)Where any meat, uncured trophy, specified plant, or part or derivative thereof] is seized under the provisions of this section, the Assistant Director of Wild Life Preservation or any other officer of a gazetted rank authorized by him in this behalf or the Chief Wild Life Warden or the authorized officer may arrange for the sale of the same and deal with the proceeds of such sale in such manner as may be prescribed and where it is proved that the meat, uncured trophy, specified plant, or part or derivative thereof seized under the provisions of this section is not Government property, the proceeds of the sale shall be returned to the owner.

(5) Notwithstanding anything contained in any other law for the time being in force, any officer not below the rank of an Assistant Director of Wild Life Preservation or Wild Life Warden shall have the powers, for purposes of making investigation into any offence against any provision of this Act,

(a) To issue a search warrant;

(b) To enforce the attendance of witnesses;

(c) To compel the discovery and production of documents and material objects; and

(d) To receive and record evidence

Further any evidence recorded shall be admissible in any subsequent trial before a Magistrate provided that it has been taken in the presence of the accused person. [Section 50]

Punishment for wrongful seizure:

If any person, exercising powers under this Act, vexatiously and unnecessarily seizes the property of any other person on the presence of seizing it for the reasons mentioned in section 50, he shall, on conviction, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both. [Section 53]

THE INDIAN FOREST ACT, 1927

The object of the Act is to consolidate the law relating to forests, the transit of forest-produce and the duty leviable on timber and other forest-produce. It is pertinent to mention here that "forest-produce" includes timber, charcoal, bark, lac, mahua flowers, trees and leaves, flowers and fruits, wild animals and skins, tusks, horns, bones, silk, cocoons, honey and wax, and all other parts or produce of animals, and also peat, surface soil, rock and minerals including lime-stone, laterite, mineral oils, and all products of mines or quarries.

Seizure of property liable to confiscation:

(1) When there is reason to believe that a forest-offence has been committed in respect of any forest-produce, such produce together with all tools, boats, carts or cattle used in committing any such offence, may be seized by any Forest-officer or Police-officer.

(2) Every officer seizing any property under this section shall place on such property a mark indicating that the same has been so seized, and shall, as soon as may be, make a - report of such seizure to the Magistrate having jurisdiction to try the offence on account which the seizure has been made. [Section 52]

Forest-produce, tools, etc., when liable to confiscation:

(1) All timber or forest produce which is not the property of Government and in respect of which a forest-offence has been committed, and all tools, boats, carts and cattle used in committing any forest offence, shall be liable to confiscation. [Section 55]

Procedure as to perishable property which is seized:

The Magistrate may direct the sale of any property seized under section 52, subject to speedy and natural decay, and may deal with the proceeds as he would have dealt with such property if it had not been sold. [Section 58]

Punishment for wrongful seizure: Any Forest-officer or Police-officer who vexatiously and unnecessarily seizes any property on presence of seizing property liable for confiscation under this Act shall be punishable with imprisonment for a term which extend to six months, or with fine which may extend to five hundred rupees, or with both. [Section 62]

Power to arrest without warrant:

(1) Any Forest-officer or Police-officer without orders from a Magistrate and without a warrant, arrest any person against whom a reasonable suspicion exists of his having been concerned in any forest-offence punishable with imprisonment for one month or upwards.

(2) Every officer making an arrest under this section shall, without unnecessary delay and subject to the provisions of this Act as to release on bond, take or send the person arrested before the Magistrate having jurisdiction in the case, or to the officer in charge of the nearest police station. [Section 64]

THE INFORMATION TECHNOLOGY ACT, 2000

This is a new era of electronic age in which information and communication revolution is taking place all over the world and digital technologies are playing a significant role in every phase of human's life. Electronic commerce is growing and digital signatures are being replaced by physical signatures at a fast pace. In India, Information Technology Act, 2000, is enacted with the objective to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involves the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and also to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Banker's Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto. Further it deals with 'cyber contraventions as well as 'cyber offences' and for these two types of deviances, there are two mechanisms of search provided under the IT Act 2000, one relates to 'cyber contravention' which is civil in nature and only penalty is provided for it and the other relates to 'cyber offences' which are criminal in nature.

Access to computers and data:

(1) The Controller or any person authorized by him shall, if he has reasonable cause to suspect that any contravention of the provisions of this Chapter has been committed, have access to any computer system, any apparatus, data or any other material connected with such system, for the purpose of searching or causing a search to be made for obtaining any information or data contained in or available to such computer system.

(2) The Controller or any person authorized by him may, by order, direct any person in charge of, or otherwise concerned with the operation of, the computer system, data apparatus or material, to provide him with such reasonable technical and other assistance as he may consider necessary. [Section 29]

Further Chapter IX of the Act provides for penalties which includes accessing or securing access, damaging, introducing a virus, etc., without permission of the owner or any other person who is in-charge of a computer or computer network.

Chapter XI of the IT Act provides for offences such as tampering with computer source documents, hacking, publishing obscene information, etc.

Power of police officer and other officers to enter, search, etc.:

Any police officer, not below the rank of Inspector, or any other officer of the Central Government or a State Government authorized by the Central Government in this behalf may enter any public place and search and arrest without warrant any person found therein who is reasonably suspected of having committed or of committing or of being about to commit any offence under this Act.

Explanation. – For the purposes of this sub-section, the expression "public place" includes any public conveyance, any hotel, any shop or any other place intended for use by, or accessible to the public.

(2) Where any person is arrested under sub-section (1) by an officer other than a police officer, such officer shall, without unnecessary delay, take or send the person arrested before a magistrate having jurisdiction in the case or before the officer-in-charge of a police station.

(3) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall, subject to the provisions of this section, apply, so far as may be, in relation to any entry, search or arrest, made under this section. [Section 80]

THE ELECTRICITY ACT, 2003

Electricity means electrical energy generated, transmitted, supplied or traded for any purpose or used for any purpose except the transmission of a message. [Section 2(23)]

Theft of Electricity:

(1) Whoever, dishonestly, --

(a) taps, makes or causes to be made any connection with overhead, underground or under water lines or cables, or service wires, or service facilities of a licensee; or

(b) tampers a meter, installs or uses a tampered meter, current reversing transformer, loop connection or any other device or method which interferes with accurate or proper registration, calibration or metering of electric current or otherwise results in a manner whereby electricity is stolen or wasted; or

(c) damages or destroys an electric meter, apparatus, equipment, or wire or causes or allows any of them to be so damaged or destroyed as to interfere with the proper or accurate metering of electricity,

So as to abstract or consume or use electricity shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(2) Any officer authorized in this behalf by the State Government may,

(a) enter, inspect, break open and search any place or premises in which he has reason to believe that electricity has been or is being, used unauthorisedly;

(b) search, seize and remove all such devices, instruments, wires and any other facilitator or article which has been or is being, used for unauthorized use of electricity;

(c) examine or seize any books of account or documents which in his opinion shall be useful for or relevant to, any proceedings in respect of the offence under sub-section (1) and allow the person from whose custody such books of account or documents are seized to make copies thereof or take extracts therefrom in his presence.

(3) The occupant of the place of search or any person on his behalf shall remain present during the search and a list of all things seized in the course of such search shall be prepared and delivered to such occupant or person who shall sign the list:

PROVIDED that no inspection, search and seizure of any domestic places or domestic premises shall be carried out between sunset and sunrise except in the presence of an adult male member occupying such premises.

(4) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) relating to search and seizure shall apply, as far as may be, to searches and seizure under this Act. [Section 135]

MOTOR VEHICLES ACT, 1988.

Power of police officer to impound document.

Police officer or other person authorized in this behalf by the State Government may, if he has reason to believe that any identification mark carried on a motor vehicle or any license, permit, certificate of registration, certificate of insurance or other document produced to him by the driver or person in charge of a motor vehicle is a false document within the meaning of Section 464 of the Indian Penal Code, (45 of 1860.) seize the mark or document and call upon the driver or owner of the vehicle to account for his possession of or the presence in the vehicle of such mark or document.

(2) Further if they believe that driver may abscond or otherwise avoid the service of a summons, seize any license held by such driver and forward it to the Court taking cognizance of the offence and the said Court shall on the first appearance of such driver before it, return the license to him in exchange for the temporary acknowledgment given under sub-section (3).

(3) A police officer or other person seizing a license under sub-section (2) shall give to the person surrendering the license a temporary acknowledgment therefor and such acknowledgment shall authorize the holder to drive until the license has been returned to him or until such date as may be specified by the police officer or other person in the acknowledgment, whichever is earlier:

Provided that if any magistrate, police officer or other person authorized by the State Government in this behalf is, on an application made to him, satisfied that the license cannot be, or has not been, returned to the holder for which the holder is not responsible, the magistrate, police officer or other person, as the case may be, may extend the period of authorization to drive to such date as may be specified in the acknowledgment. [Section 206]

Power to detain vehicles used without certificate of registration permit, etc.

1. Any police officer or other person authorized in this behalf by the State Government may, if he has reason to believe that a motor vehicle has been or is being used in contravention of the provisions of section 3 or section 4 or section 39 or without the permit required by sub-section (1) of section 66 or in contravention of any condition of such permit relating to the route on which or the area in which or the purpose for which the vehicle may be used, seize and detain the vehicle, or

instead of seizing the vehicle, seize the certificate of registration of the vehicle and shall issue an acknowledgment in respect thereof.

2. Where a motor vehicle has been seized and detained under sub-section (1), the owner or person in charge of the motor vehicle may apply to the transport authority or any officer authorized in this behalf by the State Government together with the relevant documents for the release of the vehicle and such authority or officer may, after verification of such documents, by order release the vehicle subject to such conditions as the authority or officer may deem fit to impose. [Section 207]

THE ARMS ACT, 1959

The Act was enacted to consolidate and amend the law relating to arms and ammunition. All arrests and searches made under this Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973. Chapter IV of the Act provides for the power and procedures to be followed while making search, seizure or arrest.

Power to demand production of license:

Any police officer or any other officer specially empowered in this behalf by the Central Government may demand the production of his license from any person who is carrying any arms or ammunition and if that person refuses to give his name and address or if the officer concerned suspects that person of giving a false name or address or of intending to abscond, such officer may arrest him without warrant. [Section 19]

Arrest of persons conveying arms, etc., under suspicious circumstances without warrant: Where any person is found carrying or conveying any arms or ammunition whether covered by a license or not, in such manner or under such circumstances as to afford just grounds of suspicion that the same are or is being carried by him with intent to use them for any unlawful purpose, any Magistrate, any police officer or any other public servant or any person employed or working upon a railway, aircraft, vessel, vehicle or any other means of conveyance, may arrest him without warrant and seize from him such arms or ammunition. [Section 20]

Search and seizure by magistrate:

(1) Whenever any magistrate has reason to believe that any person residing within the local limits of his jurisdiction has in his possession any arms or ammunition for any unlawful purpose, may after having recorded the reasons for his belief, cause a search to be made of the house or premises occupied by such person, and if any, seize and detain the same in safe custody for such period as he thinks necessary.

(2) Every search under this section shall be conducted by or in the presence of a magistrate or by or in the presence of some officer specially empowered in this behalf by the Central Government. [Section 22]

Search of vessels, vehicles for arms:

Any magistrate, any police officer or any other officer specially empowered in this behalf by the Central Government, may for the purpose of ascertaining whether any contravention of this Act or the rules made thereunder is being or is likely to be committed, stop and search any vessel, vehicle or other means of conveyance and seize any arms or ammunition that may be found therein along with such vessel, vehicle or other means of conveyance. [Section 23]

Seizure and detention under orders of the Central Government:

The Central Government may at any time order the seizure of any arms or ammunition in the possession of any person, notwithstanding that such person is entitled by virtue of this Act or any other law for the time being in force to have the same in his possession, and may detain the same for such period as it thinks necessary for the public peace and safety. [Section 24]

Prohibition as to possession of notified arms in disturbed areas, etc.

(1) Where the Central Government is satisfied that there is extensive disturbance of public peace and tranquility or imminent danger of such disturbance in any area and that for the prevention of offences involving the use of arms in such area, it is necessary or expedient so to do, it may by notification in the Official Gazette-

(d) authorize any such officer subordinate to the Central Government or a State Government as may be specified in the notification -

(i) to search at any time during the period specified in the notification any person in, or passing through, or any premises in, or any animal or vessel or vehicle or other conveyance of whatever nature in or passing through, if such officer has reason to believe that any notified arms are secreted by such person or in such premises or on such animal or in such vessel, vehicle or other conveyance or in such receptacle or other container;

(ii) To seize at any time during the period specified in the notification any notified arms in the possession of any person in such area or discovered through a search under sub-clause (i), and detain the same during the period specified in the notification.

The provisions of the Code of Criminal Procedure, 1973 relating to searches and seizures shall, so far as may be, apply to any search or seizure made as above. [Section 24A]

CHAPTER 5

FAULTY CONSEQUENCES OF SEARCH AND SEIZURE IN TRIAL:

Law enforcement officers are entrusted with the power to conduct investigations, perform searches and seizures of persons and their belongings and make arrest. But this power must be exercised within the boundaries of the law, and when police officers exceed the boundaries, they jeopardize the admissibility of any evidence collected for prosecution. It is settled principle that a

statute authorizing or regulating searches and seizures, is to be construed strictly against the State and liberally in favor of the individual. The construction of such statutes should not be unduly restricted, nor should they be given a technical construction which would defeat the ends of justice and permit guilty persons to escape through technicalities nor should they be construed so strictly as to thwart reasonable and proper efforts to detect and prevent crime.

When any of the directives related to search and seizure of any of the sections of Cr.P.C or directives by special acts are violated, then the search so performed is known as an illegal search. To ensure that the searches and seizures are credible, safeguards are provided in Cr.P.C and in special laws too as discussed above. If the safeguards are not followed the logical consequence would be that the search would not have the same credibility which a search would have if the safeguards are duly followed. However, non-compliance cannot have the effect of totally effacing the search or seizure. In India the courts are of the view that no legislation bars admissibility of evidence on grounds of search being illegal or otherwise. The Courts does not refuse to admit materials into evidence merely because they were obtained through an unlawful search.

The primary remedy in illegal search cases is the exclusionary rule of evidence which states that things which are found out of an illegal search or seizure are not admissible When there is a procedural lapse that vitally affects the trial to the prejudice of the accused and is irreversible, the accused would be entitled to be acquitted if the Court is satisfied of the prejudice caused. This rule acts as a deterrent to the illegal conduct of the law enforcement personnel. In United States of America following the exclusionary rule all evidence obtained by law enforcement officers by searches and seizures in violation of Fourth Amendment is inadmissible in evidence in federal as well as state courts as was held in' Mapp vs. Ohio'

Britain has provided for exclusion of illegally obtained evidence under Police and Criminal Evidence Act, 1984. But there is no exclusionary rule in India because the Indian Evidence Act, 1872, which was codified during the colonial regime, only test for admissibility of evidence is the relevance of facts and this rule was not codified. A judge, however, has a discretion to exclude evidence, even though technically it may be admissible, as part of his duty to secure a fair trial of the accused. Nevertheless, the Code of Criminal Procedure provides for certain provisions which discusses the outcome of non-compliance of provisions relating to search which is enumerated as follows:

When there is non-compliance with the provisions relating to searches:

(a) If any Magistrate not empowered by law to issue a search warrant does issues it under Section 94 of Cr.P.C the proceeding is not vitiated. A search warrant for the search of a place that is suspected to contain stolen property, forged documents, etc. can only be issued by a District Magistrate, Sub-divisional Magistrate or a Magistrate of the first class. But, if any Magistrate not empowered by law though erroneously, but in good faith, does that thing then the warrant will not become ineffective and his

proceedings shall not be set aside merely on the ground of his not being so empowered to issue such a warrant. [Section 460(a)]

(b) If any Magistrate not being empowered by law issues a search-warrant for a document, parcel or other thing in the custody of a postal or telegraph authority it will be illegal and the proceeding shall be void. Section 93(3) clearly states that a District Magistrate or a Chief Judicial Magistrate is authorized to grant a warrant to search for a document, parcel or other thing in the custody of postal or telegraph authority. [Section 461(b)]

(c) Similarly, if a Magistrate, other than District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class, not empowered by law, issues a search warrant in case of wrongful confinement to search for the person so confined, under Section 97, such warrant will be illegal and any entry into such place subsequent to such illegal warrant shall be considered to be without legal authority.

(d) Search without warrant by police officers not authorized by law would be illegal and entry into such place will be unlawful. Sections 153, 165 and 166 of Cr.P.C states that a place can be searched by the officer in charge of a police station, or a police officer not below the rank of sub-inspector making an investigation or any other officer authorized by law without a warrant. Therefore, a search by any other police officer will be illegal.

(e) Even a search by a police officer outside the limits of his police station and in the situations where he is not authorized to do so would be without legal authority and illegal. [Section 166(3)]

(f) Section 100 of Cr.P.C provides general procedures that need to be necessarily followed at the time of the search. Besides this, Section 165 and Section 166 also provides for additional procedures to be followed, when the search is made by a police officer without a warrant. Contravention of these Sections would make the search illegal or irregular.

(g) If the entry into the place of search is with the consent of the occupant of such place, then the search and recovery will not be illegal on the ground that the search procedure mentioned under Sections 100 and 165 were not followed.

Further if an arrest has been made in violation of the statutory provisions regulating arrests it is illegal arrest because it is not in accordance with the procedure established by the law and also it is violation of Article 21 of the Constitution.

INDIA AS IT STANDS TODAY:

In **Dharambir Khattar vs. Union of India**[20] the Hon'ble Delhi High Court held that

20. Delhi HC 2013 Cri LJ 2100.

articles seized in violation of the statute may be inadmissible but any other finding in the course of such illegal search can still be admissible based on the relevance of facts and circumstances.

In **R.M. Malkani vs. State of Maharashtra**[21] the Hon'ble Court allowed admissibility of stolen evidence by police based on the proposition that no provision of any statute bars admissibility of such evidence.

It is pertinent to mention here that The Law Commission of India in its 94th[22] report noted that in absence of any legislation, forbidding admissibility of evidence obtained by illegal searches or other illegal means is not viable. The credibility of such illicitly obtained evidence might be reduced, however, its relevance cannot be questioned.

It is important to note here that Hon'ble Supreme Court deviating from its precedent has held the trial to be tainted in cases of NDPS Act.

In **State of Punjab vs. Balbir Singh**[23] and in **Saiyad Mohd. Saiyad Umar Saiyad vs. State of Gujarat**[24] the Hon'ble Supreme Court has laid down that a search or arrest in violation of the provisions of the NDPS Act vitiates the trial and thereby upheld the acquittal of accused due to non-conformity with Section 50 of the NDPS Act. It was stated that compliance with these provisions is mandatory and since consequences following are serious, any irregularity cannot be allowed. It held that failure to observe the safeguards while conducting search and seizure would render the conviction and sentence of an accused illegal.

The Hon'ble Court could very well understand the gravity of privacy right and the miscarriage of justice which it causes by admissibility of evidence obtained by illegal searches or other illegal means but lack of legislation acts as a hindrance in discarding it.

However, in **Pooran Mal vs. Director of Inspection (Investigation)**[25] the Constitutional Bench held that relevant evidence gathered during illegal search can be used as evidence. Illegality of search does not vitiate the evidence collected during such illegal search. The only caution is that the Courts should be circumspect in dealing with such evidence or material. The proceedings pursuant to such search cannot be questioned and can go on. The Hon'ble Court held that exclusion of evidence obtained by illegal search would be wrong as neither the Constitution per se has any such provision nor extended construction of any portion under Part III prescribes this. Also, in **Radhakishan vs. State of UP**[26] the Hon'ble Court held that assuming that the search was illegal, the seizure of the articles is not vitiated but the court may be inclined to examine carefully the evidence regarding seizure, but no other consequence ensues.

21. 1973 SCR (2) 41.
22. Evidence obtained illegally or improperly (1983).
23. (1994) 3 SCC 299.
24. (1995) 3 SCC 610.
25. AIR 1974 SC 348.
26. AIR 1963 SC 822.

In **Pirthi Chand vs. State of Himachal Pradesh**[27] the Hon'ble Supreme Court held that the evidence collected in a search in violation of law does not become inadmissible under the Evidence Act. The Court further observed that even if search was found to be in violation of law, what weight should be given to the evidence collected was a question to be gone into during trial. The court further elaborately considered the effect of the violation of Section 50 of NDPS and held that any evidence recorded and recovered in violation of the search and the contraband seized in violation of the mandatory requirement does not ipso facto invalidate the trial.

The evidence obtained under an illegal search and seizure does not exclude relevant evidence on that ground. It is wrong to invoke the spirit of Constitution is to exclude such evidence. The evidence obtained through illegal search cannot be excluded completely for consideration only on the ground that it has been obtained through illegal search and seizure. When the test of admissibility of evidence lies in relevancy, unless there is an express or implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search and seizure, is not liable to be shut out. It is settled law that illegality committed in investigation does not render the evidence obtained during that investigation inadmissible. The manner in which the contraband is discovered may affect the factum of discovery but if the factum of discovery is otherwise proved then the manner becomes immaterial.

In **Shyam Lal Sharma vs. State of M.P**[28] it was held by the Hon'ble Court that even if the search and seizure is illegal being in contravention of Section 165, it does not have any effect in its application to the subsequent steps taken in the investigation.

In **Sunder Singh vs. State of Uttar Pradesh**[29] a three Judge Bench of the Hon'ble Court held that under Section 103 of the Cr.P.C 1973 though respectable inhabitants of the locality were not associated with the search, that circumstance would not invalidate the search. It would only affect the weight of the evidence in support of the search and the recovery. At the highest, the irregularity in the search and the recovery would not affect legality of the proceedings. The Hon'ble Apex Court held that it would thus be settled law that every deviation from the details of the procedure prescribed for search, would not necessarily lead to the conclusion that search by the police rendered the recovery of the articles pursuant to the illegal search, irrelevant evidence nor the discovery of the fact inadmissible at the trial. How much weight is to be attached to such evidence depends on facts and circumstances in each case. The court is required to scan the evidence with care and to act upon it when it is proved and the court would hold that the evidence would be relied upon.

In **Rakesh Kumar Sachdeva vs. State [Delhi Administration]**[30] it was held that failure

27. AIR 1989 SC 702.

28. AIR 1972 SC 886.

29. (2000) 2 SCC 174.

30. (1994) Supp. 3 SCC 729.

to join independent witness of locality is also not fatal. Conviction based on evidence of police offcers alone is not improper.

In **State vs. Mukandi Lal**[31] it was held that the provisions of section 100 Cr.P.C. do not apply to recoveries in consequence of a statement made by an accused person in custody under Section 27 of the Evidence Act. The opening words of this section makes it clear that its provisions are confined only to a search under Chapter VII i.e., only to search of places. It does not apply to discoveries made from, the accused persons in consequence of statements made under section 27 of the Evidence Act. But later in **Balbir Singh vs. Haryana**[32] it has been held that it was no longer a secret that the police had been using Section 27 of the Evidence indiscriminately and as such a very strong proof of the highest standard was required to prove the recoveries and in case no independent witness of the locality joined the investigating officer at the time of recoveries from the house of the accused it casted a shadow of doubt on the police version hence the guilt against the accused was not established so as a matter of caution provisions of section 100 Cr.P.C. should be made applicable to recoveries under section 27 Evidence Act

In **Sultan Khan vs. State**[33] it was held that in course of a search when certain outsiders entered in a room wherefrom certain offending articles were alleged to have been recovered without having their persons searched it would undoubtedly raise doubt about criminality of accused for possession and accused would be entitled to benefit of doubt.

In **State vs. Radha Kishan**[34] it was held that a witness who was not a permanent resident of the locality where the search was carried on, but at the time of search he was staying there temporarily as a guest with his relative was competent witness, the fact that the relative of the witness belonged to the opposite party to that of the accused would not make him an interested witness.

In **Simon K. Fernandez vs. State**[35] it was held by the Hon'ble Court that as far as possible the police should avoid utilizing persons who have already acted as search witnesses. The fact that a person frequently acts as a search-witness leads to the inference that he is easily available and amenable to the police. In other words, he is a professional search witness. But the mere fact that a person had previously acted as a search-witness is not enough for discrediting him.

In **State of Punjab vs. Jasbir Singh**[36] the Hon'ble Court held that it was settled law that evidence collected during investigation in violation of the statutory provisions does not become inadmissible and the trial on the basis thereof does not get vitiated.

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31. 1967 (69) Punj LR.
32. 1987 Chandigarh C Cases 612(P & H).
33. 1969 Cal WN 39.
34. 87(2000) DLT 106.
35. AIR 1951 Bom 468.
36. (1996) 1 SCC 288.

In **Buhha Majhi vs. State**[37] it was held that witnesses not going inside the house of accused but standing outside, would make the search irregular but would, not affect legality of prosecution.

In **State of Punjab vs. Baldev Singh**[38] the Hon'ble Court held that an illicit article seized from the person of an accused, during search conducted in violation of the safeguards provided in Section 50 of NDPS Act, cannot by itself be used as admissible evidence of proof of unlawful possession of the contraband on the accused. Any other article recovered during that search may, however, be relied upon by the prosecution in independent proceedings against an accused notwithstanding the recovery of that material during an illegal search and its admissibility would depend upon the relevancy of that material and the facts and circumstances of that case.

The current position of law according to Baldev Singh case is that an illegal search and seizure may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act. The Hon'ble Supreme Court held that the judgment in Ali Mustaffa's case correctly interprets and distinguishes the judgment in Pooran Mal's case and the broad observations made in Pirthi Chand's case and Jasbir Singh's case are not in tune with the correct exposition of law as laid down in Pooran Mal's case. Seizures of all objects and substances, other than narcotics, when made during an illegal search and seizure, as has been stated above, may be relied upon by the prosecution in other proceedings against an accused and its admissibility would depend upon the relevancy of that material and the facts and circumstances of that case.

Frequently asked questions:

1.) Should the testimony of witness be discarded if he happens to be official witness?

The Hon'ble Supreme Court in **State of Punjab vs. Balbir Singh**[39] held that the testimony of witness is not to be doubted or discarded merely because he happens to be official witness. As a rule of caution and depending upon the circumstances of the case the court may look for corroboration from independent evidence. It has to be considered whether the offcial has deliberately failed to comply with the provisions or failure was due to lack of time and opportunity to associate some independent witness with the search. The Court further held that if the provisions of the Act have not been complied with, the Court has to consider whether any prejudice has been caused to the accused and also examine the evidence in respect of the search in the light of the fact that the provisions have not been complied with and further consider whether weight of evidence is in any manner affected because of the noncompliance.

37. Orissa High Court 1962.

38. AIR 1999 SC 2378.

39. (1994) 3 SCC 299.

2) Whether non-examination of independent witnesses, although present renders the prosecution case doubtful?

Again, in **State of Punjab vs. Balbir Singh**[40] it was held that merely because a number of witnesses were present, and the prosecution had not examined any of the independent witnesses just on that account, the prosecution case cannot be rendered doubtful.

3) Whether omission on the part of the investigating officer to join with him some independent persons or respectable of the locality to witness the recovery makes it inadmissible?

In **State of Punjab vs. Wassan Singh**[41] the Hon'ble Court held that failure of investigating officer to join with him some independent persons or respectable persons of the locality to witness the recovery devalues that evidence but does not render it inadmissible.

4) When the Seizure-witness is from different Place than the place of seizure will it be acceptable?

In **Sama Alana Abdulla vs. State of Gujarat**[42] it was held by the Hon'ble Court that in case the seizure list witnesses were from a different place than from where the seizure took place, and the reason was that the place where the seizure took was inhabited mostly by relations of the accused, and it would have been difficult to find an independent witness from that place was considered and found acceptable by the Court. Merely because the seizure witnesses were from other place, so it cannot, therefore, be said that the investigation was not fair and therefore independent corroboration was necessary.

5) What will be the fate of trial on delivery of an investigation seal to a third party?

In **Piara Singh vs. State of Punjab**[43] it was held that it cannot be said that a criminal trial would succeed or fail merely on the technicality of the delivery of an investigation seal to a third person or the Latter's refusal or inability to appear as a witness about the same.

6) If a seizure list is not prepared in the case of Motor Vehicle Act is the trial vitiated?

In **Transport Commissioner A.P. vs. S. Sardar Ali**[44] it was held by the Hon'ble Court that in the case of seizure under the Motor Vehicle Act, there is no provision for preparing a list of things seized in the course of the seizure for the reason that all those things are seized not separately but as part of the vehicle itself. But it is in the interest of the very officer or person seizing the vehicle so that he may not be open to any charge being laid against him later that such officer or person takes care to prepare a list of detachable things which are ordinarily not part of 'the vehicle and give a copy of the list to the person in charge of the vehicle at the time of seizure.

40. Ibid.

41. 1996 SCC (1) 458.

42. (1993) 2 GLR 1062.

43. 1982 Cr. LJ 1176.

44. AIR 1983 SC 1225.

7) Section 50 of the NDPS Act states that the designated officer, prior to the search, must inform the person to be searched about his right to be searched in front of a gazetted officer or magistrate. Is this mandatory?

The Hon'ble Court in **State of Punjab vs. Baldev Singh**[45] mentioned that this is a protection offered by the legislature to a person being accused of such an act and one who is to be subjected to the search. The purpose of this section is two-fold, it protects the person from fallacious charges and false claims and it ensures that there is a force of authority granted to the prosecution as well. The court held that this is obligatory on the officer in the case. Lack of such notice may not vitiate the trial process itself, but any conviction made solely on the basis of such evidence is unsustainable. Further any evidence adduced from such a search cannot be used as a presumption for a future search as, the grounds under Section 54 states that it must be in compliance with Section 50.

8) Whether some materials acquired during search which is found to be useless and also acquired from the property which was not mentioned for in search warrant will lead to entire evidence inadmissible?

In the **Pooran Mal vs. Director of Inspection (Investigation)**[46] the Hon'ble Court held that the findings of a search and seizure cannot be held to be inadmissible merely on the ground of the illegality of the search and seizure and also if there are some materials acquired during the search which are useless, this will not lead the entire evidence to be inadmissible.

9) When illegal search was made and Section 123 of the Customs Act was not applicable because the seizure was made not by the Customs Authorities but by the police under the Code of Criminal Procedure and therefore the burden of proving the offence lay on the Police which it did not discharge. Whether this illegal search and seizure will vitiate the trial?

In **State of Maharashtra vs. Natwarlal Damodardas Soni**[47] the Hon'ble Court observed that the police had powers under the Code of Criminal Procedure to search and seize the gold if they had reason to believe that a cognizable offence was being committed. Even, assuming that the search was illegal yet, it will not affect the validity of the seizure and further investigation by the Customs Authorities or the validity of the trial which was followed on the complaint of the Assistant Collector of Customs.

10) What will be the effect on trial when seizure witness turns hostile with regard to his signature on the seizure memo taking the plea that he was made to sign black paper?

In **Shyamal Ghosh vs. State of West Bengal**[48] it was held by the Hon'ble Court that statement of the witness who turned hostile even if partially supported the case of the prosecution

45. AIR 1999 SC 2378

46. AIR 1974 SC 348.

47. AIR 1980 SC 593.

48. (2012) 7SCC 646.

can also be relied upon by the court to the extent it supports the case of prosecution and the trial shall not be vitiated.

CHAPTER 6

CONCLUSION

The Code of Criminal Procedure lays down the general rules that need to be followed in case of search, seizure and production of materials. The specific Acts and laws provide for specific provisions and procedures for the law enforcement officers to conduct search and seizures. The police officer and the Magistrate needs to be careful while carrying out search and seizure of persons or property. The search should be according to the laws and if it is not so, as discussed above, then the search may be unlawful which can result in the release of a searched person or seized property. There is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist due to the fault of the law enforcement agencies, instead of correcting them.

Law enforcement officers' needs to be sensitized and proper training should be provided to them from time to time to follow the procedures and safeguards provided. There are cases which are not unknown where the persons are arrested by the police but no entry of arrest is made in the daily diary register and it is only when the police, decides to produce the person arrested before the magistrate that they make an entry in the register according to their convenience. Many a times the police tend to use the stock witnesses and pays them regularly instead of calling impartial 'panch' witnesses who are impartial men of integrity and good moral character. The police officer sometimes prepare one seizure list for all the accused together. The articles seized are also generally not distinctively described. Every Act has their own procedure to be followed if specifically provided in the Act but the police conducting the search and seizure generally applies the same procedure. In **State of Punjab vs. Baldev Singh**[49] it was held that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities' seriously inviting action against the concerned offcial so that the laxity on the part of the investigating authority is curbed. Recently in **Dnyaneshwar v. State of Maharashtra**[50]**,** the Hon'ble Bombay High Court has held that the act of the police officers entering the house of the person to be searched in the night when his family was sleeping which included two ladies and the issues, amounted to the intrusion into their privacy and therefore State was liable to pay compensation for the illegal search as it was violation of fundamental right to privacy.

In England and United States of America the police force is held in high esteem and inspires confidence of the public and the courts unlike their counterparts in India where there is a chronic

49. AIR 1999 SC 2372.

50. 2019 SCC Online Bom 4949.

distrust and lack of confidence towards police forces. In order to develop trust and confidence in police, reform is the need of time both on the part of police and government. Adequate manpower and small jurisdiction should be allocated to the police station. Scientific instruments and basic storage containers should be provided in adequate amount so that the items seized can be properly sealed and brought to the 'malkhana' from the place of occurrence. The nature of evidence in cyber offences is complex and hence special digital forensics has to be utilized. Specific Acts needs different procedure and the police officer should be trained as per the requisites of the particular Act and not follow the same procedure as the normal rules of search and seizure will not fit the bill.

There is a maxim based on Blackstone's formulation that *"It is better that ten guilty persons escape than one innocent suffer"*. The accused is entitled to a fair trial and conviction resulting from an unfair trial is contrary to our concept of justice. But at the same time in our country where less than ten persons out of a hundred tried for serious offences are convicted giving the accused benefit of every small irregularity is no longer permissible as these rules will further diminish the effectiveness of the criminal justice system. The interest of the society is also to be considered, with equal concern for the liberty of an individual. The faith in the system may reach vanishing point if people find persons accused of serious offences being set free to continue their trade by introduction of artificial rules which stifle the truth altogether for the fault of the law enforcement agencies, instead of correcting them. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice which should not be permitted. In light of the cases discussed and analysed, it appears that the recent and current position of the judiciary on the question of law pertaining to the admissibility of evidence collected during illegal searches is just, fair and compatible with our system of jurisprudence. But at the same time looking at the massive growth of crime and criminals in our society we need to introspect and review the aspect of search and seizure laws in India.

ANNEXURE-I

FORM NO. 10

WARRANT TO SEARCH AFTER INFORMATION OF A PARTICULAR OFFENCE

(See Section 93 of Cr.P.C)

To…….. (Name and designation of the police officer or other person or persons who is or are to execute the warrant).

WHEREAS information has been laid (or complaint has been made) before me of the commission (or suspected commission) of the offence of…… (Mention the offence concisely), and it has been made to appear to me that the production of…… (Specify the

thing clearly) is essential to the inquiry now being made (or about to be made) into the said offence (or suspected offence);

This is to authorize and require you to search for the said…… (The thing specified) in the…….. (describe the house or place or part thereof to which the search is to be confined), and, if found, to produce the same forthwith before this Court, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Dated, this…….day of……, 20

(Seal of the Court)

(Signature)

ANNEXURE-II

FORM NO. 11

WARRANT TO SEARCH SUSPECTED PLACE OF DEPOSIT

(See Section 94 of Cr.P.C)

To……..... (Name and designation of a police officer above the rank of a constable).

WHEREAS information has been laid before me, and on due inquiry thereupon had, I have been led to believe that the……....(Describe the house or other place) is used as a place for the deposit (or sale) of stolen property (or it for either of the other purposes expressed in the section, state the purpose in the words of the section);

This is to authorize and require you to enter the said house (or other place) with such assistance as shall be required, and to use, if necessary, reasonable force for that purpose, and to search every part of the said house (or other place, or if the search is to be confined to a part, specify the part clearly), and to seize and take possession of any property (or documents, or stamps, or seals, or coins, or obscene objects, as the case may be) (add, when the case requires it) and also of any instruments and materials which you may reasonably believe to be kept for the manufacture of forged documents, or counterfeit stamps, or false seals or counterfeit coins or counterfeit currency notes (as the case may be), and forthwith to bring before this Court such of the said things as may be taken possession of, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Dated, this……day of……, 20…..

(Seal of the Court)

(Signature)

Proforma of Search/seizure List.

ANNEXURE-III

Search/seizure List

Ref. …… P.S. Case /GDE No. ….. dt. …….. u/s ……..…

……

1. Date & Time of Seizure:-……..……..……
2. Place of Seizure:- ……
3. From Whom Seized:-……..
4. Name & Address of Witnesses:-
   a) … . … … . .
   ……
   (b) ……..……
   ……
   (c) ……..……
   ……
   (d) ……..……
   ……..……

5. Description of Seized Articles:-
6. Signature of Witnesses:- a) …… b)……..

Search/Seized by me, …… Name……

Rank……

Date……

Place……

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Topic No. – 08

Evidentiary value of F.I.R. Touching upon (1) effects of discrepancy in F.I.R., (2) delay in lodging of F.I.R., (3) delay in transmitting the F.I.R. to the magistrate. Statement recorded by the police during an investigation; issues touching their mode of proof. U/s 161, 162 & 164 of the Cr.P.C...

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INTRODUCTION

The topic can be divided into two parts:

A. Evidentiary value of a FIR touching upon the following issues, namely

1. Effect of discrepancy in FIR;
2. Delay in lodging of a FIR;
3. Delay in transmitting the FIR to Magistrate

B. Further as regards the statement recorded by police during investigation issues touching upon mode of proof under sections 161, 162 & 164 CrPC.

Firstly, the above stated issues as regards a FIR are discussed and thereafter, we proceed to the next part of the assignment.

Evidentiary Value of FIR

Sections 154 to 176 contained in the Chapter XII of the Code of Criminal Procedure (hereinafter 'the Code') deal with information to the police and their powers to investigate. For the purposes of setting the criminal investigating agency into motion the code classifies offences in to two categories namely, - (a) cognizable offences and (b) non- cognizable offences. Whether an offence falls under the category of cognizable or non- cognizable is as per the First Schedule of the Code. In respect of cognizable offences, which are generally serious offences, a police officer may arrest a person without warrant and is under a legal duty to investigate without any orders or directions from a magistrate while in case of non-cognizable offence the police officer cannot arrest without a warrant and is not authorized to investigate without the authority given by a Judicial Magistrate. In case of cognizable offences, a First Information Report commonly known as a FIR forms the basis for putting the investigating machinery in motion.

A Constitutional Bench of the Supreme Court in **Lalita Kumar Vs. Govt. of Uttar Pradesh and others**[1] while holding that registering of a F.I.R. is mandatory u/s 154 of the Code if the information discloses commission of a cognizance offence had observed that the object sought to be achieved by registration of the earliest information a F.I.R. is inter alia ……;

1. 2014 (2) SCC 1

1. That the criminal process is set into motion and is well documented from the very start and secondly that the earliest information received in relation to the condition of a cognizable offence is recorded so that there could not be any embellishment etc.
2. It is the first step to access to justice for a victim.
3. It afforded a rule of law in as much as the ordinary person brings the commission of a cognizable crime in the knowledge of the state. It also facilitates swift investigation and sometimes even prevention of the crime. In both cases it only effectuates the regime of law.
4. It leads to less manipulation in criminal cases and prevents incidents of antedated F.I.R. or deliberately delayed F.I.R.

(I) Delay in lodging of a F.I.R.: FIR is an important document even though it is not a substantive piece of evidence. A prompt FIR lends credence to the prosecution version and often prevents possibility of a colored version being put by the informant. It is for this reason that the courts view with concern any delay in the lodging of the F.I.R. The time and date of the lodging of the F.I.R. has to be recorded on the register and that records serves as an internal check about a promptness with which the F.I.R. was lodged. The prompt lodging of the F.I.R. to a great extent brings out the spontaneous version of the occurrence and rules out the possibility of a colored and thought-out version being put up. Such a prompt F.I.R. inspires confidence that it was not outcome of any consultation or deliberation. The F.I.R. in a criminal case and particularly in a murder case is a valuable piece of evidence for the purpose of appreciating the evidence lead at the trial. Such a prompt FIR aids in obtaining the earliest information regarding the circumstances in which the crime was committed including the names of the actual culprits and the part played by them as well as the names of the eye witnesses, if any. In **Thuliya Kali V/s State of Tamilnadu**[2] the court had observed that F.I.R. in a criminal case is an extremely vital and valuable piece of evidence for corroborating the oral evidence adduced at the trial. The court further observed that delay in lodging the F.I.R. often results in embellishment as it might be creation of afterthought. On account of delay the FIR not only gets bereft of the advantage of spontaneity but danger creeps in the introduction of colored version, exaggerated account or concocted story as a result of deliberation and consultation. It is therefore essential that the delay in lodging of the F.I.R. should be satisfactorily explained.

However, it is submitted that there is no hard and fast rule that delay in lodging the F.I.R. would automatically render the prosecution case doubtful. In **Ramdas V State of Maharashtra**[3]**.** The court noted that the fact that the report was not belated is a relevant fact of which the court must take note. This fact has to be considered in the light of other facts and circumstances of the

2. AIR 1973 SC 501
3. AIR 2007 SC 155

case and in a given case the court may be satisfied that the delay in lodging the report have been sufficiently explained. In the light of the evidence of the delay, the court has to consider whether the delay in lodging the report adversely affect the case of the prosecution or not. That is a matter of appreciating of evidence. Further in **State of Punjab V Ramdev Singh[4].** it was held that delay in lodging F.I.R. cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same. Delay has the effect of putting the court on its guard to search if any explanation has been offered for the delay and if offered whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there seems to be a possibility of embellishment in the prosecution version on account of such delay the same would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court the same cannot by itself be a ground for disbelieving and discarding the entire prosecution version.

Further in **Sohdat Hussain Rahmat Hussain V/s State of Maharashtra[5]** it has been held that mere delay in lodging of the F.I.R. would not be fatal in the case where substantive evidence of prosecution witnesses regarding the involvement of the accused persons in the commission of the crime is otherwise reliable and convincing. Delay is not a mitigating circumstance when the accusations of rape are involved.

In regard to F.I.R. in sexual offences the court in **State of Himanchal Pradesh V/s Srikant Shekari[6]** has held, that delay per se is not a mitigating circumstance for the accused when the accusations of rape are involved and, in such cases, delay is not uncommon. There are several factors which may prevent the prosecutrix and her family members to come before the police and lodge a complaint. In a tradition bound society like India and more particularly rural areas it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging a F.I.R. In **Vidyadharan V/s State of Kerala[7]** the court observed that delay in lodging F.I.R. is quite natural in a traditional society to avoid embarrassment. In cases of outraging the modesty of women or rape the reputation of women come as a natural and obvious reason for delay and it should not be suspected.

It is submitted that in case of sexual offence it is no doubt true that mere delay in lodging the F.I.R. is not fatal to the case of the prosecution, however the fact that the report has been lodged belatedly is a relevant fact which the court must take notes. That fact has to be considered in the light of the other facts and circumstances of the case and in a given case the court must be satisfied that the delay in lodging the report has been sufficiently explained. Where there was a delay of 60 hours in lodging the F.I.R. in a rape case it was held fatal to the prosecution case. The explanation that no police official was found at the police station was not convincing in view of the fact that the police station in which the informant visited was full-fledged police station **(Bhaiyamiyan V/s**

4. 2004 (1) SCC 421
5. 2007 (3) AIR Bom (R) 816
6. 2004 Cr. LJ 4232 SC
7. 2004 Cr. LJ 605 (SC)

State of Madhya Pradesh)[8]. In a rape case where in medical examination no injury was found on the private parts of the prosecutrix, hymen was found intact, in the report of FSL examination no blood was found on wearing apparel of the prosecutrix, delay of 14 hours in lodging F.I.R. was found fatal to the prosecution case and the accused was acquitted of the rape charge **(Saraj Kumar Das V/s State of West Bengal[9]).**

However, in a rape case where the informant first reported the matter to the Gram Panchayat and gram pradhan called the accused but he did not appear for settlement and thereafter the F.I.R. was lodged. It was held that delay in lodging F.I.R. stood explained **(Nani Gopal Shankar V/s State of Tripura[10])**.

From the various decisions of the Supreme Court and High Court some of the following circumstances are taken as reasonable explanation of delay in F.I.R.

(1) Fear of accused persons: **(Hazilal Deen V/s State[11])**.

(2) Fear of damage to family reputation in rape cases, **Harpal Singh V/s State of Himanchal Pradesh[12], State of Karnataka V/s Manjanama[13].**

(3)Delay in F.I.R. due to medical aid: Where the delay in filling F.I.R. is due to attending the injured persons and taking them to the hospital, the delay is not fatal to the prosecution case **Raghuveer Singh V/s State of Haryana[14];** for absence of motive to falsely implicate the accused-**(Ramjag V/s State of U.P.[15]);** Delay due to shock where the persons affected by the crime were too shocked and had taken reasonable time to go to the police station their evidence cannot be doubted on account of delay **(State of Andhra Pradesh V/s M. Narshimha Rai[16]).** Whether on hearing the noise of the death of the new wed daughter the mother became unwell, the F.I.R. filed next date was held not a delayed one, **(State of West Bengal V/s Orilal Jaiswal[17]).**

(4) When husband himself burns his wife, long distance of police station from place of occurrence was held to be sufficient ground for delay **Dilip Singh V/s State of Punjab[18], State of Madhya Pradesh V/s Vidya Singh[19].**

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8. AIR 2011 SC 2218
9. 2016 CrLJ 3602 (CaL)(BD)
10. 2013 CrLJ 702 Guwahati (Gua)
11. 1977 CrLJ 538
12. AIR 1981 SC 361
13. AIR 2000 SC 2231
14. (2000) 9 SCC 88
15. AIR 1974 SC 606
16. AIR 2010 SC 3776
17. AIR 1994 SC 1418
18. AIR 1953 SC 364
19. 1998 CrLJ 365 (SC)

(5) When night intervenes **Lalayi V/s State of U.P.[20].**

(6) Rough or bad road **Lalayi V/s State of U.P.**

(7) Bad weather **Babu Krishna Kamle V/s State of Madhya Pradesh[21]**

(8) Non availability of transport **Babu Krishna Kamle V/s State of Madhya Pradesh[22].**

(9) When the F.I.R. was recorded by the police staff with much delay **Amrit Singh V/s State of Punjab[23].**

(10) When the informant did not know that the F.I.R. was necessary to lodge **Manager Yadav V/s State[24]**

(11) Delay due to rains **Fekan Bind V/s State of Bihar[25].**

(12) When amicable settlement was sought.

(13) In abduction cases it is quite natural for the complaint to go out in search of the victim and often lodging of such FIR is delayed. Doubting the case on the ground of delay in such cases is quite unjustified and the delay stands explained **Badshah V/s State of U.P.[26].**

(14) Further in cases of kidnapping and murder the delay in lodging F.I.R. is not fatal to the prosecution case as it is but natural for father and other relatives to reach for the deceased child before reporting the matter to the police **Madan Lal V/s State of Punjab[27].**

(15) In a case of rape F.I.R. was filed after unexplained delay of more than one year after the prosecutrix had given birth to a child. Conviction of the accused on charge of rape was held not proper **Ram Krishna V/s State of Madhya Pradesh[28].**

(16) Where in a case u/s 306 and 498(a) I.P.C., F.I.R. was lodged after three days of the incident, there was no allegation of maltreatment or dowry demand in the inquest report prepared immediately after the incident, it was held that registration F.I.R. was doubtful and not trustworthy.

It is submitted that delay in lodging F.I.R. becomes insignificant where eye-witness version of

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20. AIR 1974 SC 2118
21. AIR 1980 SC 1269
22. AIR 1980 SC 1269
23. 1983 CrLJ 1405
24. 1984 All. LJ 1146
25. 1988 (1) crimes 1740
26. 2005 CrLJ 346 (All)
27. 2010 CrLJ 3222
28. 2017 CrLJ (Noc) 62 MP

the incident is found to be cogent and convincing to sustain the prosecution case. It has been held that where the delay is not deliberate and is well explained then it may not have any adverse effect and further that delay is not always fatal to the prosecution case. Delay only puts the court on its guard and the same may be condoned if there is satisfactory explanation for it. The fact of delay by itself cannot be held to be a reason for rejecting evidence which is otherwise fully entitled to credit **Ali Hasan V/s State[29].** When the case is entirely based on admitted facts and it is supported by overwhelming documentary evidence, delay in lodging the F.I.R. is of no consequence.

(II) Delay in transmitting the F.I.R. to Magistrate: - The investigation of a cognizable offence begins when a police officer in-charge of police station registers a FIR based on information. Even when a reasonable suspicion of the commission of cognizable offence exists, the police officer must immediately send a report of the circumstances creating the suspicion to the Magistrate having to take cognizance of such offence upon a police report. The section lays down that if officer in charge of a police station suspected commission of a cognizable offence from information received or from other sources a report of the same shall be sent to the Magistrate empowered to take cognizance of such offences and he shall proceed in person or shall depute a subordinate to proceed to the spot to take up investigation in the case. But if the case is not of a serious nature the police officer may not do so and if the police officer does not find sufficient grounds for making the investigation, he may not even investigate the offence. However, in both the cases the police officer is mandated to send a report to that effect to the Magistrate concerned with his reasons for not complying with special section (1) and in the later case he should even inform the informant that he would not investigate the case or cause it to be investigated **(Vipin Kumar Tiwary V/s S. N. Sharma 1969 AllLJ 406).** The purpose for forthwith sending the report to the concerned Magistrate is to keep the Magistrate informed of the investigation of a cognizable offence so that he may be able to control the investigation and, if required, to issue appropriate directions **(Swati Ram V/s State of Rajasthan (1997) 2 crimes 148 (Rajasthan).** The purpose and object of Section 157 becomes clear from the combined reading of section 157 and 159 Cr.PC.

They have dual purposes. Firstly, to avoid the possibility of improvement in the prosecution story and secondly to enable the Magistrate to have a watch on the progress of the investigation **(Bathula Nagamalleshwarea Rao V/s State[30])**. It should be noted that the Magistrate stated u/s 156(3) and section 157(1) is a judicial Magistrate.

The importance of prompt dispatch of a copy of the F.I.R. to a Magistrate empowered to taken cognizance of such an offence can hardly be over emphasized. The time at which the report is received by the Magistrate concerned goes a long way in coming to the proper conclusion as to time at which the F.I.R. may have been written, lodged or registered **(Swaran Singh V/s State[31]).** Failure to send a report to the Magistrate as required by this provision is a breach of

29. 2013 (3) Ad Delhi 125 DB

30. (2008) Volume 3 SCC (Cri) 898

31. 1981 CrLJ 364 P and H

duty and may go to show that the investigation in the case was not just, fair and forthwith and that the prosecution case must be looked at great suspicion.[32] In **State V/s Nidhan Singh**[33] it was observed that a prompt lodging of the F.I.R. to a great extent brings out this spontaneous version of the occurrence and rules out the possibility of a colored and thought-out version being put up. The legislature by providing in the Section 157 Cr.P.C. that the officer in charge of the police station shall forthwith sent a copy of the report to the Magistrate concerned provided an external check for the prompt lodging of the F.I.R. This section provides a safety valve in the cases when the F.I.R. is either ante-timed or ante-dated. The receipt of the special report by the Magistrate in time lends credence to the prompt lodging of the F.I.R. and an unexplained delay in the receipt of the special report by the Magistrate concerned creates a doubt about the promptness of the F.I.R. and puts the court on its guard. No doubt that the non-compliance of Section 154 and Section 157 does not constitute a ground to throw away a prosecution case but it does emerge as a factor to be seriously reckoned with while appreciating the entire evidence. Its non-observance is bound to cast some shadow on the case obviously to its detriment because of the adverse inference. **(Mahabir Singh V/s State**[34]**), Victor Immanuel V/s State of Tamilnadu**[35]**.** However in **Pala Singh V/s State of Punjab**[36] and also in **Gurpreet Singh V/s State of Punjab**[37] as well as in **Ravi Kumar V/s State of Punjab**[38] it was held that where the F.I.R. is actually recorded without delay and the investigation started on the basis of that F.I.R. and there is no other infirmity then howsoever improper or objectionable the delayed receipt of the report by the Magistrate concerned be, it cannot by itself justify the conclusion that the investigation was tainted and the prosecution unsupportable.

Dispatch of a copy of the F.I.R. under the mandatory provision of Section 157 of the court further ensures that there is no manipulation or interpolation in the F.I.R. If the prosecution is asked to give an explanation for the delay in dispatch of a copy of the F.I.R., it ought to do so. In **State of Rajasthan V/s Daub Khan**[39] the court held that where officer in charge of the police station is not asked questions about the delay in sending special report to the Magistrate no adverse inference shall be drawn against the prosecution.

It should not be noted that the expression 'forthwith' within Section 157(1) of the code does not mean that the prosecution is required to explain every minute delay in sending copy of the F.I.R. to the Magistrate, of course the same has to be sent within reasonable dispatch which means

32. R.V. Kelkar's Criminal Procedure; EBC Publishing (P) Ltd., Lucknow, 2018
33. 1984 CrLJ 1632 (J&K)
34. 1979 CrLJ 1159 (Del
35. 1991 CriLJ 2014 (MA)
36. (1972) 2 SCC 640
37. (2005) 12 SCC 615
38. (2005) 9 SCC 315\
39. (2016) 2 SCC 607

within a reasonable possible time **(Chinappa Rao V/s State of Andhra Pradesh[40]).** The word forthwith in Section 157 means promptly and without any undue delay **(Arjun Marik V/s State of Bihar[41]).** It is submitted that the said provision of Section 157 has the affect of causing an obligatory duty on the police to forthwith send a copy of the F.I.R. to the Magistrate and whenever the police fail to discharge this mandatory duly it is under an obligation to furnish reasons for not discharging.

It has been held in **State of U.P. V Gokaran[42],** that every delay in sending the report to the Magistrate u/s 157 would not necessarily lead to the inference that the F.I.R. has not been lodged at the time stated or had been ante-dated or the investigation was not fair and forthwith right. Though the delay has to be explained by the prosecution.

Where the record shows that the police promptly came into action and completed investigation by the submitting charge-sheet, prosecution case is established during trial, mere delay in sending the copy of the F.I.R. to the concerned Magistrate would not be fatal to the prosecution case. **(Pappu Singh V/s State of Bihar[43].** In **Shukhvinder Singh V/s State of Punjab[44],** it was held that the requirement of sending special report to the Magistrate is an external check on the working of police agency and not in all cases the delay will make a prosecution case doubtful.

However, it is submitted that the delay puts the court on guard as to whether the version as stated in the court was same version as reported in the F.I.R. or was a result of deliberation involving some other persons who were actually not involved in commission of crime. In any case in absence of any prejudice to the accused delay would not vitiate trial.

It is also submitted that word 'forthwith' has no fixed or absolute meaning and the same has to be construed with reference to the object of the provision of law and circumstances of the case. If the F.I.R. is not sent forthwith then there must be some explanation on the record. A purpose of sending F.I.R. to the court forthwith is that Magistrate in charge of the case must become aware about the progress of the investigation. However, if no prejudice is caused to the accused mere delay would not be fatal unless it appears that something has been concealed and the F.I.R. seems to be a suspicious piece of document **(Anant Kumar Brahmchari V/s State of Bihar[45].** It has also been held that non-mention of the time of dispatch of F.I.R. to the Magistrate is not fatal to the prosecution case **(Sheo Shankar Singh V/s State of U.P.[46].**

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40. AIR 2002 SC 3648
41. 1994 SCC (Cri) 1551
42. AIR 1985 SC 131
43. 2011 CriLJ 2040 (Pat) (B)
44. 2014 CriLJ 446 (SC)
45. 2013(1) PLJR 455 (Pat)
46. 2013 (83) ACC 728 (SC)

Where in a double murder case F.I.R. was sent to the Magistrate forthwith on the day of the commission of offence, and the F.I.R. revealed the names of all the accused persons and details of the incident, the prosecution case could not be suspected on that ground alone **(Ram Prashad and others V/s State of Chhattisgarh[47].** It is submitted that the object of recording the earliest version and it's reaching the Magistrate forthwith is to avoid embellishments and keep the Magistrate informed of the investigation. Where no infirmity is brought to the notice of the Court and no prejudice is occasioned to the accused the delay itself cannot be urged as a technical ground to contend that investigation is tainted and prosecution unsupportable.

Where the F.I.R. was actually recorded without delay and investigation started on the basis of the F.I.R. and there was no other infirmity brought to the notice of the court then however improper the delayed receipt of the report by the Magistrate concerned it cannot by itself justify that the investigation was tainted and the prosecution was unsupportable. It has also been observed by the court that it is necessary to send the F.I.R. 'forthwith' to the Magistrate without any delay and there is no justification in keeping of the communication of the F.I.R. to 'working day' as what is contemplated by Section 157 is 'forward the report forthwith to the Magistrate' and not to the court. In a large number of cases the investigating officer are not sending the report to the Magistrate expeditiously on the ground that a particular date is not a working day. The expression used is 'forthwith' and this requirement should not be taken lightly since it was intended to safe guard the interest of the accused and to rule the possibility of an F.I.R. lodged after consultation and deliberation **(Sandeep V/s State of U.P. 2012 (6) SCC 107, Krishnappa V/s State of Karnataka[48]).** It has also been held that even if holidays are declared after registering F.I.R. the said F.I.R. should reach the Magistrate at his residence **(Biju V/s State of Kerala[49]).**

It is submitted that a mere delay in sending the copy of the F.I.R. to the Magistrate by itself does not render the whole of the prosecution case doubtful. It has also been held that where the witnesses do not have any animosity with the accused and that they were not under the influence of the police the lapse on the part of the special messenger to reach the court in time is not a serious infirmity **(Mahaveer Prashad Akela V/s State of Bihar[50]).** It has also been held that in a case where the F.I.R. was actually recorded without delay and the investigation promptly commenced and no infirmity in the investigation was shown mere delay in receipt of the F.I.R. by the Magistrate cannot be held to be fatal to the prosecution case **(Balram Singh V/s State of Punjab[51]).** Further where there is no delay in F.I.R., the late receipt of the same by Magistrate in the absence of vitiating circumstances would not make the lapse fatal to the prosecution case. In **Anirudhan V/s State of Kerala[52],** it was observed that where no question was put to the investigating officer

47. 2010 (3) crimes 533 (chat) (DB)
48. AIR 2012 SC 2946
49. 2012 (4) KLT 382
50. 1987 CriLJ 1545 (Pat) (DB)
51. AIR 2003 SC 2214
52. 2003 (4) 366 (Kerala)(DB)

regarding the delay in sending copy of the were F.I.R. had not been filed by an eyewitnesses no case of prejudice to the accused was made out, the accused could not claim acquittal on the mere ground of delay in sending copy of the F.I.R. to the Magistrate. It has been held that delay in sending F.I.R. to the concern Magistrate is not fatal unless the false implication of the accused is shown and prejudice is shown to have been caused to the accused **(K. Mani V/s Inspector of Police, Spl CBI V/s Kachhi[53]).**

Where there was delay of five days in forwarding F.I.R. to the concerned Magistrate, however no question was put to the I.O. in his cross-examination about the delay in dispatch of the F.I.R. to the Magistrate, it was held the delay was not a fatal to the prosecution case **(Anjan Das Gupta V/s State of West Bengal[54]).**

Where F.I.R. is not ante-timed delay in sending the same thereof to the Magistrate is not fatal to the prosecution case.

Where the delay in dispatch of F.I.R. to concerned Magistrate is explained investigation cannot be called tainted.

Where no question is asked to the investigating officer as to the reason for the alleged delay in dispatch of F.I.R. no adverse interference would be drawn.

Where the record shows the investigation was taken up immediately after lodging of the F.I.R., delay in sending copy of the F.I.R. to the concerned Magistrate would not be fatal.

Where the special inspector deposes that after registering F.I.R. he sent the said F.I.R. to concerned authorities and a copy of the same to the Court the provisions of Section 157 Cr.P.C. are not violated. In **Pavesh Kalyandas Bhavsar V/s Sadiq Yakub Bhai[55],** the court again reiterated that a mere delay in reaching F.I.R. to the concerned Magistrate itself would not be fatal to the prosecution case but coupled with other facts showing manipulation would be taken as prejudicial to the prosecution case. The non compliance of Section 157 Cr.P.C. is an infirmity which when coupled with other infirmities might give benefit of doubt to the accused. The case of the prosecution may not be thrown out merely due to non-compliance of Section 157 Cr.P.C. In the facts and circumstances a delay of ten days in reaching the F.I.R. to the Magistrate was held not fatal **(Paresh Kalyandas Bhavsar V/s Sadiq Yakub Bhai[56])** but delay of three days was held fatal in **State of Gujarat V/s Raju Bhai, Dhamir Bhari, Bariya[57].**

Where the F.I.R. is true, the mere delay in sending it to the concerned Magistrate would be no ground to doubt the genuineness of the report **(Paresh Kalyandas Bhavsar V/s Sadiq Yakub Bhai[58]).**

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53. 2016 CriLJ 1644
54. AIR 2016 SC 5510
55. AIR 1993 SC 1544
56. AIR 1993 SC 1544
57. 2014 CriLJ 771 (Gujarat)(DB)
58. AIR 1993 SC 1544

Where the court of Magistrate was situated at the distance of 60 kms, there were holidays in course, the delay of one day in sending of the F.I.R. to the court of Magistrate was held not fatal **(Ramdev V/s State of Rajasthan[59].** In **Amar Singh V/s State 1996 CriLJ 3848 (Del) (DB),** the court held that mere delay in sending F.I.R. to concern Magistrate is not fatal if case is otherwise proved, by mere delay in sending report, F.I.R. does not become suspicious and not fatal to the prosecution case in its entirety.

Where prejudice to the accused is not proved delay in sending copy of the F.I.R. to concern Magistrate is not fatal.

In **Ganesha V/s State of Madhya Pradesh[60]** it was observed that where no question was put to the I.O. during his cross-examination that copy of F.I.R. was not sent to the concerned Magistrate it shall be presumed that the copy of F.I.R. was sent to the concern Magistrate as u/s 114 (e) of the Indian Evidence Act, there is presumption, that such official act was performed by the concerned police official in accordance with law.

Where the F.I.R. sent to the concerned Magistrate does not contain the signatures, endorsement of Magistrate about its receipt but the head constable deposes about sending of the F.I.R. and the time of receipt and entry about the same also appears in General Diary the omission is not sufficient to hold F.I.R. ante-dated **(Subhash V/s State of U.P.)[61]**

Where the copy of F.I.R. sent to Magistrate contained his endorsement made thereon the absence of seal did not make any difference **(S.B. Kali Gonnabar V/s State of Karnataka[62]).** It is submitted that where the F.I.R. was actually recorded without delay and that investigation started on the basis of the F.I.R. and there was no other infirmity brought to the notice of the Court then however improper or objectionable the delayed receipt of the report by the Magistrate concerned is, it cannot by itself justify that the investigation was tainted and the prosecution unsupported.[63]

Discrepancy in F.I.R.:

The F.I.R. is a vital document in criminal procedure of our country and its object from the point of view of the informant is to set the criminal justice system in motion and from the point of view of the investigating authority is to obtain first hand information about the alleged criminal activity so as to enable to take suitable steps to investigate and to bring to book the guilty. The Supreme Court in **Lalita Kumari V/s State Government of Uttar Pradesh and others[64]** while holding compulsory registration of F.I.R. u/s 154 Cr.P.C essential if the information discloses

59. 2003 CriLJ 1680 (Raj)(DB)
60. 2006 CriLJ 3604
61. AIR 1987 SC 1222
62. AIR 1994 SC 848
63. (Soni 1894)
64. (2014) 2 SCC page 1

commission of a cognizable offence also observed that this would help the society specially the poor in rural and remote areas of the country. One of the objects and reasons of the code is to protect the interests of the poor and this mandatory requirement of registration of the information in case of a cognizable offence would go a long way in fulfilling this object. At the time of registration of F.I.R. what is to be seen is merely whether the information given ex-fascia discloses the commission of a cognizable offence or not. The F.I.R. is not an encyclopedia **(Ramesh Maruti Patil V/s State of Maharashtra**[65] it need not contain an exhaustive account of the incident. It is not a catalogue nor does one expect that a just informant disoriented in mind and in distress to give such graphic details[66]). It has been held that a first information report is not an encyclopedia and minor omissions have to be ignored where prosecution evidence is otherwise found reliable. Minute details of the incident need not be given in the F.I.R. but broad features of the case have to be mentioned. In effect only gist of the occurrence may be mentioned in F.I.R. to set the police machinery in motion and every detail need not be given[67]. In **Munsi V/s State of Rajasthan**[68] the court observed that it is sufficient if the F.I.R. contains sufficient features and the kernel of the prosecution story. Where broad features of the offence are given, the F.I.R. cannot be discarded as laconic. Further in **State of U.P. V/s Nahar Singh**[69] the court observed that an F.I.R. should not be too sketchy or vague yet not maintaining of the detail and meticulous particular is no ground to reject the prosecution case. It need not contain each and every minute incident that occurred either prior to or subsequent to the offence. Non- mention of utterances made by the accused was held of no consequence in **(Rama Kant Singh V/s State of Bihar**[70]**).** Further the F.I.R. need not be a detailed document and omission to detail the subsequent overt act of the accused separately was held of no significance. Further, omission to state the injuries of the accused in the F.I.R. is not fatal, when explained by the prosecution in oral evidence.

At this stage, it is prudent to point out that an F.I.R. is not a substantive piece of evidence and can only be used to corroborate the statement of the maker u/s 157 Evidence Act and to contradict u/s 145 of the Evidence Act. It can only be used for corroboration or contradiction purposes that too when F.I.R. was lodged by a person having direct knowledge about the occurrence. **State of Bombay V/s Rusy Mistry**[71]**, Hasib V/s State of Bihar**[72]**, Aghanoo Nagesia V/s State of Bihar**[73]**.**

65. AIR 1994 SC 28
66. Om Prakash V/s State of Uttaranchal AIR 2002 SCW 491
67. Sohoni's Code of Criminal Procedure 1973 (Volume 2); LexixNexix, Gurgaon, Haryana 2018 (Provided by Bihar Judicial Academy, Patna)
68. 2008 CriLJ (NOC) level 66 (Rajasthan)
69. AIR 1998 SC 1328
70. 2006 CriLJ 4752 (Pat)
71. AIR 1960 SC 391
72. (1972 4 SCC 773
73. AIR 1966 SC 119

It has been held that an F.I.R. can never represent the entire evidence of the case. **(Tej Bir V/s State of Haryana[74].** Where the F.I.R. is filed by rustic village women this fact has to be considered by the court **(State of West Bengal V/s Joymodak[75]).** In a complaint for offence u/s 304(B) I.P.C. for demand of dowry omission of details of harassment would be consequential. The mental state of the father/mother filing the complaint who had lost his/her daughter has to be kept in view **(State V/s Arjun Manikappa Nagure[76]).** All the words stated in heat of passion should not be mentioned in F.I.R. and everything cannot be written in F.I.R. In F.I.R. it is not necessary to give all details of incident and mere information of crime is enough **Ramchand V/s State of Rajasthan[77].** However it has been held that vague information about of an offence does not amount to an F.I.R. and that it should contain the basic prosecution case **(Zakir Hussain V/s State of M.P[78])**. Merely not mentioning names of all the accused and their overt acts, elaborate the details of injuries said to have suffered would not make the F.I.R. vague or unreliable. The F.I.R. is not an encyclopedia of all the facts. It has been held that where a large number of accused are involved then all the names and details need not be given in the F.I.R. **(Ganga Bhavani V/s Raya Pati Ventek Reddly[79])**. In **Gurpeet Pal Singh V/s State of Punjab[80]** the court explained the effect of non-disclosure of names of witnesses in F.I.R. In the said case as required under the rule, substance of information received u/s 154 Cr.P.C. had been entered in the daily diary wherein names of all the four accused and that of the deceased having been mentioned but so far witnesses are concerned the same had not been disclosed. What is required to be mentioned in the daily diary in the substance of the information received and the same cannot be said to be a repository of everything. The factum of murder of deceased by the four accused persons including the appellants accused had been specifically entered. Non- disclosure of the names of witnesses in the daily diary as well as mortuary register ipso facto cannot affect the prosecution case more so when there are no other circumstances to otherwise create doubt regarding veracity of the prosecution case. It has also been observed the F.I.R. is not a plaint or that a list of witnesses is to be attached to it. In fact, it may be very often that informant may not even know the persons or witnesses and they have to be worked out during investigation **(Srikant Pathak V/s State of U.P. 1991(3) premise 503 ALL).** Where the F.I.R. was lodged just after 6 or 11 hours of the occurrence in case of murder of two persons and names of eye witness were not mentioned in the F.I.R. and no satisfactory explanation was given that such omission is consistent with the inference that the alleged witnesses were not present at the time of occurrence **(Kana Ram V/s State of**

74. (2011) 11 SCc 556
75. 2009 CriLJ 3895 (Cal)(DB)
76. 2017 CriLJ 2018 (Cal) (DB)
77. 1995 CriLJ (Raj) 225
78. 2008 CriLJ 1289(Chhattisgarh) (DB)
79. AIR 2013 SC 3681
80. AIR 2006 SC 191

Rajasthan[81]). In another case it has been held that failure to mention the name of eye witnesses in the F.I.R. would not in any way affect the testimony of witnesses. **(Delhi Administration V/s Vishwa Bandhu Billa[82]).** Further the omission of the names of two prosecution witnesses in the F.I.R. cannot be in the circumstances of the case be of much significance as to reject their testimony on that scope **(Ashok Kumar V/s State Daily Administration[83]).** It has been held that it will lead to undesirable results, if the testimony of witnesses found reliable and trustworthy is discarded on the ground that their names are absent in the F.I.R. **(Rakkha Dineshan @ Mele Puthi Yadalh Dineshan V/s State of Kerala[84]).** However, omission of names of witnesses in an F.I.R. is not sufficient by itself to entail rejection of their testimony **Naipath Singh V/s State of Haryana[85], State of Bihar V/s Paramhansh Yadav[86].** Where an F.I.R. was not lodged by an eye witness of the occurrence but by Gram Rakashi then non-mention of names of two witnesses may be of some relevance but it would not be sufficient by itself to entail rejection of the testimony of a witness **(State V/s Arun @ Arun Kumar Pradhan[87]).** For a witness to be relied on it is not necessary to be mentioned in the F.I.R. A witness can see the occurrence and his presence at the spot may be made out from the statement given by witness and also the surrounding circumstances **(Thakur Mahato[88]).** It is submitted that when there is independent and reliable evidence that a witness not named in the F.I.R. was present during the occurrence there is no reason that his testimony be rejected on the sole ground that his name is conspicuously absent in the first information statement.

It is well settled that if the witness is found to be independent and reliable and is believed to be present during the occurrence then his evidence cannot be rejected on the sole ground that his name had not been named in the F.I.R. Non-mention of name of a witness may be an honest omission, an inadvertent mistake or may be due to various others conceivable reasons. In **Chandra Bhai V/s State of U.P.[89]** the court observed that *"on examining the F.I.R. we find that no mention has been made as to who are the witnesses to the occurrence. That by itself cannot be the ground to discard the evidence of witness who is stated be a witness of the occurrence if nothing has been brought out in the cross-examination to impeach his testimony"*.

In **Hardev V/s State of U.P.[90]** the court held that omission to mention to name of the

81. 1985 (1) Cri 859
82. 1978 SCC (Cri) 556
83. AIR 1977 SC 1304
84. 1990 (1) Cri 707
85. AIR 1977 SC 1066
86. 1986 PLJR 688
87. 1984 (2) Cri 1984
88. 1991 (3) Cri 641 (pat)(DB)
89. 1972 SCC (Cri) 290
90. AIR 2016 SC 1615

assailants does not result in the negation of the character of the document as a F.I.R. and will not by itself be sufficient proof of their innocence. Where names of some accused are mentioned in the F.I.R. and of other accused are not mentioned it is the circumstance which the prosecution has to explain though no rule of law stipulates that an accused whose name is not mentioned in the F.I.R. is entitled to an acquittal. **Darshan Singh V/s State of Punjab**[91]. Further where the name of the accused is not mentioned but his designation is given absence of name is hardly of any significance **(Kishan Chand Mangal V/s State of Rajasthan**[92]**).** In **Bisan Das V/s State of Punjab AIR 1975 SC 573** it was held that in the F.I.R. the name of the accused is not mentioned but at the same time the miscreants are described as some unknown men then this explanation explains the omission. However, it has also been observed that omission of the names of the accused in the F.I.R. does gives rise to suspicion about their involvement in the crime and such unnamed accused persons are entitled to benefit of doubt **(Subal Ghorai V/s State of West Bengal**[93]**).** Though it is expected from a prudent man to disclose the names of accused yet if the accused cannot be identified or not known to the prosecution witnesses then it is not serious to dwell upon. However, where the accused are very much known to the P.W.-1 family it creates a serious doubt in the mind of the court when they are not named in the F.I.R. Therefore, the court in **Krishan Gowdha V/s State of Karnataka**[94] set aside the conviction of the accused appellant u/s 302 read with section 34, 324/149 I.P.C. as recorded by the High Court and the judgment of the trial court acquitting the accused was restored. In **Mahatam Rai V/s State of Bihar**[95]**,** the court held that F.I.R. being the earliest version of prosecution case presented before the police, hence any fatal omission in F.I.R. such as non mention of names of accused persons is a matter of significance. Where all the minute details are given in a lengthy F.I.R. there is no reason to expect that the informant was confused about the identity of the person who tried to pull him up **(State of Rajasthan V/s Hukam Chand**[96]**).** In **State of U.P. V/s Naresh**[97] as well as **Ranjeet Singh V/s State of M.P.**[98] the court observed that an F.I.R. is not encyclopedia of the entire case. It may not and need not contain all the details the names of the accused though may be important but not naming of the accused in the F.I.R. may not be a ground to doubt the contents thereof in case the statements of the witnesses are found to be trustworthy. The court has to determine after examining the entire factual scenario. Therefore, non-mentioning of the names of the accused in the F.I.R. is not a ground alone to tilt the balance of the case in favour of the accused though at the same time this fact of non-naming the accused person in the F.I.R. cannot be ignored. The question

91. AIR 1689 SC 554
92. AIR 1983 SC 1
93. (2013) 4 SCC 607
94. AIR 2017 SC 1657
95. (1997) 1 East Cri 298 (Pat)
96. (1983) 2 Cri 868
97. AIR (2011) 4 SCC 321
98. AIR (2011) SC 255

is whether a person was impleaded by way of afterthought or not must be determined having regard to the entire factual scenario in each case. Therefore, non-naming of one of the accused persons in the F.I.R. is no reason to disbelieve the testimony of crucial witnesses. Where five members of the family were battered and F.I.R. was lodged by the member of the battered family who was under severe psychological pressure, omission to mention the name of the accused was not material when statement of witnesses who accompanied informant was recorded immediately thereafter and in that statement the name of the omitted accused was mentioned as a person last seen with one of the deceased **(Sri Bhagwan V/s State of Rajasthan[99])**. Also, it has been held that there is no rule of law that an accused whose name is not mentioned in F.I.R. is entitled to acquittal, nor its imperative that all the accused persons must be named in the F.I.R. **(Sadre Alam V/s State of Bihar[100]).** Where in the F.I.R. names of accused A1, A11 and A17 were mentioned and it was stated that other accused were also involved, non-mention of all the 24 accused persons and details of injuries suffered by some of the accused persons would not render the F.I.R. week or unreliable. **Venkteshwar vs. State of Andhra Pradesh[101].**

It has been observed that in cases of robbery or dacoity the omission of the name of the accused is not of much significance. The prosecution can prove its case on the basis of the recovery which are subject matter of the offence and the identification of the culprits in the Test Identification Parade **(Lal Singh vs. State of UP[102])**. Where the FIR was given by a pardanashin lady and names of some of the accused were not mentioned, it was held on the facts of the case that merely absence of names of some of the accused is not sufficient to doubt prosecution case **(Rambali Thakur vs. State of Bihar[103]).** In **Dilip Prem Narayan Tiwari vs. State of Maharashtra[104]** the court held that omission of the accused persons in the FIR did not have much significance, where the informant was in a state of shock having seen the dead bodies of his young man and brother-in-law. However where the overt act as alleged to being committed by an accused by the witness is not borne by medical evidence and the name of the accused does not find a place in the FIR the omission becomes significant and he is entitled to get benefit of doubt **(Rewa Ram vs. State of Maharashtra[105])**Where the appellant along with his family members was alleged to have killed the deceased though he was not named in FIR by the informant or the eyewitness of the occurrence and the informant named him only in his deposition and further other witnesses who deposed the name of the accused were examined many days after the incident, by following the rule of caution the accused was given benefit of doubt and acquitted of the charges u/

99. AIR 2001 SC 2342

100. 2007 (3) BLJR 3017 (Pat)

101. AIR 2003 SC 574

102. AIR 2004 SC 299

103. 1988 CriLJ 767 (pat)

104. (2010) 1 SCC 775

105. 1983 CriLJ 1845 (Mah.)

s 302 IPC **(Sajjan Sharma vs. State of Bihar[106])**. An accused who has not been named in the FIR to whom a definite role has been attributed in the commission in the crime and when such role is established by cogent and reliable evidence and the prosecution is also able to prove its case beyond the reasonable doubt then such an accused can be punished in accordance with law **(Jitendra Kumar vs. State of Haryana[107])** where the informant fails to name a particular accused in the FIR and the said accused is not named at the earliest opportunity when the statements of the witnesses are recorded it could tilt the balance in favour of the accused **(Ranjit Singh vs. State of MP[108]).**

It has been held that unless there is material absence of details of assault in FIR it is not fatal to the prosecution case if the prosecution story otherwise is found to be reliable, and the same cannot be rejected merely on the ground that the manner of assault by the accused has not been narrated in the FIR, **(Kovwari Surya Bhashkar Reddy vs. State of Andhra Pradesh[109]).** In **State of UP vs. Krishna Master[110]** the court held that non-mentioning of motives in the FIR cannot be recorded as omission of an important and material fact.

Non-mention of the weapon of assault would not put the prosecution case out of court. It has been observed that a testimony of prosecution witnesses cannot be rejected merely because weapon of the accused has not been mentioned in the FIR. However, it has been observed that where a wrong description of weapons in the FIR is given it is bound to affect value of the testimony of the witnesses. It can lead to the conclusion that either the victim or the natural witnesses did not see the weapons that had been used and the weapons said to be used were mentioned falsely either on their suggestions or the suggestions of more competent minds **(State vs. Ramawatar[111]).** Where the prosecution case is that the assault was made by lathi and postmortem report confirmed this, mere fact that the assault by lathi was not mentioned in FIR would not be sufficient to doubt this important fact. Absence of mention of lathi or spear in FIR would not put the prosecution case out of court **(State of UP vs. Babu Das[112]).** Where the eyewitness deposed that all the assaults were with arms with sharp cutting weapons like knifes and spear, lacerated wounds and abrasions were found on dead body and there was no inconsistency between medical and ocular evidence then mere non-mentioning of this fact in the FIR is immaterial when use of spear and lathi was also mentioned in the statement recorded by the IO.

An FIR provides corroboration to an evidence of the maker of thereof. It is submitted that an FIR provides a direction to the investigating officer and the necessary clues about the crime and

106. AIR 2011 SC 632

107. (2012) 6 SCC 204

108. AIR 2011 SC 255

109. AIR 1998 SC 1570

110. AIR 2010 SC 3071

111. AIR 1955 (ALL) 138

112. AIR 2985 SC 1384

perpetrator thereof. There may be concocted FIR where in some innocent persons are deliberately introduced as the accused persons raising a doubt about the prosecution story. However, a vigilant, competent and searching investigation can despoil all the doubts of the court and on the basis of the evidence led before it, the court can weigh the inconsistency in the FIR and the direct evidence led by the prosecution[113]. It is not a universal rule that once FIR is found to contain discrepancies the whole prosecution case as a rule has to be thrown **(Algara Samya vs. State by DSP[114]).** It has been observed that some discrepancies are exaggerated and have to be ignored and it is the duty of the court to reject the unreliable part of the evidence and accept what is found to be truthful. Where the case of the prosecution was that the accused caused injuries on the person of the informant and when the FIR does not disclose such fact then such an omission can seriously impeach credibility of informant. It has been held in **BalaKa Singh vs. State of Punjab AIR 1975 SC 162** that an FIR loses its authenticity if it is written after inquest report. The court had deprecated on number of occasions the registration of the FIR after preparation of a detailed inquest report. In **Rati vs. State of MP[115]** it was held that the purpose of the FIR is to set the investigating agency into motion and therefore merely because a typed report had been made to the police it would not by itself be enough to reject the same on the ground that it does not appear to be natural.

Where there was overwriting in the FIR and the same was not on facts pertaining to actual occurrence the FIR is not rendered unreliable specially when there was no involvement of the accused at the time of preparation of the FIR **(State of UP vs. Hariom[116]).** However, where there was overwriting of a name and time of incidents, in the circumstances of the case, it was held to be not of consequence **(State of MP vs. Sri Kishan 1984 CriLJ (MP) 197 or Motilal vs. State of UP AIR 2010 SC 281).**

Where a plea was taken by the accused that the FIR was registered at the police station after consultation and deliberately gaps were left in the body of the FIR with a view to tilt the same at a later point of time the same was found to be devoid of substance and the plea was rejected **(Dharmendra vs. State of UP[117]).** In **Rajmandal Thakur vs. State of Bihar[118],** it has been held that any vague information cannot be treated as an FIR. Further where overwriting, cutting were observed in the FIR and also the role of the accused persons was not mentioned and further where the informant stated that he wrote the FIR on dictation of the sub inspector of police, the FIR was held to be highly suspicious. **(Satyaveer Singh vs. State of UP[119]).** In **State of West**

113. Sohoni's Code of Criminal Procedure 1973 (Volume 2); LexixNexix, Gurgaon, Haryana 2018 (Provided by Bihar Judicial Academy, Patna)

114. 2010 CriLJ 29

115. 1984 CriLJ Page 12

116. 1998 (9) SCC 63

117. 2017 CriLJ 1551 SC

118. 1993 CriLJ 1090 (Pat.)

119. 2016 CriLJ 4863 (ALL) (DB

Bengal vs. Deepankar Ghosh[120], the court held that where the FIR is promptly filed by the mother of the daughter who had suffered 70 percent burn injuries possibility of false story is excluded though some exaggeration in FIR cannot be ruled out. The court has repeatedly held that a cryptic telephonic message cannot be treated as an FIR. In **Randhir Singh vs. State of Punjab 1980 CriLJ 1397** anonymous telephonic call was made to the police, wherein it was stated that the accused appellant who had committed the murder of his wife at his place is burning the body of deceased. When the police reached there and found the half-burnt body of the victim and also the accused confessed to the crime. The court held that the anonymous telephonic information was sufficient to register the FIR by the police officer u/s 302. In **Manu Sharma vs. State of NCT of Delhi[121]** and **Suryajeet Shankar vs. State of West Bengal[122]** the court held that cryptic telephonic information given by unknown person informing death of unknown person to police cannot be treated as an FIR. However, a telephonic message which is not vague or cryptic can be treated as an FIR. Where a telephonic message has been given to an officer incharge of the police station and the person giving the message can be ascertained or is capable of the being ascertained, the information can be reduced into writing as required by section 154 CrPC and it is a faithful record of such information and the information discloses commission of a cognizable offence and is not cryptic one or incomplete in essential details, then such information does constitute an FIR. Whereas, an anonymous information which is vague or cryptic and lacks in essential details or information which has not been faithfully recorded would not constitute an FIR. It has been held that an entry in Rojnnamcha cannot be treated as an FIR **[Dasan vs. State of Kerala 1987 CriLJ 180 (Kerala) (DB)].** Where the information is given by illiterate villager it is not expected that the information would be accurate **(Devendra Singh vs. State of UP[123]**. It has been held that where the oral evidence on record proves the murderous assault made by the accused persons, alteration, if any, made in the first information report as regard time of occurrence is not of much significance. Section 154 mandates that the FIR is required to be signed by the informant. Where the FIR is not under signature/thumb impression of the informant and no explanation is forthcoming the same is to be rejected **(State of Maharashtra vs. Ahmad Gulam Nabi Saikh[124]).** However, where the FIR was dictated by the deceased and due to injuries in his arm he could not put his signature, FIR was not invalid because it was thumb marked by deceased **(Ram muni Yadav vs. State of UP[125]).** Where the maker of the FIR only admitted the signature on the FIR but did not prove the contents of the same, it was held that the FIR was not substantive piece of evidence in the case **(Juganu vs. State of Chhattisgarh[126]).** It was held that FIR

120. 2015 CriLJ 4645 (CAL) (DB)

121. (2010) 6SCC 1

122. (2013) 2 SCC 146

123. AIR 2010 SC 281

124. 1997 CrilJ 2377

125. 2003 (ALL LJ) 2249

126. 2017 CrilJ 663 (Chhattisgarh) (DB)

written on a plane paper is reliable **(Rakad Singh vs. State of MP[127].)** In **State vs. NS Ghaneshwaran AIR 2013 SC 3673,** the court held that provisions of Section 154 (2) are merely directory and not mandatory as it prescribes only a duty to give the copy of the FIR. Mere non supply of copy of the FIR to informant would not vitiate registration of FIR. Where the accused shot the deceased at a shop at about 7:00 pm, in the presence of the wife and son of the deceased, and the accused was known to them, the testimony of the eyewitness could not be rejected, merely because of omission of reference of a burning lamp in the shop **(Rajendra Mahto vs. State of Bihar[128].** It is submitted that FIR is admissible u/s 157 of the Evidence Act as corroborating the testimony of the informant or for contradicting him u/s 145 or under section 8 of the Evidence Act as evidence regarding his conduct. It may also be admissible as his admission when the accused himself registers the first information report. Section 25 of the Evidence Act lays down that a confession before a police officer is inadmissible and it cannot be proved as against him. But in a case, it was held that if there is a confession of the accused pure and simple in the first information report made by him, the entire first information report is inadmissible in evidence. If in addition to the confession it contains certain other matters, which are relevant to the inquiry in the crime, they may be taken into evidence as admissions of the accused but care must be taken to see that such statements are not a part of the narrative of confession. **(State of Rajasthan Vs Shiv Singh[129].**

Statement Under Section 161 Cr.P.C.:

Under section 161 Cr.P.C. the investigating police officer making an investigation can examine orally any person supposed to be acquainted with the facts and circumstances of the case and such person is required to answer truly all questions relating to the case put to him by such an offence. However, the person giving any oral testimony may not answer any question which might have a tendency to expose him to a criminal charge or to a penalty or forfeiture. The police officer may reduce into writing any statement made to him in the course of the examination of the person and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records. Vide the Criminal Law Amendment Act 2013 a new proviso has been inserted in section 161 Cr.P.C. wherein the legislature has mandated that the statement of a women who has been a victim of the offences as prescribed u/s 354, 354 A, 354 B, 354 C, 375, 376, 376 A, 376 B, 376 C, 376 D, 376 E or Section 509 of I.P.C. shall be recorded by a women officer. The object being to protect the victim from the embarrassment of narrating the sexual act to which she has been subjected before a male police officer.

It cannot be overemphasized that the investigating officer is under obligation to record the statements of eye witness of the occurrence at the earliest opportunity after the registration of a

127. 1994 CriLJ 494 (MP) (DB)

128. AIR 1998 SC 1546

129. 1962 (1) CriLJ 82

case and the promptness lends some assurance to the court about the credibility of the witnesses and further eliminates the chances of an adulterated account creeping in the testimony. It is also noted that the police officer investigating the case is under no obligation to reduce to writing any statement made to him during investigation. He may do so if he feels it to be necessary. However, it has been held that it is desirable that the statement should be recorded where reasons of urgency do not preclude such a course **(In re: B. Subba Reddi[130]).** Further it has been held that if the police fail to record the statement of a solitary eye witness to the occurrence the accused is deprived of valuable right of testing the veracity of the witness with reference to his earlier version and it would therefore be difficult to attach any weight or value to the statement of such witness in court **(Parma V/s State of M.P.[131]).** Also, it has been held in **Manu Sharma V/s State (NCT of Delhi)[132] (Zahira Habibulla Sheikh V/s State of Gujarat[133])** that it is not a requirement in law that the statement u/s 161 of the code has to be recorded in the language known to the person giving the statement. Where the witness made a statement in English but it was recorded in Hindi in the absence of challenge it was presumed that the statement was recorded correctly. As stated above, statement of women victims of sexual assault should be recorded by women officer to prevent any embarrassment. Further the statement u/s 161 Cr.P.C. may also be recorded by audio video electronic means after the Cr.P.C. Amendment Act 2008. It should also be stated that the record of statements u/s 161 is to be maintained in the diary of proceedings popularly referred to the case diary. In **Daban Gazi V/s Emperor[134].** The court strongly condemned the practice of police officers to incorporate oral statements made to them in the special diary u/s 172 in the belief that by doing so the statements could be kept away from the knowledge of the accused. The court held that the accused is entitled to get the copy of even statements of witnesses examined in the course of investigation as entered in the case diary, maintained u/s 172. Further in **Queen Empress V/s Bhagwantia[135],** it was held that it is not illegal though unnecessary for a police officer recording a statement to obtain signatures of by standers to authenticate record of such statement. Further the accused has a statutory right to obtain a copy of the statement of prosecution witnesses recorded u/s 161 Cr.P.C. and non furnishing of the same may cause him prejudice as he is deprived of the opportunity of cross examining the witness on contradictions, inconsistencies and improvements with reference to the statement. It has been held that non supplies of copies of the statement recorded u/s 161 Cr.P.C. would result in infraction of fair trial.

The object of Section 161 is to collect evidence which may later be produced at the trial. The words 'any person' in Section 161 (1) include any person who may be accused of the crime

130. AIR 1948 Mad 23

131. 1970 MPLJ 335

132. AIR 2010 SC 2352

133. 2004 (4) SCC 158

134. ILR 33 Cal 1023

135. ILR 15 All 11

subsequently **(Dinnath V/s Emperor[136]).** The expression 'any person' supposed to be acquainted with the facts and circumstances of the case includes the accused person who fills that role because the police suspect him to have committed the crime and must therefore be familiar with the facts. The accused person even after his remand to judicial custody can be questioned by the police with a Magistrate's permission which do not amount to custody in the police **(Gian Singh V/s State[137]).** Such a person is required to answer truly all questions relating to the case put to him by the police officer. However, he is not bound to answer such questions which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. If a person refuses to answer, he can be punished u/s 179 I.P.C. and if he gives a false answer, he can be punished u/s 193 I.P.C.

A statement u/s 161 of the Code is not and cannot be treated as a substantive evidence except when falling within the provisions of Section 27 of Indian Evidence Act. It may be used only for the purpose of contradicting the evidence of the prosecution witnesses and not for the purpose of corroborating evidence nor for contradicting a person examined in the course of investigation and who later figures as a court witness or as a defence witness **(Tarun Chakraborty V/s State of West Bengal[138], Vijendra V/s State of Delhi[139].** In **Bhagwan V/s State of U.P.[140],** it has been held that the statement of the victim recorded by the police u/s 161 Cr.P.C. when the victim subsequently dies can be treated as a dying declaration. Such a statement would be admissible u/s 32(1) of the Indian Evidence Act and the bar u/s 162 Cr.PC is subject to this exception.

It is submitted that questioning a suspect is desirable for detection of crime and even for the protection of the accused person. Such a person however has been given protection both by Section 161 (2) and Article 20(3) of the Constitution against questions the answers to which would have a tendency to expose him to a criminal charge. In **Nandini Satpathy V/s P.L. Dani[141],** the Supreme Court had extensively considered the parameters of Section 161 (2) Cr.P.C. and the scope and ambit of article 20 (3) of the Constitution. The court observed that "the accused person cannot be forced to answer questions merely because the answers thereto are not implicative which when viewed in isolation and confine to that particular case. He is entitled to keep his mouth shut if the answers have a reasonable prospect of exposing him to guilt in some other accusation actual or imminent even though the investigation under way is not with reference to that. The court further observed that tendency to expose to a criminal charge is wider than actual exposure to such charge. In determining the incriminatory character of an answer, the accused is entitled to consider and the court while adjudging will take note of the setting, the

136. AIR 1940 Nagpur 186

137. 1981 CriLJ 100 Delhi

138. 2010 CriLJ 3745 (Cal) (DB)

139. (1997) 6 SCC 171

140. (2013) 12 SCC 137

141. (1978) 2 SCC 424

totality of circumstances, the equation, personal and social, which have a bearing on making an answer substantially innocent but in-effect guilty in import. However fanciful claims, unreasonable apprehensions and vague possibilities cannot be the hiding ground for an accused person. He is bound to answer where there is no clear tendency to incriminate.

Compelled testimony has been considered as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like. Frequent threats of prosecution if there is failure to answer may take on the complexion of undue pressure violating Article 20(3). Legal penalty may itself not amount to duress but the manner of mentioning it to the victim of interrogation may introduce an element of tension and tone of command perilously hovering near compulsion".

Therefore the court strongly suggested the following guidelines or safeguards while examining the parameters of Section 161 of the code within the scope and ambit of Article 20(3) of the Indian Constitution, namely:

a.i.1. If the accused person expresses the wish to have his lawyer by his side when the police interrogate him, this facility shall not be denied to him. This presence of lawyer will obviate the overreaching of Article 20(3) and Section 161(2).

a.i.2. The police must invariably state and record the fact about the right to silence against self-incrimination and where the accused is literate take his written acknowledgment.

a.i.3. After the examination of the accused where lawyer is not present the police official must take the said person to a Magistrate, Doctor or any other nonpartisan official or non-official and allow a secluded audience where he may unburden himself beyond the reach of the police and tell whether he has suffered duress. It should be followed by judicial or some other custody for him where the police cannot reach him.

It is submitted that the Supreme Court in **D.K Basu V/s State of West Bengal**[142] had issued several guidelines to the police including permitting the arrested person to meet his lawyer during interrogation.

In **Sidharth V/s State of Bihar**[143] and **Sunita Devi V/s State of Bihar**[144]**,** the court answered in negative the question as to whether an accused should be given the gist of interrogation of statements u/s 161(3) of the Code. It has also been held that there is no provision in Cr.P.C. empowering the court to issue directions to the I.O. who records the statement of the witnesses u/s 161 of the Code.

142. (1997) 6 SCC 642

143. (2005) 12 SCC 545

144. (2005) 1 SCC 608

Section 162 CrPC

Section 162 Cr pc provides that the person making a statement in connection with investigation of case being conducted by the police shall not sign the statement if it is reduced to writing nor can the statement or any other record thereof be used for any purpose except those mentioned in any inquiry/trial in respect of any offence under investigation at the time when such statement was made. The intention behind section 162 is to protect the accused from being prejudicially affected by any dishonest or questionable matters adopted by an overzealous police officer who may be inclined to mis-record the statements or bring pressure or influence on the witnesses **(Yusufali Esmail Nagree V/s State of Maharashtra[145]).** However, as would be seen from the proviso to section 162(1) and sub section 2 of section 162 there is not a total bar on the use of statements made to police officers, the defence is not completely deprived of an opportunity to discover what a particular witness said at the earliest opportunity.[146] The whole object of the section is to protect the accused both against overzealous police officers and untruthful witnesses. **(Khatri (4) V/s State of Bihar[147])** It has been held that the bar created by Section 162 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 section 162 would not be attracted **(Vinay D. Nagar V. State of Rajasthan[148]).** Section 162 is enacted for the benefit and protection of the accused. But that protection is unnecessary in any proceeding other than an inquiry or trial in respect of the offence under investigation. The bar created by section 162 has no application for example in a civil proceeding or in a proceeding under Article 32 or 226 of the Constitution, a proceeding under section 452 of the code for disposal of property, and a statement made before a police officer in the course of investigation can be used as evidence in such a proceeding, provided it is otherwise relevant under the Evidence Act **(Khatri (4) V. State of Bihar1[49];** SEE ALSO, **Malakala Surya Rao V. G. Janakamma[150]: Bal Kishan V. state of Rajasthan[151]; Thampi Chettiar Arjunan Chettial V. State[152]).** The Patna High Court has ruled that a Magistrate can issue process on the basis of

145. AIR 1965 BOM 3

146. R.V. Kelkar's Criminal Procedure; EBC Publishing (P) Ltd., Lucknow, 2018

147. (1981) 2 SCC 493

148. (2005) 5 SCC 597: (2008) 2 SCC (Cri) 666: 2008 Cri LJ 1907

149. (1981) 2 SCC 496: 1981 SCC (Cri) 503, 507: 1981 Cri LJ 597

150. (1964) I Cri LJ 504: AIR 1964 AP 198

151. 1984 Cri LJ 308 (Raj)

152. 1985 Cri LJ 1158 (Ker)

a statement given to the police on an earlier occasion on the same matter. **Gajendra Swaroop Srivastava V. Baleshwar Prasad Kesari[153].**

The prohibition under the section extends to all the statements whether the statement is confessional or otherwise, whether the statement has been reduced in writing or not or whomsoever had made the same. Further, the prohibition extends to all statements made by any person whether accused or not. The person making the statement need not be in the police custody while making the statement but the statement has to be before a police officer and must have been made in the course of an investigation under chapter XII of Cr.PC **(Pakala Narayan Swami V. Emperor[154])**.

Where the investigating officer has by mistake obtained the signature of accused on the seizure memo in violation of section 162(1) it shall not vitiate the whole proceedings. **State of UP V. M.K. Anthony.[155]**

In **R.M. Malkani V. State of Maharashtra AIR 1973 SC 157** It was held that a tape-recorded statement is outside the purview of section 162. Where a person talking on the telephone allows a police officer to record on tape and the court permits the tape recording to be played over it was held that such conversation was not within the vice of section 162. Similarly, the bar of section 162 does not operate on a statement contained in a letter written to a police officer **(Kaliram V. State of UP[156]).** However, a letter containing narration of facts addressed by a person to a police officer during the course of an investigation would be inadmissible u/s 162. In **Satya Narayana V. Emperor[157]** it was held that a statement made to third person in the presence of a police officer is not within the purview of the section. Also, any statement made to a person assisting the police during the course of investigation cannot be treated as the statement to the police. Thus, if after arranging the identification parade the police leaves the field and allows the identification to be made under the sole direction of the Pancha witnesses the statements of the identifying witnesses made to the pancha witnesses would be outside the purview of section 162 **(Santa Singh v. State of Punjab[158]).** It is submitted that section 162 of the Code only puts restrictions on the use of statements made to investigating officers during investigation. It does not say that every statement made during the period of investigation comes within the ambit of its prohibition. Therefore, the statements sought be excluded from evidence must be ascribable to the inquiry conducted by the investigating officer and not one which is dehors the inquiry. Therefore, where an investigation has begun on the basis of FIR and then in respect of the same offence another report is found who have been made quite independently off and in no relation to the pending investigation and was not designed to promote the pending investigation and has no

153. 1988 Cri LJ 129 (Pat) (FB)

154. AIR 1939 PC 44

155. AIR 1985 Supreme Court 48

156. AIR 1972 SC 2773

157. AIR 1944 Patna 67

158. AIR 1956 SC 526

reference at all to the investigation the second report is not hit by the ban u/s 162 **(Emperor v. Aftab Md. Khan[159]).** Whether the investigation has commenced or not is a question of fact depending upon the circumstances in each case. Where two persons gave information at the police station about the commission of a rape in a hotel, and the police officer without recording the information proceeded to the spot and recorded their statements there, it was held that the oral information given at the police station was the FIR and the sub-sequent statements recorded at the spot were hit by Section 162 **(Lachhman v. State[160]).** Where on hearing some rumors the police officer visited the place of occurrence but recorded the statement of a prosecution witness after coming back from the scene and registered the case, the statement was held not hit by Section 162 **(Pattad Amarappa v. State of Karnataka[161]).** An extra judicial confession by constable, who committed the murder of another constable, to fellow constables before investigation had commenced was held to be not hit by section 162 **(State v. Ram Singh[162]).** A statement of disproportionate assets prepared by a senior technical officer on the basis of the information furnished by the IG of police was held to come as expert opinion u/s 45 of the Evidence Act and was not falling under the bar of Section 162 **(Hemanta Kumar Mohanti V. State of Odisa[163]).** In **Khatri v. State of Bihar,[164]** it has been held that statement made before a police officer in the course of investigation can be used in a civil proceeding or in a proceeding under Article 32 or Article 226 of the constitution provided it is relevant under the Indian Evidence Act. An FIR recorded prior to commencement of investigation is not hit by the provision of sections 162 CrPC **(Ram Singh V. State of Punjab[165]).** Where statements in course of conversation between accused and witnesses before commission of offence were over heard by a police officer the same are not hit by section 162 and are admissible against the accused **(State of Bihar V. C.R. Singhani[166]).** The direction of a Magistrate to the police to register a case is not hit by section 162 **(Upkar Singh v. Ved Prakash[167]).** Identification by a person in custody of another does not amount to making a statement or falling within the embargo of section 162 Cr.PC. It would be admissible u/s 8 of Evidence Act as a piece of evidence relating to conduct of the accused person in identifying the dead bodies of the terrorists **[State (NCT of Delhi) v. Navjot Sandhu[168]].** In the same case the court observed that the statements given by the accused on T.V. in presence of press reporters while in police custody should not be relied upon irrespective of the fact whether the statement was

159. (1940) 41 CrLJ 647

160. 1973 Cri LJ 1658 (HP)

161. 1989 Supp (2) SCC 389: 1990 SCC (Cri) 179: 1989 Cri LJ 2167

162. 1973 Cri LJ 150 (HP)

163. 1973 CUTLT 367

164. AIR 1981 SC 1068

165. 1992 Cri LJ 805 (P&H-DB)

166. 1959 BLJR 494

167. AIR 2004 SC 4320

168. AIR 2005 SC 3820

made to a police officer within the meaning of section 162 or not. Such statements should not be attached any credibility which are made in the course of such interview prearranged by the police **[State (NCT of Delhi) v. Navjot Sandhu[169]].** It has been held that the acts as distinguished from statements of the accused in pointing out places where the crime was committed or property connected with the crime was concealed or in producing such property, are admissible under section 8 of the Evidence Act as evidence of conduct. In **Emperor v. Nanua,[170]** was observed:

> *"Conduct may, in certain circumstances, include statements as well as acts, but in doing so, it still retains the difference between an act and a statement. The difference between a statement and an act is clear. A statement must consist of words, be they spoken or written, or be they spelled out as would be done by a mute person who spells out words on his fingers, and even words would not always be statements, as for instance, if a person recited the number from 1 to 10, it one considers a statement in the sense used in this section. Acts, however, exclude words and cannot be translated into words"*

The same view was taken in **Babu Lal Behari Lal v. Emperor[171]: Radha Nath v. State[172]; Syamo Moha Patro v. Emperor[173]; Lala Lalung v. emperor[174].** But see **Hira Lohar v. Emperor[175]; Tara v. Emperor[176]: Birju v. Emperor[177]. Emperor v. Nanua,[178]** also.

This section shuts out statements, written or oral, express or implied, made by witnesses to the police during the course of the investigation; but care must be taken not to press this argument too far, to shut out evidence, not what a witness said but also of what a witness saw or did. Conduct must be distinguished from speech **(Mor Mahomud v. Emperor[179]).**

It should be noted that u/s 162 Cr.PC what is barred is a statement made by the accused to the police in course of investigation whether the same is confession or a admission. However, statements following under Section 32(1) and section 237 of the Evidence Act are exceptions to this rule.[180] When the statement is not made during the course of investigation it may not come within the purview of section 162 and if it is not hit by section 25 Evidence Act it can be used in

169. AIR 2005 SC 3820
170. AIR 1941 All 145 at pp. 148149
171. AIR 1946 Nag 120
172. AIR 1953 Cal 602
173. AIR 1932 Mad 391 (FB)
174. AIR 1939 Cal 176
175. AIR 1919 Bom 162
176. AIR 1935 Oudh 1
177. AIR 1941 Oudh 563
178. AIR 1941 All 145 at p. 149
179. AIR 1940 Sind 168 at 170
180. V. Thomas V. state of Kerala 974 Cr. LJ 849 (Ker)

evidence.[181] Where an anonymous letter was written by the accused to the police officer complaining about the acts of a Chaukidar who was murdered by the accused it was held that the statement was not hit by section 162 Crpc and was held to be admissible in evidence as an admission as to the motive u/s 21 Evidence Act.

A letter containing confessional statement to a police officer was held to be inadmissible in evidence in **Sitaram V. State of UP[182].**

In **Dalip Singh V. State of Punjab[183]** the court considered the question as to whether a letter containing a confession was admissible or not u/s 162 Cr.PC and it was observed that the prohibition relating to the use of a statement made to a police officer during the course of an investigation cannot be set at naught by the police officer not himself recording the statement of a person but having it in the form of communication addressed by the person concerned to the police officer. If a statement made by a person to a police officer in the course of an investigation is inadmissible, except for the purposes mentioned in Section 162, the same would be true of a letter containing narration of facts addressed by a person to a police officer during the course of an investigation. It is not permissible to circumvent the prohibition contained in section 162 by the investigating officer obtaining a written statement of a person instead of the investigating officer himself recording that statement.

A statement u/s 162, as per the provision, may be used for the purposes of contradicting the prosecution witness in the manner provided by the second part of section 145 of the Indian Evidence Act and where any part of such statement is so used the same may be also used in the re-examination of such witness but only for the purpose of explaining any matter referred to in the cross examination. It is submitted that the statement is not to be used for the purpose of cross examination of the witness within the meaning of the first part of the said section but is used only for contradiction of such prosecution witness and may be done either by the defence or by the prosecution with permission of the court in cases where these witnesses are declared hostile. Further the explanation to section 162 provides that an omission to state a fact or circumstance in the statement referred to in section 162(1) may amount to contradiction. It should be noted that every omission is not contradiction but an omission can amount to contradiction if it appears to be significant and otherwise relevant having regards to the context in which such omission occurs. Therefore, whether an omission amounts to a contradiction in the particular context shall be a question of facts. In **Tahsildar Singh V. State of UP[184],** the court held that a particular statement though not expressly recorded can be deemed to be part of what is expressly recorded and can be used for contradiction not because it is an omission strictly but because it is deemed to form part of the recorded statement.

181. R.V. Kelkar's Criminal Procedure; EBC Publishing (P) Ltd., Lucknow, 2018

182. AIR 1966 SC 1906

183. (1979) 4 SCC 332

184. AIR 1959 SC 1012

Section 164 CrPC:

Section 164 CrPC provides for recording of confessions and other statements which are not confession. The statement or a confession may be recorded by any Judicial Magistrate whether or not he has jurisdiction and the same may be recorded during the course of investigation or at any time afterwards but before inquiry or trial. Such a confession or statement may be recorded by audio video electronic means in the presence of the advocate of the person accused of an offence. It should be noted that the mode of recording a confession is not the same as in the case of recording a statement. The mode of recording a confession is much more elaborate so as to ensure that free and voluntary confessions alone are recorded under the section.[185] It has been held that the Act of recording a confession u/s 164 is a solemn Act and in discharging his duties under the section the Magistrate must take care to see that the requirement of law under 164 must be fully satisfied.[186] Before recording a confession, the Magistrate is required to explain to the person making the confession that he is not bound to make such confession and that if it does so it may be used in evidence against him. In **Kehar Singh v. State**[187] it has been held that failure to convey a question invalidates the confession and renders it inadmissible in evidence. Further section 164(2) clearly lays down that the Magistrate is not to record any such confession unless upon questioning he has reason to believe that the person making the confession is doing so voluntarily. In **Nazir Ahmed v. King Emperor**[188] it was held that a Magistrate is not obliged to record the confession of a self-accusing mad man or a confession which he considers to be incredible or useless for any purpose of justice when he has not satisfied about its voluntary nature. In **Chandran v. State**[189] it was held that for the exercise for jurisdiction to record confession u/s 164 it is a sine qua non that the Magistrate must have reason to believe that confession is being voluntary made. The expression has reason to believe, imports a very high degree of expectation wrought by reason, a satisfaction fast-rooted in terra firma, free from doubt as to the truth of the fact perceived and believed. Normally the following directions are followed by Magistrate in order to ensure that a confession is being made voluntary.

(a) After giving warnings to the confessing person, the Magistrate should give him adequate time to think and reflect, so as to ensure that he is completely free from police influence.

(b) The accused should be assured, in plain terms, of protection from any sort of apprehended torture/pressure from police, etc., in case he declines to make a statement.

185. R.V. Kelkar's Criminal Procedure; EBC Publishing (P) Ltd., Lucknow, 2018

186. Kuthu Goala v. State of Assam, 1981 Cr. LJ 424, 427 (Gau); Munshi Soren v. State of Assam,

187. 1981 Cr. LJ 1408, 1412 (Gau). AIR 1989 SC 683

188. PC 253

189. 1978 Cr. LJ 1693 (SC)

(c) If at any time before the confession is recorded, the accused states that he is not willing to make the confession, the magistrate shall not authorize the detention of such person in police custody. Even in the case in which the confession is made and recorded, the accused person, as a matter of rule, should be sent to judicial lock up and on no account be returned to police custody. Sub-sec. (3) guarantees that police pressure is not exerted on the person who is unwilling to confess. This is a further safeguard to ensure that the confession is voluntary.

(d) The accused should particularly be asked the reason why he is going to make a statement which would surely go against his self-interest in trial.

(e) The magistrate must put questions to the accused in order to ascertain the voluntariness of the confession.

(f) To adjudge voluntariness, the magistrate should take note of two basic factors. First, the existing mental condition of the prisoner. A man in peril undergoing distress, worry and strain is ordinarily not mentally fit person to make a statement to endanger his life and liberty. The magistrate must satisfy himself by some objective tests that a mentally disabled person is fit enough to understand the implications of the warnings and to make a fatal statement. Secondly, the magistrate must satisfy the court by documentary/ oral evidence that he had fully exercised his judicial mind to get the real motive which prompted the prisoner to confess.

(g) It is imperative for the magistrate to explain to the accused his constitutional rights under Art. 22 (1) of the Constitution as well as the provisions of Sec. 303 of CrPC about his right to consult a lawyer before recording his confession.

The confession shall be recorded in the manner provided in section 281 CrPC for recording the examination of an accused person and shall be signed by the person making the confession. It should be also noted that the whole of the confession including every question put to the accused and answered by him shall be recorded in full. The record shall be shown or read to the accused and he shall be at liberty to explain or add to his answers. No oath can be administered to the accused who is making a confession before a magistrate. After recording the confession, the magistrate shall make a memorandum at the foot of such record to the following effect:—

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him. (signed) A.B., Magistrate".

In **Dhananjaya Reddy v. State of Karnataka**[190] the court held the omission to comply

190. 2001 Cr. LJ 1712 (SC)

with the mandatory provision is likely to render the confessional statement inadmissible. Also, in **Jagmal v. Emperor**[191] it was held that a confession without the certificate of Magistrate as to its voluntariness is bad in law. In **Hemraj v. State of Ajmer**[192] it was held that though section 164 does not mention the place or time of recording a confession nevertheless the same should be recorded in open court and during court hours unless there are exceptional reasons to the contrary. Further the magistrate recording the statement or confession u/s 164 is required to send the record directly to the magistrate by whom the case is enquired into or tried. Such record is admissible in evidence even though the magistrate making the record is not called as a witness to formally prove it at the trial of accused person because according to section 80 Evidence Act the court is required to presume that the record is genuine, that any statement as to the circumstances under which it was made are true and that such confession or statement was duly recorded. It has been held that a confession recorded in accordance with special procedure of section 164 can be used as a substantive proof without formally proving it. In **Shrishail Nageshi Pare v. State of Maharashtra**[193] it was held that a retroactive confession by accused may form the basis of conviction if some corroboration is received. However, the same cannot be used against the co-accused.

If a person desires to make a statement other than confession it can be recorded by magistrate under sub section 5 of section 164 CrPC and such a statement shall be recorded by the magistrate in the manner in which evidence is generally recorded. However, the magistrate considering the circumstances of the case may suitably modify the recording of such statement. Before recording such a statement, the magistrate may administer oath to the said person.

After the Criminal Law Amendment Act 2013 the judicial magistrate is to record the statement of victims of sexual offences u/s 354 to 364(D), 376(2), 376(A) to 376(E) or section 509 IPC in the manner prescribed in section 164(5) as soon as the offence is brought to the notice of the police. If the victim making the statement is temporarily or permanently mentally or physically disabled the statement may be recorded by the magistrate with the assistance of an interpreter or special educator and shall be videographer. The statement of such a person who is temporarily or permanently mentally or physically disabled shall be considered a statement in lieu of examination-in-chief as specified in section 137 of the Indian Evidence Act 1872 such that the maker of the statement can be cross examined on such statement without the need for recording the same at the time of trial.

A statement recorded under 164 CrPC cannot be used as a substantive evidence but can only be used for contradicting or corroborating u/s 145 and 157 Evidence Act when the person making the statement gives evidence in court. A statement is a public document u/s 174 of the Evidence Act. However, questions arise as to legal consequences of non compliance with

191. AIR 1948 ALL 211

192. AIR 1954 SC 462

193. AIR 1985 SC 866

provisions of section 164. To a certain extent section 463 CrPC is designed to cure some defects and irregularities. Section 463 CrPC permits oral evidence to be given to prove that procedure as laid down in section 164 CrPC had been followed when the court finds that record produced before it does not show that was so. If the oral evidence establishes that the procedure had been followed then only can the record be admitted. Further the section cures the irregularity when the confession is made in one language and recorded in another.[194] Where the accused was not cautioned or while recording his confession some questions put to him was not recorded by magistrate it became the duty of the Sessions Judge to look into and find out whether such omission has prejudiced the accused. If not, the confession would be admissible evidence. In **Kehar Singh V. State**[195] it was held that the magistrate's failure to ask why the accused wanted to confess is a noncompliance of form curable u/s 463. However, where a magistrate lacks jurisdiction to record a confession u/s 164 and he records it, it cannot be said that the accused duly made a statement u/s 164 and this defect is incurable[196]. In **Chandran v. State of Tamilnadu**[197] it was held that if the magistrate recording a confession does not on the face of the record certify in clear terms his satisfaction or belief as to voluntarily nature of confession recorded by him, the defect would be fatal to the admissibility and use of confession against the accused at the trial.

Section 164 CrPC covers the interest of both the accused and the prosecution and it can be used for contradiction and corroboration.

194. R.V. Kelkar's Criminal Procedure; EBC Publishing (P) Ltd., Lucknow, 2018

195. AIR 1989 SC 683

196. State of UP V. Singhara Singh AIR 1964 SC 358

197. (1978) 4 SCC 90

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Aspects relating to the cognizance of offence by a magistrate & cognizance of offence by the court of session under section 193 Cr.P.C..

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Aspects relating to the cognizance of offence by a magistrate & cognizance of offence by the court of session under section 193 Cr.P.C.

1. Meaning of Cognizance:

The word cognizance is of frequent use in legal and judicial discussions.

The etymology of the word cognizance - It is based on the Latin word Cognoscere which means "get to know". Later on, from old French word Conoisance, the English word Conisance came into existence. The spelling with g, influenced by Latin, arose in the 15th century and gradually affected the pronunciation.

The dictionary meaning of Cognizance are:

Cambridge Dictionary - To take notice of and consider something.

Merriam-Webster Dictionary - 1: a distinguishing mark or emblem (such as a heraldic bearing) 2a: knowledge, awareness b: notice, acknowledgment take cognizance of their achievement. 3: jurisdiction, responsibility.

According to **Black's Law Dictionary the word 'cognizance'** means 'jurisdiction' or the 'the exercise of jurisdiction' or 'power to try and determine causes'. In common parlance it means taking notice of.

Though the word 'cognizance' or the words 'taking cognizance' have not been defined in the Code of Criminal Procedure, the same derive definite connotation from plethora of precedents and gain perceptive explanation and incisive exegesis from judicial pronouncements.

This was defined by the Supreme Court, in the case of **R.R.Chari v. State of U.P, AIR 1951 SC 207,** where it defined it as the application of judicial mind and held that taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to the suspected commission of offense.

In **Ajit Kumar Palit v. State of W.B., AIR 1963 SC 765:** The Supreme Court held that the word 'cognizance' has no esoteric or mystic significance in Criminal Law or procedure. It merely means 'become aware of' and when used with reference to a court or judge 'to take notice judicially.

In **Nupur Talwar versus CBI, REVIEW PETITION (CRL.) NO. 85 OF 2012 IN CRIMINAL APPEAL NO. 68 OF 2012,** 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. It was held that cognizance is simply a frame of mind that there is prima facie evidence against the accused that he might be involved in the case, it has nothing to do with the pronouncement of guilt of the accused.

Thus, a Magistrate is said to have taken cognizance when on the basis of the materials available (police report, complaint or personal knowledge/ information given by any person) he finds that an offence has been committed and proceeds towards the trial of the case. There must be application of judicial mind to the materials. The litmus test of taking cognizance is making a thorough assessment of allegations by coming into grip with the facts presented and bringing into focus the law on the subject and applying the facts to the law and thereafter arriving at a conclusion by a process of reasoning and evidencing that all the relevant facts have been taken note of and properly analyzed in the light of the law applicable.

2. Cognizance by a Magistrate:

Taking cognizance is one of the basic steps in any criminal case as only after taking the cognizance of offences, the judiciary comes into picture.

The procedure to be followed for criminal proceedings is determined by the Code of Criminal Procedure, 1973.

The Chapter -XIV of the Code, from Section190 to 199 deals with the provisions regarding power of the Magistrate to take cognizance and the restrictions on it.

Any Magistrate of the first class and any magistrate of the second class may take cognizance of any offence. Section 190- 199 of the Code describes the methods by which, and the limitations subject to which, various criminal courts are entitled to take cognizance of offences. Section 190(1) provides that, subject to the provisions of S. 195-199, any magistrate of the first class and any magistrate of the second class specially empowered in this behalf, may take cognizance of any offences—

(a) Upon receiving a complaint of facts which constitute such an offence.

(b) Upon a police report of such facts.

(c) Upon information received from any person other than a police officer, or upon his own knowledge, that such an offence has been committed.

S. 190(2) - The Chief Judicial Magistrate may specially empower any magistrate of the second class as mentioned to take cognizance of such offences as are within his competence to inquire into or try.

Therefore, apparently the Magistrate may take cognizance of offences on the basis of complaint, police report or on the information received from any person other than a police officer or upon his own knowledge.

Complaint is defined under section 2(d) of the Code as- 'any allegation made orally or in writing to a magistrate, with a view to his taking action under this code that some person, whether known or unknown, has committed an offence, but does not include a police report.' Police-report has been defined by S. 2(r) as - "a report by a police officer to a magistrate under S. 173(2)" i.e., the report forwarded by the police after the completion of investigation.

Apart from the complaint and the police-report, the Magistrate has been vested with the power to take cognizance on the basis of the information received from any person or upon his own knowledge. The real distinction between sub-clause (c) and sub-clauses (a) and (b) of section 190(1) is that, in the two latter cases an application is made to the Magistrate to take cognizance of the offence either by a complaint or by the police, while in the former case the Magistrate takes cognizance suo motu either on his own knowledge or on information received from some person who will not take the responsibility of setting the law in motion.

The object of Section 190 is to ensure the safety of a citizen against the vagaries of the police by giving him the right to approach the Magistrate directly if the police does not take action or he has reason to believe that no such action will be taken by the police. Even though the expression 'take cognizance' is not defined, it is well settled by a catena of decisions that when the Magistrate takes notice of the accusations and applies his mind to the allegations made in the complaint or police report or information and on being satisfied that the allegations, if proved, would constitute an offence decides to initiate judicial proceedings against the alleged offender he is said to have taken cognizance of the offence. Cognizance is in regard to the offence, not the offender.

There is no such legal requirement imposed on a Magistrate for passing detailed order while issuing summons vide **Kanti Bhadra Shah v. State of W.B., (2000) 1 SCC 722.** The following passage will be apposite in this context:—

> *"12. If there is no legal requirement that the trial court should write an order showing the reasons for framing a charge, why should the already burdened trial courts be further burdened with such an extra work? The time has reached to adopt all possible measures to expedite the court procedures and to chalk out measures to avert all roadblocks causing avoidable delays. If a Magistrate is to write detailed orders at different stages merely because the counsel would address arguments at all stages, the snail-paced progress of proceedings in trial courts would further be slowed down. We are coming across interlocutory orders of Magistrates and Sessions Judges running into several pages. We can appreciate if such a detailed order has been passed for culminating the proceedings before them. But it is quite unnecessary to write detailed orders at other stages, such as issuing process, remanding the accused to custody, framing of charges, passing over to next stages in the trial."*

In **U.P. Pollution Control Board v. M/s. Mohan Meakins Ltd. & Ors., (2000) 3 SCC 745,** and after noticing the law laid down in **Kanti Bhadra Shah v. State of West Bengal, (2000) 1 SCC 722,** it was held as follows:—

> *"The legislature has stressed the need to record reasons in certain situations such as dismissal of a complaint without issuing process. There is no such legal requirement imposed on a Magistrate for passing detailed order while issuing summons. The process issued to accused cannot be quashed merely on the ground that the Magistrate had not passed a speaking order."*

However, in **Rupan Deol Bajaj and another vs. KPS Gill and another, (1995) 6 SCC 194,** the Supreme Court remarked as under:—

> *"28. Since at the time of taking cognizance the Court has to exercise its judicial discretion it necessarily follows that if in a given case - as the present one - the complainant, as the person aggrieved raises objections to the acceptance of a police report which recommends discharge of the accused and seeks to satisfy the Court that a case for taking cognizance was made out, but the Court overrules such objections, it is just and desirable that the reasons therefore be recorded. Necessity to give reasons which disclose proper appreciation of the issues before the Court needs no emphasis. Reasons introduce clarity and minimize chances of arbitrariness. That necessarily means that recording of reasons will not be necessary when the Court accepts such police report without any demur from the complainant. As the order of the learned Magistrate in the instant case does not contain any reason whatsoever, even though it was passed after hearing the objections of the complainant, it has got to be set aside and we do hereby set it aside."*

Hence at the time of passing cognizance order it is prudent to give reasons whenever the Magistrate takes a departure from the findings of the police-report or complaint-petition on the basis of which he decides to take cognizance.

3. Cognizance of Offences by Magistrate on Police-Report:

Section 190(b) of the Code provides that the Magistrate may take cognizance on police - report. Police-Report has been defined in the Code as the report under section 73(2) Cr.P.C.

First Information Report sets the criminal justice system in motion. After the registration of the FIR the police proceeds with the investigation of the case in the manner provided under the Code. Once the investigation is complete, the police submit the police report with necessary particulars in accordance with the Sec.173 of the Code.

Under the Cr.P.C investigation consists generally of the following steps:

(1) Proceeding to the spot,

(2) Ascertainment of the facts and circumstances of the case,

(3) Discovery and arrest of the suspected offender,

(4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if' the officer thinks fit, (b) the search of places of seizure of things considered necessary for the investigation and to be produced at the trial, and

(5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so, taking the necessary steps for the same by filing of a charge-sheet U/s 173. It is also clear that the final step in the investigation viz., the formation of the opinion as to whether or not there is a case to place the accused on trial is to be that of the officer in-charge of the police station."

When the police in the course investigation, finds sufficient evidence against the accused, the police-report submitted is commonly called as charge-sheet; where there is no sufficient evidence collected in the investigation so as to implicate any accused, the police-report submitted, is commonly called as final-form. The Cr.P.C, as such, does not use the expression 'charge-sheet' or 'final report'. But it is understood, in the Police Manual containing Rules and Regulations, that a report by the Police, filed U/s 170 of the Code, is referred to as a 'charge- sheet'. But in respect of the reports sent U/s 169, i.e., when there is no sufficient evidence to justify the forwarding of the accused to a Magistrate, it is termed variously, in different States, as either 'referred charge', 'final report', or 'Summary'.

Upon receiving the police-report the Magistrate has got three options:

1. To accept and take cognizance on the basis of the police-report;
2. To differ with the police-report and take cognizance on the basis of materials in the police- report holding that there are sufficient grounds to proceed further;
3. To reject the police-report and order further investigation.

However, where the Magistrate differs with the police-report it is obligatory on him to notice the informant. The informant may not be satisfied with the police investigation and file a protest-petition, the Magistrate if upon hearing the informant is satisfied that the police investigation was not fair, may take cognizance on the protest-petition and may proceed with it in the manner prescribed for the complaint U/s 190(a) of the Code.

In **Abhinandan Jha vs. Dinesh Mishra, AIR 1967 SC 117,** it has been held that, the use of the words 'may take cognizance of any offence', in sub-s. (1) of sec.190 in our opinion imports the exercise of a 'judicial discretion', and the Magistrate, who receives the report, under s. 173, will have to consider the said report and judicially take a decision, whether or not to take cognizance of the offence. From this it follows that it is not as if that the Magistrate is bound to accept, the opinion of the police that there is a case for placing the accused, on trial. It is open to the Magistrate to take the view that the facts disclosed in the report do not make out an offence for taking cognizance or he may take the view that there is no sufficient evidence to justify an accused being put on trial. On either of these grounds, the Magistrate will be perfectly justified in declining to take cognizance of an offence, irrespective of the opinion of the police. On the other hand, if the Magistrate agrees with the report, which is a charge-sheet submitted by the police, no difficulty whatsoever is caused, because he will have full jurisdiction to take cognizance of the offence, under s. 190(1) (b) of the Code. This will be the position, when the report under s.173, is a

charge-sheet. Then the question is, what is the position, when the Magistrate is dealing with a report submitted by the police, under sec.173, that no case is made out for sending up an accused for trial, which report, as we have already indicated, is called, in the area in question, as a 'final report'? Even in those cases, if the Magistrate agrees with the said report, he may accept the final report and close the proceedings. But there may be instances when the Magistrate may take the view, on a consideration of the final report, that the opinion formed by the police is not based on a full and complete investigation, in which case in our opinion the Magistrate will have ample jurisdiction to give directions to the police, under s.156 (3), to make a further investigation That is, if the Magistrate feels, after considering the final report, that the investigation is unsatisfactory, or incomplete, or that there is scope for further investigation, it will be open to the Magistrate to decline to accept the final report and direct the police to make further investigation, under s.156(3). The police, after such further investigation, may submit a charge-sheet, or, again submit a final report, depending upon the further investigation made by them. If, ultimately, the Magistrate forms the opinion that the facts, set out in the final report, constitute an offence, he, can take cognizance of the offence under s.190 (1) (c), notwithstanding the contrary opinion of the police, expressed in the final report.

The Supreme Court further held that there is certainly no obligation, on the Magistrate, to accept the report, if he does not agree with the opinion formed by the police. Under those circumstances, if he still suspects that an offence has been committed, he is entitled, notwithstanding the opinion of the police, to take cognizance, undersec.190 (1)(c) of the Code. That provision, in our opinion, is obviously intended to secure that offences may not go unpunished and justice may be invoked even where persons individually aggrieved are unwilling or unable to prosecute or the police, either wantonly or through bona fide error, fail to submit a report, setting out the facts constituting the offence. Therefore, a very wide power is conferred on the Magistrate to take cognizance of an offence.

The principle laid down in Abhinandan Jha has since been reiterated in several judicial pronouncements.

In the three Judge Bench judgment in **Bhagwant Singh v. Commissioner of Police and Anr (1985) 2 SCC 357,** the Supreme Court stated that a Magistrate, in dealing with a report from the police under Section 173, can adopt one of three courses-

(1) he may accept the report and drop the proceedings; or

(2) he may disagree with the report, take cognizance of the offence and issue process; or

(3) He may direct further investigation to be made by the police under Section 156(3).

The Court then went on to hold that *"we are accordingly of the view that in a case where the Magistrate to whom a report is forwarded under sub-section (2)(i) of S. 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is*

no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report."

Thus, it can be summarized that -

1. The Magistrate may accept the police-report and take cognizance of the offences made out, or
2. The Magistrate may differ with the police-report and take cognizance on the basis of the materials available in the case-diary, after notice to the informant.
3. The Magistrate may accept the police-report and proceed on the protest-petition filed by the informant in the manner provided for the complaint under section 190(1) (a) of the Code.
4. The Magistrate may reject the police-report and drop the further proceedings.
5. The Magistrate may reject the police-report and direct further investigation U/s 156 (3) of the Code.

The observation of Supreme Court in **H.S. Bains. v. State, (1980) 4 SCC 631** is very pertinent to be mentioned here:—

"The Magistrate is not bound by the conclusions arrived at by the police even as he is not bound by the conclusions arrived at by the complainant in a complaint. If a complainant states the relevant facts in his complaint and alleges that the accused is guilty of an offence under Section 307, Indian Penal Code the Magistrate is not bound by the conclusion of the complainant. He may think that the facts disclosed an offence under Section 324, Indian Penal Code only and he may take cognizance of an offence under Section 324 instead of Section

307. Similarly if a police report mentions that half a dozen persons examined by them claim to be eye witnesses to a murder but that for various reasons the witnesses could not be believed, the Magistrate is not bound to accept the opinion of the police regarding the credibility of the witnesses. He may prefer to ignore the conclusions of the police regarding the credibility of the witnesses and take cognizance of the offence. If he does so, it would be on the basis of the statements of the witnesses as revealed by the police report."

The stage of taking cognizance is an important 'judicial check' or safeguard on the powers of the police and is an essential facet of the rule of law. It ensures that if an innocent has been wrongly brought to book by the police then he will not have to unnecessarily go through a judicial trial.

4. Cognizance of offences by Magistrate on Complaint Petition:

Section 190(1) (a) of the CrPC empowers a Magistrate to take cognizance on the basis of a complaint. Complaint is defined under section 2(d) of the Code as- *"any allegation made orally*

or in writing to a magistrate, with a view to his taking action under this code that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation.—A report made by a police officer in a case which discloses, after investigation, the commission of a non- cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant."

When on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under section 200 and the succeeding sections in Chapter XV of the Code, he is said to have taken cognizance of the offence within the meaning of Section 190(1) (a). But if he has instead taken action of some other kind, such as issuing a search warrant for the purposes of investigation, or ordering investigation by the police under section 156(3) of the Code, he cannot be said to have taken cognizance. Upon receiving a complaint regarding cognizable offences, the Magistrate may exercise his power under section 156(3) Cr.P.C and this he does before taking cognizance on the complaint but if once he takes cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3) of the Code.

The filing of bogus and fake complaint in order to set criminal law in motion by unscrupulous persons is often complained and therefore while exercising the discretion, with the intelligible differentia and by weighing the cause in judicial scales having regard to the facts and circumstances of the given case, the Magistrates must decide with care and cautiously examine as to whether the complaint filed is the outcome of personal vendetta or outburst of animosity or originated from evil impact of fickle mind so as to wreak vengeance against the opponent, otherwise malicious prosecution would be rampant putting on peril the valuable rights and liberties of citizens through Courts themselves.

Therefore, if a litigant knocks the doors of the justice with a grievance, the Magistrate must apply judicial mind coupled with discretion and such exercise should not be arbitrary, capricious, whimsical, fanciful and casual. In this regard the findings of the Hon'ble Supreme Court in **Pepsi Foods Ltd. and Anr. Vs. Special Judicial Magistrate and Anr. (1998) 5 SCC 749** is worth mentioning wherein it has been held that - *"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before*

summoning of the accused. Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

There may be a variety of grievances and every grievance cannot be received as a matter of routine and the Magistrate must be able to classify amongst the cases so as to decide whether a particular case is fit for taking cognizance or not. An offence is made punishable under the Penal Laws and therefore cognizance can be taken only if the allegations and disputes attract the Penal Provisions.

Considering the rise in false complaints and frequent invoking of provision U/s 156(3) Cr.P.C the Hon'ble Supreme Court has in **Priyanka Srivastava & Anr vs State Of U.P, (2015) 6 SCC 287**, held that *"In our considered opinion, a stage has come in this country where Section 156(3) Cr.P.C. applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores. We have already indicated that there has to be prior applications under Section 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an application under Section 156(3) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR."*

It is high time that the Magistrate while taking cognizance on a complaint or sending the

complaint for investigation U/s 156(3) Cr.P.C must exercise the discretion judiciously and carefully to ensure that the Courts do not become an agency to coerce the citizens.

5. Cognizance by Magistrate upon information received from any person other than a police officer, or upon his own knowledge:

According to S. 190(1) (c) the Magistrate can take cognizance of any offence upon the information received from any person other than a police officer or upon his knowledge. The object is to enable the Magistrate to see that justice is vindicated notwithstanding that the persons individually aggrieved are not willing or unable to prosecute. Hence the proper use of the power conferred by this provision is to proceed under it when the Magistrate has reason to believe the commission of a crime but is unable to proceed ordinary way owing to absence of any complaint or police report about it. Therefore, the word 'knowledge' as used in the clause (c) should be interpreted rather liberally so as to subserve the real object of the provision.

Section 190 of the Code empowers the magistrate to take cognizance of an offense in cases where the victim does not lodge an FIR in the police station due to any reason or in cases where the police refuse to admit FIR reported by any victim. Thus, this provision is meant to safeguard the interests of the victims while keeping a check on the unfettered powers of the police. The clause is divided in three exclusive parts which empower the Magistrate to take cognizance upon receiving a complaint of facts or upon a police report of such facts or upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

The real distinction between sub-clause (c) and sub-clauses (a) and (b) of section 190(1) is that, in the two latter cases an application is made to the Magistrate to take cognizance of the offence either by a complaint or by the police, while in the former case the Magistrate takes cognizance suo moto either on his own knowledge or on information received from some person who will not take the responsibility of setting the law in motion. In this case, the law partly out of regard for the susceptibilities of the accused and partly to inspire confidence in the administration of justice allows the accused right to claim to be tried before another Magistrate.

However, in practice we do not very often see the invoking of the power U/s 190(1) (c) of the Cr.P.C by a Magistrate.

6. Cognizance of Offences by the Court of Sessions:

Under the scheme of the Cr.P.C the original cognizance taking power has been bestowed upon the Magistrate and under the said scheme Sec.193 Cr.P.C provides that - Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.

Once a case is committed to the Court of Sessions as provided U/s 209 Cr.P.C the rider on the cognizance taking power of the Court of Sessions is lifted. There may be a case when upon receipt of the case after commitment, the Court of Sessions find that there are sufficient materials to summon any persons as accused whose name does not figure out as an accused and at this stage the Court of Sessions may exercise the power U/s 193 Cr.P.C.

In **Kishun Singh and others Vs State of Bihar,(1993) 2 Supreme Court Cases 16** It has been held that - Sessions Court has jurisdiction, on committal of a case to it, to take cognizance of offence of persons not named as offenders, whose complicity in the crime comes to light from the material available on record - Hence on committal under S.209, Sessions Judge is justified in summoning, without recording evidence, the appellants not named in police report under S.173 to stand trial along with those already named therein.

On committal, the restriction on the Court of Session to take cognizance of an offence as a Court of original jurisdiction gets lifted. The opening words of Section 193 Cr.P.C. categorically recite that the power of the Court of Sessions to take cognizance would commence only after committal of the case by a magistrate. The said provision opens with a non-obstante clause except as otherwise expressly provided by this code or by any other law for the time being in force. The Section therefore is clarified by the said opening words which clearly mean that if there is any other provision under Cr.P.C. expressly making a provision for exercise of powers by the Court to take cognizance, then the same would apply and the provisions of Section 193 Cr.P.C. would not be applicable.

In Dharam Pal, the Supreme Court had noticed the conflict in the decisions of **Kishun Singh & Ors v. State of Bihar, (1993) 2 SCC 16** and **Ranjit Singh v. State of Punjab, AIR 1998 SC 3148,** and referred the matter to the Constitution Bench. However, while referring the matter to a Constitution Bench, this Court affirmed the judgment in Kishun Singh and doubted the correctness of the judgment in Ranjit Singh. In Ranjit Singh, the Court observed that from the stage of committal till the Sessions Court reaches the stage indicated in Section 230 Cr.P.C., that court can deal with only the accused referred to in Section 209 Cr.P.C. and there is no intermediary stage till then for the Sessions Court to add any other person to the array of the accused, while in Kishun Singh, this Court came to the conclusion that even the Sessions Court has power under Section 193 Cr.P.C. to take cognizance of the offence and summon other persons whose complicity in the commission of the trial can prima facie be gathered from the materials available on record and need not wait till the stage of Section 319 Cr.P.C. is reached. This Court in **Dharam Pal** *(Supra)* held that the effect of **Ranjit Singh** *(Supra)* would be that in less serious offences triable by a Magistrate, the said Court would have the power to proceed against those who are mentioned in Column 2 of the charge-sheet, if on the basis of material on record, the Magistrate disagrees with the conclusion reached by the police, but, as far as serious offences triable by the Court of Sessions are concerned, that Court will have to wait till the stage of Section 319 Cr.P.C. is reached.

The issue was considered by the Constitution Bench in the case of **Dharam Pal & Ors. v. State of Haryana & Anr., AIR 2013 SC 3018,** wherein it was held that a Court of Sessions can with the aid of Section 193 Cr.P.C. proceed to array any other person and summon him for being tried even if the provisions of Section 319 Cr.P.C. could not be pressed in service at the stage of committal.

In Dharam Pal, the Constitution Bench approved the decision in Kishun Singh that the Sessions Judge has original power to summon accused holding that the Sessions Judge was entitled to issue summons under Section 193 Code of Criminal Procedure upon the case being committed to him by the Magistrate. The key words in Section 193 are that "no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code." The above provision entails that a case must, first of all, be committed to the Court of Session by the Magistrate. The second condition is that only after the case had been committed to it, could the Court of Session take cognizance of the offence exercising original jurisdiction.

7. Restrictions on power to take cognizance of an offence:

Section 195-199 are exception to the general rule contained in section 190 regarding taking cognizance of an offence.

Sec-195: Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.—

(1) No Court shall take cognizance-

(i) of any offence punishable under section 172-188 (both inclusive) of the Indian Penal Code, or

(ii) of any abetment of, attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit, such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;

(a) (i) of any offence punishable under any of the following section of the Indian Penal Code, namely, sections 193-196 (both inclusive), 199,200,205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in section 463, or punishable under section 471,475 or 476 of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) Of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii), except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate.

(2) Where a complaint has been made by a public servant under clause (a) of sub- section (1) any authority to which he is administratively subordinate may order the withdrawal of the complaint and send a copy of such order to the Court; and upon its receipt by the Court, no further proceedings shall be taken on the complaint:

Provided that no such withdrawal shall be ordered if the trial in the Court of first instance has been concluded.

(3) In clause (b) of sub-section (1), the term "Court" means a Civil, Revenue or Criminal Court, and includes a tribunal constituted by or under a Central, provincial or State Act, if declared by that Act to be a Court for the purposes of this section.

(4) For the purposes of clause (b) of sub-section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from appealable decrees or sentences of such former Court, or in the case of a civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within whose local jurisdiction such civil court is situated

Provided that-

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;

(b) Where appeals lie to a civil and also to Revenue Court, such Court shall be deemed to be subordinate to the civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed.

Section 340 Cr.P.C prescribes the procedure as to how a complaint may be preferred under section 195 Cr.P.C while under section 195 of CrPC it is open to the Court before which the offence was committed to prefer a complaint for the prosecution of the offender.

Provisions under section 195 of CrPC are mandatory and no Court can take cognizance offences referred to therein.

195A. **Procedure for witnesses in case of threatening etc.:**

A witness or any other person may file a complaint in relation to an offence under section 195A of the Indian Penal Code.

196. **Prosecution for offences against the State and for criminal conspiracy to commit such offence.**

(1) No Court shall take cognizance of-

(a) any offence punishable under Chapter VI or under section 153A, section 295A or sub- section (1) of section 505 of the Indian Penal Code, or

(b) a criminal conspiracy to commit such offence, or

(c) any such abetment, as is described in section 108A of Indian Penal Code, except with the previous sanction of the Central Government or of the State Government.

(1A) No Court shall take cognizance of-

(a) any offence punishable under section 153B or sub-section (2) or sub-section (3) of section 505 of the Indian Penal Code, or

(b) a criminal conspiracy to commit such offence;

Except with the previous sanction of the Central Government or of the State Government or of the District Magistrate.

(2) No Court shall take cognizance of the offence of any criminal conspiracy punishable under section 120B of the Indian Penal Code, other than a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceeding:

Provided that where the criminal conspiracy is one to which the provisions of section 195 apply, no such consent shall be necessary.

(3) The Central Government or the State Government may, before according sanction under sub- section (1) or sub-section (1A) and the District Magistrate may, before according sanction under sub-section (1A) and the State Government or the District Magistrate may, before giving consent under sub-section (2), order a preliminary investigation by a police officer not being below the rank of Inspector, in which case such police officer shall have the powers referred to in sub-section (3) of section 155.

197. **Prosecution of Judges and public servants.—**

(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.

Explanation -

For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section166A, 166B, 354, 354A, 354B, 354C, 354D, 370, 375, 376A, 376AB, 376C, 376D, 376DB or section 509 of the Indian Penal Code.

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

(3A) Notwithstanding anything contained in sub-section (3), no Court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a Court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the Court to take cognizance thereon.

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.

198. **Prosecution for offences against marriage.**

(1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:

Provided that-

(a) where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf;

(b) where such person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorized by the husband in accordance with the provisions of sub-section (4) may make a complaint on his behalf;

(c) where the person aggrieved by an offence punishable under section 494 and 495 of the Indian Penal Code (45 of 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's, brother or sister, with the leave of the Court, by any other person related to her by blood, marriage or adoption.

(2) For the purpose of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code:

Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.

(3) When in any case falling under clause (a) of the proviso to sub-section (1), the complaint is sought to be made on behalf of a person under the age of eighteen years or of a lunatic by a person who has not been appointed or declared by a competent authority to be the guardian of the person of the minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, the Court shall, before granting the application for leave, cause notice to be given to such guardian and give him a reasonable opportunity of being heard.

(4) The authorization referred to in clause (b) of the proviso to sub-section (1), shall be in writing, shall be signed or otherwise attested by the husband, shall contain a statement to the effect that he has been informed of the allegations upon which the complaint is to be founded, shall be countersigned by his Commanding Officer, and shall be accompanied by a certificate signed by

that Officer to the effect that leave of absence for the purpose of making a complaint in person cannot for the time being be granted to the husband.

(5) Any document purporting to be such an authorization and complying with the provisions of sub-section (4), and any document purporting to be a certificate required by that sub- section shall, unless the contrary is proved, be presumed to be genuine and shall be received in evidence.

(6) No Court shall take cognizance of an offence under section 376 of the Indian Penal Code (45 of 1860), where such offence consists of sexual inter-course by a man with his own wife, the wife being under fifteen years of age, if more than one year has elapsed from the date of the commission of the offence.

(7) The provisions of this section apply to the abetment of, or attempt to commit, an offence as they apply to the offence.

198A. **Prosecution of offences under section 498A of the Indian Penal Code.**

No Court shall take cognizance of an offence punishable under section 498A of the Indian Penal Code (45 of 1860) except upon a police report of facts which constitute such offence or upon a complaint made by the person aggrieved by the offence or by her father, mother, brother, sister or by her father's or mother's brother or sister or, with the leave of the Court, by any other person related to her by blood, marriage or adoption.

198B. **Cognizance of offence.**

No Court shall take cognizance of an offence punishable under section 376B of the Indian Penal Code where the persons are in a marital relationship, except upon prima facie satisfaction of the facts which constitute the offence upon a complaint having been filed or made by the wife against the husband.

199. **Prosecution for defamation.**

(1) No Court shall take cognizance of an offence punishable under Chapter XXI of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:

Provided that where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf.

(2) Notwithstanding anything contained in this Code, when any offence falling under Chapter XXI of the Indian Penal Code (45 of 1860) is alleged to have been committed against a person who, at the time of such commission, is the President of India, the Vice-President of India, the Government of a State, the Administrator of a Union territory or a Minister of the Union or of a State or of a Union territory, or any other public servant employed in connection with the affairs of

the Union or of a State in respect of his conduct in the discharge of his public functions, a Court of Session may take cognizance of such offence, without the case being committed to it, upon a complaint in writing made by the Public Prosecutor.

(3) Every complaint referred to in sub-section (2) shall set forth the facts which constitute the offence alleged, the nature of such offence and such other particulars as are reasonably sufficient to give notice to the accused of the offence alleged to have been committed by him.

(4) No complaint under sub-section (2) shall be made by the Public Prosecutor except with the previous sanction-

(a) of the State Government, in the case of a person who is or has been the Governor of that State or a Minister of that Government;

(b) of the State Government, in the case of any other public servant employed in connection with the affairs of the State;

(c) Of the Central Government, in any other case.

(5) No Court of Session shall take cognizance of an offence under sub-section (2) unless the complaint is made within six months from the date on which the offence is alleged to have been committed.

(6) Nothing in this section shall affect the right of the person against whom the offence is alleged to have been committed, to make a complaint in respect of that offence before a Magistrate having jurisdiction or the power of such Magistrate to take cognizance of the offence upon such complaint

The analysis of section 195-199 will bring out the following points -

1. Prosecution for contempt of lawful authority of public servant- Sec.195(1)(a) No court shall take cognizance-

a. of any offence punishable under section 172-188, IPC, or

b. of any abatement of, or attempt to commit, such offence; or

c. of any criminal conspiracy to commit such offence,

The object of this provision is to save the accused person from vexatious or baseless prosecution prompted by vindictive feeling on the part of the private complainants. The provision of Section 195(1) (a) being mandatory, any private prosecution in respect of the said offenses is totally barred. Only the concerned public servants can make a complaint and initiate proceedings in respect of these offenses. The power to make the complaint can be exercised only by the public servant who is for the time being holding the office or is a successor-in-office of the public servant whose order is disobeyed or lawful authority disregarded and thus an offense under Sections 172 to 188, IPC has been committed. The bar or limitation imposed by subsection 1(a) of Section 195 equally extends to both cognizable as well as non-cognizable offenses. It may be noted that all the

offenses covered by Sections 172 to 188 of IPC except the one under Section 188, are non-cognizable offenses. It may be noted that Section 195 being mandatory taking cognizance of any offense referred to therein without a proper complaint by the concerned public servant would be illegality which cannot be cured by Section 465 of Cr.P.C.

2. Prosecution for offence against public justice and for offence relating to documents given in evidence -Sec.195(1)(b)

No court shall take cognizance

(a) of any offence punishable under any of the following section of IPC, namely, section 193- 196, 200,205-211, and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any court; or

(b) of any offence described in section 463, or punishable under section 471, section 475 or section 476 IPC when such offence is alleged to have been committed in respect of a document produced or given in evidence in proceeding in any court; or

(c) of any criminal conspiracy to commit or attempt to commit, or the abatement of any, offence specified in sub-clause(a) or sub-clause(b);

Except on the complaint in writing of the court, or of some other court to which the court is subordinate. [Section 195(1) (b)]. Clause (b) of Section 195(1) relates to prosecution for offenses against public justice. No Court shall take cognizance of any such offense or of attempt or abetment or of any criminal conspiracy to commit any such offense, when such offense is alleged to have been committed to, or relation to, any proceeding in any Court, except on a complaint in writing of that Court or of some other Court to which that Court is subordinate.

3. Prosecution for offences against the State No court shall take cognizance of -

(a) any offence punishable under Chapter VI or under section 153-A, 153-B, 195-A or section 505 IPC; or

(b) a criminal conspiracy to commit such offence;

Except with the previous sanction of the Central Government or the State Government. [Section 196(I)]

4. Prosecution for the offence of criminal conspiracy

No court shall take cognizance of the offence of criminal conspiracy punishable under section 120-B IPC, other than a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two year or upward, unless the State Government or the district magistrate has consented in writing to the initiation of the proceeding. [Section 196(2)] However, no such consent shall be necessary if the criminal conspiracy is one to which the provision of section 195 apply [proviso to section 196(2)]; because, in case of such conspiracies the complaint of the concerned public servant or of the appropriate court will be necessary to initiate the proceeding.

5. Prosecution of judges and public servant

According to section 197(1), no court shall take cognizance of any offence alleged to have been committed by a person who is or was a judge or magistrate or a public servant, except with the previous sanction of the appropriate State or Central Government. In order to attract this restrictive rule, the provision requires that

(a) The judge, Magistrate or the public servant is or was one not removable from his office save by or with the sanction of the appropriate government.

(b) the alleged offence must have been committed by him while acting or purporting to act in the discharge of his official duty;

(c) the previous sanction must have been given by the Central government if, at the time of the commission of the alleged offence the accused person is or was employed in connection with the affair of the Union of India; and similarly, if the accused person is or was employed in connection with the affairs of a State, such previous sanction would have to accorded by the State Government.

6. Prosecution of member of armed forces

No court shall take cognizance of any offence alleged to have been committed by any member of the armed forces of the union while action or purporting act in the discharge of his official duty, except with the previous sanction of the Central government. [Section 197(2)]

7. Prosecution for offence against marriage

No court shall take cognizance of any offence punishable under chapter XX of the IPC except upon a complaint by some person aggrieved by the offence. [Section 198 (I)]

8. Prosecution of husband for rape

No court shall take cognizance of an offence under section 376 IPC (Rape), where such offence consists of sexual intercourse by a man with his own wife, the wife being under 15 year of age, if more than one year has elapsed from the date of commission of the offence. [Section 198(6)]

No court shall take cognizance of an offence under section 376-B (rape by husband of the victim women, when they are living separately), except upon a complaint by wife against husband unless the court is satisfied, prima facie of the facts constituting the offence. [Section 198-B]

8. Limitation Period for taking Cognizance of an Offence

Section 468: Bar to take the Cognizance of an offence-

1. No Court shall take the cognizance of an offence after the expiry of the prescribed period as specified in subsection (2)

2. The period of limitation shall be:

Offence punishable with	**Period of Limitation**
Fine only	6 months
Imprisonment not exceeding 1 year	1 year
Imprisonment Minimum of 1 year Maximum of 3 years	3 years

In computing the period of limitation for the offence when two offences are tried together; the period of limitation shall be determined in pursuance of the offence which is punishable with the more severe punishment or the most severe punishment.

Section 469: **Beginning of period of limitation**

The period of limitation commences from the following points:

1. On the day when the offence was committed

2. When the person aggrieved by the act had no knowledge regarding the commission the offence or the police officer; it begins on the day when it comes to the knowledge of the aggrieved party or police making an investigation into the case whichever is earlier.

3. When the person who has committed an act is unknown or not being identified, the first date on which the accused was known either to the aggrieved person or to the police officer making an investigation into the case whichever is earlier.

The day from which such period of limitation begins shall be excluded for the purpose of this Chapter. It means that the first day from which the period of limitation begins to be calculated shall not be included while computing the period of limitation.

Section 470: **Exclusion of Time in certain cases**

This section provides the period which shall not be included in computing the period of limitation.

The period of limitation that is to be excluded in computing the period of limitation is explained below:

1. The time during which such person is prosecuting another prosecution with due diligence whether in a court of Appeal, or in the Court of the first instance against the offender.

2. Such period will not be excluded unless the prosecution is related to the same facts and is prosecuted in good faith in a court which from of defect of jurisdiction or other cause of like nature is unable to entertain it.

In the case where the institution of proceeding is stayed by the order or injunction, the time shall exclude:

i. The period during the continuance of such order or injunction.

ii. The day on which it was made or was issued.

iii. The day on which it was withdrawn.

In a case where the notice of prosecution of offence is given or the previous consent or the sanction of the Government is mandatory under the Code of Criminal Procedure or any other law for the time being in force the following period shall be excluded:

i. The period of notice or;

ii. The period for obtaining the consent or sanction of the Government

iii. Explanation to section 470 also specifies that in computing the time which is required for taking the sanction or the permission from the Government or any other authority the date on which the application was made for taking the consent or sanction and the date on which the permission or the consent was granted shall be excluded.

In computing the period of limitation following period is to be excluded:

i. The time during which the offender is absent from India or from any territory which is outside from India but is under the administration of Central Government.

ii. The time during which the offender has avoided arrest either by concealing himself or either by absconding.

Section 471: **Exclusion of date on which court is closed:**

The day when the Court is closed is excluded from being accredited to the specified period of limitation.

It is a rule that in the case when the period of limitation expires on the day of the closure of court proceedings the cognizance of an offence is taken when the court reopens.

When the court closes on normal working hours for a particular period it is presumed that the Court has been closed for the same day.

Section 472: **When the offence continues:**

In the case of a continuing offence fresh limitation begins to run at every moment.

Extension of Period in Certain Cases: As per section 473 of Code of Criminal Procedure notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may take cognizance of an offence after the expiry of the period of limitation, if it is satisfied of the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice.

1. This section is the pivotal section as it focuses on administering justice. It gives a chance to the complainant or the aggrieved person to institute the case even after the expiry of the prescribed period of limitation.

2. In normal circumstances, the case is not to be instituted after the expiry of the prescribed period but in exceptional circumstances, the court allows for the institution of the case.

It is the discretion of the Court to extend the period of limitation. The conditions for exercise of such discretion:

1. When the court is satisfied with the facts and circumstances of the case that complainant was prevented by sufficient cause from not appearing before the Court within the prescribed period of limitation are.

2. The cause of the delay is properly explained and the court is satisfied with it.

3. The court is of the opinion that it is necessary to extend the period in the interest of justice.

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Topic No. – 10

Custody/release and disposal of seized property during inquiry or trial, and disposal of property after the conclusion of a trial.

By

Sri Neeraj Kr. II,

Additional District & Sessions Judge,

Katihar.

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Additional District & Sessions Judge, Katihar.

Topic : Custody/release and disposal of seized property during inquiry or trial, and disposal of property after the conclusion of a trial.

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Custody/release and disposal of seized property during inquiry or trial, and disposal of property after the conclusion of a trial.

ABBREVIATIONS USED

1. ACC (All) - Accident and Compensation Cases Allahabad
2. AIR All – All India Reporter Allahabad
3. AIR AP.- All India Reporter Andhra Pradesh
4. AIR Bom- All India Reporter Bombay
5. AIR Cal – All India Reporter Calcutta
6. AIR Guj – All India Reporter Gujrat
7. AIR Lah – All India Reporter Lahore
8. AIR Mad – All India Reporter Madras
9. AIR Man – All India Reporter Manipur
10. AIR MP- All India Reporter Madhya Pradesh
11. AIR Pat – All India Reporter Patna
12. AIR Pun (FB) – All India Reporter Punjab Full Bench
13. AIR Nag – All India Reporter Nagpur
14. AIR Raj – All India Reporter Rajasthan
15. AIR Rang – All India Reporter Rangoon
16. AIR SC – All India Reporter Supreme Court
17. ALD (Cri) - Andhra Legal Decision (Criminal)
18. ALT - Andhra Law Times
19. AP – Andhra Pradesh
20. APLJ - Andhra Pradesh Law Journal
21. BBCJ – Bihar Bar Council Journal
22. BLJ – Bihar Law Judgments
23. BLJR – Bihar Law Journal Reports
24. Bom. CR – Bombay case reports
25. Bom. HCR - Bombay High Court Reports
26. Bom. HCR OCJ - Bombay High Court Reports Original Civil Jurisdiction

27. Bom LR – Bombay Law Reporter
28. Bro C C – Brownie Chancery Reports
29. Cal LJ – Calcutta Law Journal
30. Cal LT – Calcutta Law Times
31. Cal. W .N.- Calcutta Weekly Notes
32. CGBLJ – Chhatisgarh Bar council Law Journal
33. CEGAT – Customs, Excise, Gold (Control) Appellate Tribunal
34. CPC – Code of Civil Procedure 1908
35. CRPC – Code of Criminal Procedure 1973
36. Crime – Crimes
37. CLT – Cuttack Law Times
38. Cri L. J. - Criminal Law Journal
39. Crl. M. A. - Criminal Miscellaneous application
40. CRL. M. C. - Criminal Miscellaneous Case
41. Crl. Misc. No. - Criminal Miscellaneous number
42. CRL. R. C. No. - Criminal Revision case number
43. CRL. REV. P.- Criminal Revision Petition
44. CWJC – Civil Writ Jurisdiction Case
45. DLT – Delhi Law Times
46. DM – District Magistrate
47. East Cr. C. - Eastern Criminal Cases
48. EC Act – Essential Commodities Act 1955
49. ELT (Cal) – Excise Law Times Calcutta
50. ELT (Delhi) – Excise Law Times Delhi
51. ELT (Ker.) - Excise Law Times Kerala
52. ELT (SC)- Excise Law Times Supreme Court
53. Gau LR – Gauhati Law Reporter
54. GLH – Gujrat Law Herald
55. GLH (UJ) – Gujrat Law Herald Unreported judgments
56. GLR – Gujrat Law Reporter

57. HC – High Court
58. HP – Himachal Pradesh
59. ILR All - Indian Law Reports – Allahabad
60. ILR Bom – Indian Law Reports Bombay
61. ILR Cal - Indian Law Reports Calcutta
62. ILR Guj – Indian Law Reports Gujrat
63. ILR Kar – Indian Law Reports – Karnataka
64. ILR Mad – Indian Law Reports – Madras
65. ILR Mysore – Indian Law Reports Mysore
66. In Re – In the matter of
67. IPC – Indian Penal Code 1860
68. IPR - Intellectual Property Rights
69. IR Nag – Indian Rulingst Nagpur
70. JT SC – Judgment Today Supreme court
71. Ker LT – Kerala Law Times
72. KLT – Kerala Law Times
73. Mad LW (Crl) – Madras Law Weekly Criminal
74. Mah LJ – Maharashtra Law Journal
75. Manu/SC- Manupatra Supreme Court
76. MLJ – Madras Law Journal
77. MLW (Cri) – Madras Law weekly criminal
78. MP – Madhya Pradesh
79. MWN (Cri) – Madras Weekly notes criminal
80. NDPS Act – Narcotic Drugs and Psychotropic Substances Act 1985
81. OLR- Orissa Law Reviews
82. Ori L. J.(Mad.) - Orissa Law Journal Madras
83. PCA – Prevention of Cruelty to Animals Act 1960
84. PIL- Public Interest Litigation
85. PLJR (SC) – Patna Law journal Reports Supreme court
86. QBD – Queen's Bench Division Law reports

87. Rajasthan LR – Rajasthan Law Reporter
88. Raj LW – Rajsthan Law Weekly
89. SC – Supreme Court
90. SCALE – Supreme Court Almanac
91. SCC – Supreme Court Cases
92. SCC OnLine All- Supreme court case online Allahabad
93. SCC online AP - Supreme Court case online Andhra Pradesh
94. SCC OnLine Bom - Supreme Court case online Bombay
95. SCC OnLine Del – Supreme Court case online Delhi
96. SCC OnLine Gau- Supreme court case online Gauhati
97. SCC OnLine HP - Supreme Court case online Himachal Pradesh
98. SCC OnLine Kar - Supreme Court case online Karnataka
99. SCC OnLine Ker - Supreme Court case online Kerala
100. SCC OnLine Mad - Supreme Court case online Madras
101. SCC OnLine MP - Supreme Court case online Madhya Pradesh
102. SCC OnLine Pat - Supreme Court case online Patna
103. SCC OnLine Raj - Supreme Court case online Rajasthan
104. SCC OnLine SC - Supreme Court case online Supreme Court 105.SCC OnLine TS - Supreme Court case online Telangana 106.SCC OnLine Utt - Supreme court case online Uttarakhand
107. SCL – Supreme Court Journal 108.SCR – Supreme Court Reports
109. Supp. SCC – Supreme Court cases supplementary volume
110. SLP – Special Leave Petition
111. Tax LR (Guj) - Tax Law Report Gujrat
112. UOI – Union of India
113. UP – Uttar Pradesh

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RESEARCH METHODOLOGY, TOOLS USED, SCOPE OF THE PAPER AND CLARIFICATION

1. Methodology of research and tools.—I have used Doctrinal approach to research in preparing this work. The secondary data available are relied upon in this work. Words like disposal of property, restoration etc. and the combination thereof were used as search keys on various search engines. I depend on the residential library provided by the Bihar Judicial Academy and the internet resources.

2. Clarification.—Since the proceedings of confiscation, forfeiture, seizure, detention are related with dealing with property in one form or another, relevant Laws on these matters have been taken into this paper. Though there are subtle difference between the terms seizure, detention, forfeiture, confiscation, attachment but in this paper I have sometimes taken liberty to use these terms interchangeably.

3. Scope and limit.—The present work tries to understand the relationship of private property with the legal framework. It deal with the search and seizure procedure and consequential issues concerning disposal of property and documents with reference to Indian criminal laws as well as civil laws. The paper doesn't strive to suggest anything new but attempted to present the current trend on this aspect with the help of judicial pronouncement of Hon'ble Apex Court, Hon'ble High Court of Judicature at Patna and other Hon'ble High Courts.

SYNOPSIS OF THIS PAPER

In this work, I have tried to find out what are the philosophical, social, constitutional and legal aspect of seizure of private property and document, and issues of its disposal and the remedies available.

1. Chapter I is an introduction to the subject.
2. In Chapter II an attempt has been made to understand the concept of property and various philosophies revolving round it. The definitions of the property as it existed in

different Indian laws and the right to property as it existed in Indian legal system in the backdrop of constitutional mandate and judicial precedents have also been discussed.

3. In Chapter III, Legal provisions contained in CRPC, Bihar Police Manual, Bihar Police Act, Criminal court rules and Civil Court rules have been discussed.
4. In Chapter IV, the philosophy of restitution in Indian Law has been discussed.
5. In Chapter V provisions relating to interim custody of property under section 451 CRPC has been discussed. Landmark decisions of Hon'ble Courts providing guidelines to be followed by the subordinate courts for speedy and efficacious disposal of property have been discussed. An attempt has also been made to catalog the articles which are characterized as property in light of various judicial decisions.
6. In chapter VI, the rule of caution in passing order with respect to seized property under various special legislation, has been discussed. The decisions of the Hon'ble Courts on various aspects has also been discussed with particular reference to Essential commodities Act, NDPS Act, Excise Act, Forest Act, Wildlife Act and Motor Vehicles Act.
7. In Chapter VII, the special provisions concerning custody, retention and disposal contained in various animal related laws like prevention of cruelty to animals Act and Rules, Cattle trespass Act, Bihar Preservation and improvement of animals Act and corresponding provisions in Bihar Police Manual have been discussed. Decisions of Hon'ble Courts concerning care to be taken by courts in custody and disposal of animals have been discussed.
8. In Chapter VIII, the issues relating to documents custody and disposal have been discussed. The provisions contained in Criminal Court Rules, Civil Court Rules, CPC, Evidence Act have been briefly discussed. Certain judgments of Hon'ble Courts touching the issues of documents have also been aggregated.
9. In Chapter IX, the procedure by the police upon seizure of property under section 457 CRPC has been analyzed. Power of the police and limitation to seize property has been discussed and decisions of Hon'ble Courts on various related issues have been summarily presented.
10. In Chapter X, the issue of maintainability of revision with respect to the orders passed under section 451 and 457 CRPC has been illustrated. An attempt has been made to understand the concept of intermediate orders in light of Hon'ble Apex court decisions. The view of Hon'ble High Courts in India, on the maintainability of revision and characterization of the order as interlocutory or otherwise, has been discussed.
11. Chapter XI deals with the alternative civil remedy available with respect to seized property. Liability of the state in such matters and relevant provisions of civil laws

have been discussed. Certain judgments of Hon'ble Courts on various related matters have been reproduced.

12. Chapter XII relates to disposal of property on conclusion of trial under section 452 CR.P.C The issues involving around it and various decisions of the Hon'ble Court have been discussed.
13. Chapter XIII is related with forfeiture jurisprudence. A brief history of its evolution in the context of major religions is dealt with. Certain Indian laws on forfeiture have been discussed. Judgments of Hon'ble Courts on this topic are also presented.
14. Chapter XIV deals with the issue of restoration of possession of immovable property by criminal court under section 456 CR.P.C Solutions of various issues revolving the subject as appeared in different Hon'ble Courts judgments have been presented.
15. Chapter XV is related to the matter of payment to innocent purchaser under section 453 CRPC
16. Chapter XVI relates to the procedure to be adopted under section 458 CRPC when no claimant appeared
17. Chapter XVII deals with the issue of selling of perishable property under section 459 CR.P.C Similar provisions in other laws have been compared. Certain judgments of Hon'ble Apex Court on this matter have been produced.
18. Chapter XVIII discusses the appeal related provisions with respect to different orders concerning disposal of property under chapter XXXIV of CR.P.C Similar provisions relating to such appeals in other laws have been discussed. Certain judgments of Hon'ble Courts have also been produced.
19. Chapter XIX deals with destruction of property under section 455 CR.P.C Similar such provisions found in certain other Indian laws have been presented.
20. Chapter XX tries to conclude the ethos of the paper

INTRODUCTION

With the evolution of social life from solitary individual life, the relation of human beings with each other and with the land took new dimensions. It reflected in growing complexities in behavior of the members of the tribes and evolution of the concept of property[1]. This necessitated formulation of certain consensus on ideals and rules of behavior to be followed by the members. These ideals and ideals were known as Law which provided a blue print for all round development of the individual and different sections of the society.

1. The word Property derives from the word "Properte" which was an anglo french modification of old french"Propriete" and modern french "Proprete" and latin proprietatem. Earlier it was used in reference to nature and quality but later on it was used in the sense of possession, thing owned, individuality, peculiarity.

As the complex state structure evolved, the freedom and rights of an owner to deal with his property in accordance with his sweet will was restricted. Growing importance of property also created new challenges before the system in an unprecedented manner. It not only changed the pattern of societal development but also the individual consciousness to protect the private property from violators of law.

Maintenance of law and order in the society necessitated apprehending the violators to put a curb on their unsocial activities. Search and Seizure[2] procedure has been devised by the state to collect evidence and confiscate properties alleged to have been used in commission of the offence or with which the offence is alleged to have been committed.

Seizure, production of any property and the documents in custody of the court in any matter brings with it the issues of its retention, custody and disposal, either during pendency of the case or after the conclusion of the case.

CHAPTER II

PROPERTY

1. Meaning.—Property, in the legal sense, is essentially a bundle of rights flowing from the concepts of ownership and possession. While most of them have material existence, the value of the property depends on the knowledge of use associated with it. Element of knowledge of use complicates the conception of property since it is a vague, ever changing concept with the changing value. The notion of property as it has developed over centuries and it has embodied in our legal codes, has become so much a part of us that we tend to take it for granted, and fail to recognize the extent to which just what constitutes property and what rights the ownership of property confers are complex social creations rather than self-evident propositions[3].

2. Philosophies of Property.—Different thinkers have defined the property in myriad ways. Private property was chiefly formed by the gradual disentanglement of the separate rights of individual from the blended rights of the community[4]. The earliest form of property was group property. It was later on that families were partitioned and individual property came into being[5]. Spencer says that property is the result of individual labour therefore; no person has a moral right

2. The word SEIZURE is formed from the word SEIZE, Seizeis derived from old french word "Seisir" and (Modern french "Saisir") which means to take possession, take by force, put in possession of, bestow upon. The Late Latin "Sacire", which is generally held to be from a Germanic source, but the exact origin is uncertain. Other sources include Frankish *sakjan "lay claim to", Gothic "Sokjan" , Old English secan "to seek;" and Proto-Germanic *satjan "to place" . It is originally a legal term in reference to feudal property holdings or offices. Meaning" to grip with the hands or teeth "and" to take possession by force or capture" (of a city,etc.).

3. Capitalism and Freedom by Milton Friedman

4. Historical Theory of Property by Sir Henary Maine

5. Roscoe Pound

to property which he has not acquired by his personal effort[6]. Since labor is an exhaustive work the property is thus a reward for the exertion of that labor[7].

According to Hegel property is the manifestation of one's individuality, expression, dignity and thus property is the embodiment of one's personality[8]. According to Bentham, Property is altogether a conception of mind. It is nothing more than an expectation to derive certain advantages from the object according to one's capacity[9]. The concept of property should not only be confined to private rights but it should be considered as a social institution securing maximuminterests of society[10]. According to Jenks, no one can be allowed an unrestricted use of his property, to the detriment to others and its usage should conform to the rules of reason and welfare of the community.

In the opinion of Aristotle[11] Property has never been treated as an end, but always as a means to some other end. it may be a means to the fulfillment of the will without which individuals are not full human and is a prerequisite of individual freedom seen as a human essence. While Marx has denounced it as destructive of human essence, a negative means. He calls for abolition of property[12]. Bentham held that the ultimate end to which all social arrangements should be directed was the maximization of the aggregate utility (Pleasure minus pain) of the members of the society. While listing out the kinds of pleasures, including non material one, he held that wealth, the possession of material goods was so essential to the attainment of all other pleasures that it could be taken as the measure of pleasure or utility in the norm of the greatest good of the greatest number[13].

3. Classification of Property

3.1 Property is mainly of two kinds

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6. Labour Theory which is also known as "positive theory", "value added theory"and labor avoidance theory. This theory insists on the fact that labour of the individual is a foundation of property. Spencer developed the theory on the principle of equal freedom.
7. One other proponent of labor theory was John Locke who stated that every man has a property in his own person and whatsoever then he removes out of the state that nature hath provided, and left it it, he hath mixed his labor with, and joined to it something that is his own, and thereby makes his property. Thus one exerts his labor on"commons" and made it useful by adding value
8. PersonalityJustificationTheory
9. Psychological Theory According to this theory, property came into existence on account of acquisitive instinct of man
10. Functional Theory or'sociological theory of property. According to Laski, Property is a social fact like any other, and it is the character of social facts to alter. Property is the creation of the State The origin of property is to be traced back to the origin of law and the state. Property came into existence when the state framed laws. Property was nowhere before law. According to Rousseau, "It was to convert possession into property and usurpation into a right that law and state were founded". The first who enclosed a piece of land and said- 'this is mine'- he was the founder of real society. He insisted on the fact that property is nothing but a systematic expression of degrees and forms of control, use and enjoyment of things by persons that are recognized and protected by law
11. Theory of Property as Means to an end
12. Manifesto of the Communist Party by Karl Marx and Frederick Engels February 1848, Chapter II
13. Utilitarian theory

(a) Corporeal Property – Rights of ownership in Material things, tangible and visible, It comprehends such property as is perceptible to the senses, as lands, houses, goods, merchandise and the like; the latter consists in legal rights, as chooses in action, easements, and the like. Corporeal Property is of two kinds –

- Movable Property
- Immovable Property.

(b) Incorporeal Property – Any other proprietary rights in rem, not visible. Incorporeal property may be divided into two kinds

- Jura in re aliena – encumbrances over material things like servitudes, securities (mortgages, leases), trust.
- Jura in re propria – Rights in immaterial things such as patents, trademarks and copyrights or the intellectual property.

3.2. What is Intellectual Property?

Intellectual property is a term referring to a number of distinct types of creations of the mind for which property rights are recognized—and the corresponding fields of law. Under intellectual property law, owners are granted certain exclusive rights to a variety of intangible assets, such as musical, literary, and artistic works; discoveries and inventions; and words, phrases, symbols, and designs. Patents, trademarks and copyrights, designs are the four main categories of intellectual property.

4. Right to property recognized by International Statutes.—United Nation Declaration of Human Rights (UNDHR) 1948 recognizes various rights of individuals including property.

4.1 As per Article 2 of UNDHR 1948 everyone is entitled to all the rights and freedoms without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. No distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it is independent, trust, non-self-governing or under any other limitation of sovereignty.

4.2 As per Article 17 of UNDHR 1948, everyone has the right to own property alone as well as in association with others and no one shall be arbitrarily deprived of his property.

5. Right to Property under Indian Constitution.—The Constitution of India[14] derives its foundation from the Government of India Act, 1935 and the Universal Declaration of Human

14. The Constituent Assembly examined the constitutions of various countries, which guarantee basic rights. it is stated "Broadly speaking, the rights declared in the Constitutions relate to equality before the law, freedom of speech, freedom of religion, freedom of assembly, freedom of association, security of person and security of property. Within limits these are all well recognised rights." The debates in the Constituent Assembly when the draft Article 19(1)(f) and Article 31 came up for discussion clearly indicate that the framers of our Constitution attached sufficient importance to property to incorporate it in the chapter of fundamental rights. The provision regarding freedom of "trade and

Rights (1948). Section 299 of the Government of India Act, 1935 secured the right to property and contained safeguards against expropriation without compensation and against acquisition for a non-public purpose. Articles 14, 19(1)(f), 19(5), 31, 32, 39(b) and (c), 226 and265 of the Indian Constitution placed the concept of the right to property at a higher pedestal.

The right to property ceased to be a fundamental right by the Constitution (Forty Fourth Amendment) Act, 1978. Yet forcibly dispossessing a person of his private property, without following due process of law, would be violative of theconstitutional right under Article 300 A[15] of the Constitution as also a human right[16]. The right to property was conditioned by the social responsibility. The State in exercise of its power of "eminent domain"[17] may interfere with the right of property of a person by acquiring the same for public purpose but on payment of reasonable compensation[18]. Article 300-A of the Constitution protects such right; hence the provisions of the law seeking to divest such right must be strictly construed[19]. Deprivation without sanction of law is not acquisition or taking possession under Article 300-A[20]. The right to property is now considered to be not only a constitutional or statutory right, but also a human right[21].

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intercourse," which was originally in the chapter of fundamental rights, was later removed from that chapter and put into a separate part (Article 301), in view of the suggestions by some members of the Constituent Assembly. It is significant to note that similar suggestions in respect of the right to property were not accepted. In "Constituent Assembly of India, Constitutional precedents (Third Series)" (1947)

15. Article 300-A -No person shall be deprived of his property save by authority of law

16. Tukaram Kana Joshi & Ors. v. M.I.D.C. & Ors. (2013) 1 SCC 353

17. 18 Prof. Hugo Grotious defined eminent domain in 1626 thus the property of subject is under the eminent domain of the State, so that the State or he who acts for it may use and even alienate and destroy such property, not only in cases of extreme necessity but for ends of public utility. De Jure Belli ac Pacis, 73 (1631);

    Doctrine of 'Eminent domain', in its general connotation means the supreme power of the king or the government under which property of any person can be taken over in the interest of general public. However, over the years such taking over the property by the king or the government has been made possible only after compensating the land owner of such property when it is needed for a public purpose.

    Doctrine of 'eminent domain' is based on two maxims namely salus populi supreme lex esto which means that the welfare of the people is the paramount law and necessita public major est quan, which means that public necessity is greater than the private necessity. Dr. N. Maheshwara Swamy's, 'Land Laws', (Asia Law House, Hyderabad, I st ed.,2006), p 4.

    In India, the power of the State to take private property for public use and consequent right of the owner to compensate now emerge from the constitution of India. In entry 42 list III of seventh schedule under Indian Constitution, both union and States government are empowered to enact laws relating to acquisition of property. In Chiranjit Lal v. Union of India, AIR 1967 SC 41 Hon'ble Supreme Court held that the eminent domain is the inherent right in every sovereign State to take and appropriate the private property belonging to an individual for public purpose.

18. Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai (2005) 7 SCC 627

19. N.Padmamma v. S.Ramakrishna Reddy (2008) 15 SCC 517

20. Jilubhai Nanbhai Khachar v. State of Gujarat (1995) Supp.1 SCC 596

21. State of Haryana v. Mukesh Kumar (2013) 1 SCC 353

6. Definition of property under different Indian Legislation.—The word property is a subject of diverse interpretations in various Indian Laws. Different Indian statutes define property[22], immovable property[23] and movable

22. Definition of Property in other Indian Legislation

Section 2 (26) of the Benami Transaction prohibition Act 1988; Property means assets of any kind, whether movable or immovable, tangible or intangible, corporeal or incorporeal and includes any right or interest or legal documents or instruments evidencing title to or interest in the property and where the property is capable of conversion into some other form, then the property in the converted form and also includes the proceeds from the property.

Sale of Goods Act 1930, Section 2 (11) - Property means the general property in goods, and not merely a special property.

Bihar Police Act; Section 2 (1)(v) - "Property" means any movable or immovable property, bank account, any kind of investment or valuable securities.

Army Act 1950; Section 151 (3) - Property" includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange whether immediately or otherwise.

Smugglers And Foreign Exchange Manipulators (Forfeiture Of Property) Act, 1976 ; Section 3

(e) - "Property" includes any interest in property, movable or immovable.

Forward Contracts Regulation Act 1952 ; Explanation attached to section 21 A - For the purposes of this section, property in respect of which an offence has been committed, shall include deposits in a bank where the said property is converted into such deposits.

Narcotic drugs and Psychotropic substances Act ; Section 68 B (h) - "Property" means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible, wherever located and includes deeds and instruments evidencing title to, or interest in, such property or assets;

Prevention of Money Laundering Act 2002 ; Section 2 (v) - "Property" means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located.

Explanation.—For the removal of doubts, it is hereby clarified that the term "property" includes property of any kind used in the commission of an offence under this Act or any of the scheduled offences;

- Unlawful Activities Prevention Act 1967 . Section 2(h) - "Property" means property and assets of every description whether corporeal or incorporeal, movable or immovable, tangible or intangible and legal documents, deeds and instruments in any form including but not limited to electronic or digital, evidencing title to, or interest in, such property or assets by means of bank credits, travellers' cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit, cash and bank account including fund, however acquired;

- Wild Life Protection Act 1972 ; Section 2(h) -"Property" means property and assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and deeds and instruments evidencing title to, or interest in, such property or assets, derived from the illegal hunting and trade of wild life and its products;

- Code of Civil Procedure 1908 Explanation attached to section 16 states in this section property means property situate in india.

23. Definition of Immovable Property in different Indian Legislation

General Clauses Act, 1897, Section 3(26) - Immovable Property includes "land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth".

Indian Registration Act, Section 2 (6) - Immovable Property includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass;

Bihar and Orissa General Clauses Act, 1917; Section 2 (27) - Immovable Property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;

property[24] in a variety of ways which has application of that particular definition in the context of the specific provision and nature of legislation. The definition as contained in IPC and CRPC are reproduced below.

1. Indian Penal Code 1860 - Section 22 defines "movable property" as to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.

2. Code of Criminal Procedure 1973

- Section 105-A (d) - "Property" means property and assets of every description whether corporeal or incorporeal, movable or immovable, tangible or intangible and deeds and instruments evidencing title to, or interest in, such property or assets derived or used in the commission of an offence and includes property obtained through proceeds of crime;
- Explanation attached to Section 451 - For the purposes of this section, "property" includes— (a) property of any kind or document which is produced before the Court or which is in its custody; (b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.
- Sub Section (5) of Section 452 - In this section, the term "property" includes, in the case of property regarding which an offence appears to have been committed, not

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Income Tax Act, 1961, Section 269UA(d) - Immovable Property means -i) any land or any building or part of a building, and includes, where any land or any building or part of a building is to be transferred together with any machinery, plant, furniture, fittings or other things, such machinery, plant, furniture, fittings or other things also. Explanation.- For the purposes of this sub- clause," land, building, part of a building, machinery, plant, furniture, fittings and other things" include any rights therein;

(ii) any rights in or with respect to any land or any building or a part of a building (whether or not including any machinery, plant, furniture, fittings or other things, therein) which has been constructed or which is to be constructed, accruing or arising from any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement of whatever nature), not being a transaction by way of sale, exchange or lease of such land, building or part of a building;

Transfer of Property Act, 1882 , Section 3 - Immovable Property does not include standing timber, growing crops or grass.

Real Estate (Regulation & Development) Act, 2016, Section 2(Z) - Immovable Property includes "land, buildings, rights of ways, lights or any other benefit arising out of land and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, standing crops or grass"

24. Definition of Movable Property in different Indian Legislation

- Code of Civil Procedure 1908; Section 2 (13) - Movable property includes growing crops
- General Clauses Act, 1897; Section 3 - Movable property means "property of every description, except immovable property
- Indian Registration Act; Section 2 (9) - Movable Property includes standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description, except immovable property.
- Bihar and Orissa General Clauses Act, 1917; Section 2 (35) - Movable Property shall mean property of every description except immovable property;

only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

7. Offence against Property.—The property against which the offence may be committed include both movable and immovable. With the promulgation of different Intellectual Property rights law in India like copyright Act, Patent Act, Trademarks Act, Designs Act, now the offence may well be committed against the incorporeal property as well. Besides the property against which offence is committed, there may be property which is used in commission of offence, property acquired through the proceeds of the crime. These properties may also be liable to seizure, forfeiture or confiscation as provided in different legislation. Chapter XVII of the Indian Penal Code enumerates various offences against property. Sections 378 to Section 489 E of the Code deal with various offences of different nature. Prominent amongst those are theft, robbery, dacoity, mischief, cheating, forgery, criminal misappropriation, criminal breach of trust.

8. Stolen Property.—Section 410 of the Indian Penal Code defines Stolen Property-- Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designed as "stolen property", whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without India. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

A property is stolen for the purpose of this section when its possession is transferred by theft, extortion, robbery, dacoity or criminal breach of trust or which was obtained under misappropriation committed whether in India or outside. Not only things which have been stolen, extorted or robbed but also things which have been obtained by criminal misappropriation or criminal breach of trust are within the meaning assigned to these words.

9. Property liable to attachment under 1944 Ordinance.—The Schedule attached to the Criminal Law Amendment ordinance 1944 enumerates the offence in connection with which property is liable to be attached. An offence punishable under Section 406 or Section 408 or Section 409 of the Indian Penal Code, where the property in respect of which the offence is committed is property entrusted by the Central or a State Government or a department of any such Government or a local authority or a corporation established by or owned or controlled or aided by Government or a Government company as defined in Section 617 of the Companies Act, 1956, or a society aided by such corporation, authority body or Government Company or a person acting on behalf of any such Government or department or authority or corporation or body or Government Company or society.

10. Properties that may be seized

- Any property or article which is stolen property or objectionable article
- Counterfeit coin;
- Pieces of metal made in contravention of the Metal Tokens Act, 1889 (1 of 1889), or brought into India in contravention of any notification for the time being in force under section 11 of the Customs Act, 1962 (52 of 1962);
- Counterfeit currency note; counterfeit stamps;
- Forged documents;
- False seals;
- Obscene objects referred to in section 292 of the Indian Penal Code (45 of 1860);
- Instruments or materials used for the production of such articles
- Any newspaper, or book, or any document, wherever printed, containing any matter the publication of which is punishable under section 124A or section 153A or section 153B or section 292 or section 293 or section 295A of the Indian Penal Code (45 of 1860),
- Section 104 of the Code of Criminal Procedure provides that any Court may impound any document or thing produced before it. Likewise Order XIII rule 10 of the CPC provides that the court may impound the document.

Note - The list is not exhaustive and there are numerous other laws which provide for seizure of properties of various descriptions. A list of relevant provisions regarding search, seizure, confiscation and disposal of property as provided in the Criminal Major Acts has also been enumerated in Appendix I attached with this paper. A list of such legislation has been given in Appendix II and III attached with this paper.

CHAPTER III

LEGAL PROVISIONS TO DEAL WITH PROPERTY

Disposal of property or documents during inquiry or trial continues to have been a crucial issue before the courts across India. The legal provision relating to it is well provided for in the Chapter XXXIV of the Code of Criminal Procedure 1973 which consists of Sections 451 to 459. The provisions contained in the present code correspond to Section 516 A to 525 of the code of 1898.

1. Comparison of provisions relating to disposal of property in 1973 CrPC and 1898 Cr.P.C

Section in Cr.P.C 1973	Section in Cr.P.C 1898	Head note of the provision
451	516-A	Order for custody and disposal of property pending trial in certain cases.
452	517	Order for disposal of property at conclusion of trial
453	519	Payment to innocent purchaser of money found on accused
454	520	Appeal against orders under section 452 or section 453
455	521	Destruction of libelous and other matter
456	522	Power to restore possession of immovable property
457	523	Procedure by police upon seizure of property
458	524	Procedure where no claimant appears within six months
459	525	Power to sell perishable property

2. Provisions respecting property in other Laws

In addition to the provisions described in the foregoing paragraph, the procedure for dealing with and disposal of properties have also been prescribed in Bihar Police Act, Bihar Police Manual. Besides, Railway Protection Force Manual describes about the manner in which the property involved in the offence and the property otherwise found in the Railway premises have to be dealt with.

I. Bihar Police Act 2007

i. Section 68 of the Act provides that keeping in view the public peace and tranquility the vehicles, loud speakers and microphones may be impounded by the police. The vehicle however has to be released on furnishing a bond by the owner. The court may order for surrender of impounded articles and released vehicle and make proper order as it deem fit.

ii. Section 74 - 76 of the Act provide for the procedure to be followed with respect to the unclaimed property. Section 74 provides that such unclaimed property shall be taken by the police and report will be submitted to the DM. The DM shall keep the property in his custody and issue a proclamation. If no claimant appears within six months of the proclamation, such property shall be sold by the DM. Procedure contained in S. 457 CRPC will apply in this case. These rules have to be read in conjunction with Rule 120 (b) of the Bihar Police Manual which clearly stipulates that the unclaimed property has to be dealt with under the provisions of the Police Act.

II. Bihar Police Manual

Bihar Police Manual provides meticulous arrangement for custody of the case property. For better understanding, a peep into different relevant provisions may be made.

1. Register of property in possession of the police[25]

(a) All identifiable property stolen, whether recovered or not and all articles of which the police take charge, shall be entered in a register and a receipt shall be obtained whenever any property, of which the police take charge, is made over to the owner, sold, sent to the Court or disposed of in any other way.

2. Classes of property to be entered in register[26]

(b) Suspicious property —-Suspicious property seized by Police shall be entered in the above noted form and intimation about this shall be given at once to District or Sub-Divisional Magistrate under Section 457 CrPC. When promissory note, bonds and other similar property are seized, the value noted on them shall be entered. When gold or silver or valuable ornaments are seized, its weight shall also be written.

(c) Unclaimed property —All unclaimed property (Earlier section 25 of Act V of 1861, corresponding provision of Section 74 of Bihar Police Act 2007) shall be entered as soon as received at the police-station; or, in the case of property not brought to the police-station, but left where found, as soon as "the report is authenticated by an officer. The provisions of Sections 25-27, Act V of 1861 (Corresponding to Bihar Police Act 2007 Ss. 74 to 76) shall also apply to all such unclaimed property of which any police officer may be the finder. When unclaimed property is sold, the sale shall in all cases be held by the Sub-Inspector of the police-station.

(d) Intestate property.—Intestate property taken charge of by the police and property of a prisoner dying in jail, when sent for disposal to the police shall also be entered.

Note (1) -- All property, of which possession is taken under clauses (a), (b) and (c) or the sale-proceeds thereof shall be forwarded to the Court officer. In the case of property which deteriorates rapidly, such as fruit, the police can sell it in anticipation of sanction, in order to avoid loss.

Note (2) — Officers are prohibited from keeping their private money or property in the malkhana. No property other than those narrated in the Rules shall be kept at a police-station malkhana without the orders of I.G. Police.

3. How to deal with intestate property[27]

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25. Rule 119 of Bihar Police Manual
26. Rule 120 of Bihar Police Manual
27. Rule 121 of Bihar Police Manual

(a) If a person dies possessed of movable property to which there is no claimant, or to which an obviously false claim is made, the officer-in-charge of the police-station in which the death takes place shall take possession of the property and shall submit a report to the Magistrate-in-charge of the Sub-Division concerned. The police shall not interfere unless it is clear that there is no person present, or no person can be summoned within a reasonable time, who has a claim to the property. The police officer shall not give the above property in possession to any other claimant. If a claimant has obtained possession of property dishonestly before the police heard of it, action should be taken against him under Section 404, IPC

(b) The report when received by the Magistrate shall be forwarded with a memorandum to the district Court having jurisdiction in the case, and the orders of the Court should be requested.

(c) On receipt of the Magistrate's report the District Judge shall reply in a separate communication, and the property shall be dealt with in accordance with his orders. In practice, there are only two ways in which the property is dealt with; it is either ordered to be sold on the spot and the money remitted to the Court or the property itself is ordered to be sent to the Court.

(d) When, in the case of property that rapidly deteriorates or perishes, the police assume the responsibility of selling it in anticipation of orders, or when the Court directs that the property shall be sold on the spot, an account of the sale shall be prepared in triplicate by the police. The three copies shall be sent to the Magistrate, who shall send two copies to the Judge, and the third to the district treasurer. One of the two copies forwarded to theJudge shall be returned, with his signature, to the police-station at which it was originally prepared.

(e) When the District Judge directs that the property itself is to be sent to the Court, a challan shall be prepared in triplicate by the police officer. As in sub-rule (d), one copy shall be returned by the District Judge, with his signature, to the police-station at which it was originally prepared.

(f) Horses, cattle, ponies, sheep and goats should not be sold by the police officer without the orders of the District Judge. They shall be placed in the nearest pound, and the Judge shall pass orders as soon as be receives the report, so as to prevent the possibility of the cost for keeping exceeding the value of the animal. When an animal is ordered to be sold it shall be sold, if possible, at a public market.

(g) The cost of keeping in cases covered by sub-rule (d) will be deducted from the sale-proceeds and paid to the pound-keeper, and only the net proceeds will be

remitted to the Judge. Similarly, the cost of transport of such intestate movable property as is sent up to the district Court shall be entered in the challan forwarding the property. This cost should be met at once from the amount to credit on account of property sold. In cases in which a claim to the property is afterwards allowed, the successful claimant will generally be required to satisfy the charge for transport, or for the keep of live animals, before receiving the property or its proceeds.

(h) Expenses of municipality in disposing of corpses. —When an, officer-in- charge of a police- station has taken charge of the effects of a person dying intestate, the bona fide expenses incurred by a municipality on account of the cost of the burial or cremation of the corpse within municipal limits shall be included and the officers of the municipality shall be instructed that the amount may be recovered at once from the estate of the deceased on the presentation of a duly receipted bill for the amount to the judge.

(i) Bills for the burial of paupers should be countersigned by the police- station officer and stamped with the police-station seal.

4. Pounds[28]

(a) Officers-in-charge of police-stations shall sell all unclaimed impounded cattle brought to them for sale. A challan shall accompany such cattle. Officers-in-charge shall maintain, in connection with such sales, (1) a receipt- book for purchase-money of cattle sold, (2) a register of sales; and (3) An account of cattle sold.

Note.— The duties and responsibilities of the police in connection with that Cattle Trespass Act are laid down in Sections 10, 11, 14, and 19 of the Act.

(b) Officers-in-charge shall send notices of all reported stray cattle to the pound-keepers of their circle and shall also put up notices of such cattle on the notice-board of the station.

(c) Officer-in-charge shall frequently visit and inspect cattle pounds in. his jurisdiction, to see that food and water are properly supplied to impounded cattle, and that a proper stock of food is kept.

(d) SI of police-stations shall keep a list of cattle reported strayed and inspecting officers shall examine it and see that those connected with theft are investigated.

5. Money to be sent to Court officer[29]

Cash stolen and recovered cash, and found on under trial prisoners, sale- proceeds of

28. Rule 123 of Bihar Police Manual

29. Rule 124(g) of Bihar Police Manual

unclaimed, attached or suspicious property and any other moneys shall be forwarded to the Court officer.

6. Loss of property[30]

(a) In cases involving loss of property, the complainant shall be required to put in a list of the property stolen, signed by himself, which shall be sent to the Court with the First Information Report. The Investigating Officer shall keep a copy of the list to aid him in his enquiry. lf the complainant is unable to furnish a list of the property when he gives the first information, the Investigating Officer shall obtain such list as soon after his arrival at the spot as possible and forward it duly signed by the complainant to the Court. Police Officers should not prepare such lists themselves (Section 162. CRPC).

(b) The lists should contain the fullest description possible of each article alleged to have been stolen.

7. Theft of currency notes[31]

(a) When information is, given, either at the time of the loss or afterwards, that a note has been stolen or dishonestly received, or when reasonable grounds for suspicion that such an offence has been committed are adduced, the police shall enquire into the matter. In other cases, viz., where a lost note is presented for payment by some person other than the loser, it may be safely said that, at least, the offence of criminal misappropriation (Section 403 IPC) has been committed in respect of the note by someone. But the police have no jurisdiction to investigate *suo-motu* into the offence of criminal misappropriation, and accordingly they should merely report the facts to the Magistrate and take no further action, unless he, orders an investigation. It is left to the Magistrate to exercise due discretion in ordering such investigation.

(b) Superintendent requiring canceled Government Currency notes, which form the subject of cases, shall apply for them direct to the Controller, Paper Currency, Patna. Whenever a forged note is received at a police-station and case is registered or is not registered, in both the instances, the station-in- charge shall give a statement in the form given below by 7th of every month to Superintendent of Police. In that form, either the case number or reasons for not registering it shall be given. The Superintendent of Police after collecting the reports of all P. S., send a report to Criminal Investigation Department in that very form by 15th of every month.

8. Promiscuous seizure of property forbidden[32]

Only such property shall be seized as is either alleged or suspected to have been stolen, or

30. Rule145 of Bihar Police Manual

31. Rule 146 of Bihar Police Manual

32. Rule 165(c) of Bihar Police Manual

found under circumstances which create suspicion of the commission of an offence (see Section 102 CRPC). The whole of a man's property shall not be seized because he is suspected of having stolen some particular article or articles.

9. List of Property[33]

A list of property seized or a blank statement if nothing is seized shall be prepared, as directed in Section l00 (4) to (8) CRPC and shall be forwarded by the first available messenger or post after the search to the Court Sub-Inspector for transmission to the office of Sub-Divisional Judicial Magistrate.

10. Method of search[34]

Investigating Officer shall conduct searches in such a manner as to leave no room for suspicion that articles have been surreptitiously introduced by them or their subordinates or informers. The searching party should before entering the premises, tender themselves for personal search by the witnesses required under Section 100 CRPC

11. Copy of list to the owner[35]

The Investigating Officer or the officer conducting a search shall prepare a list of articles seized and give a copy of the list to the owner of the house. An identification slip shall be pasted on each article seized which shall be signed by the Investigating Officer and the witnesses. These articles shall be kept safely in malkhana and no sign or mark shall be given on these articles

12. Receipt of document[36]

When any document etc. is taken charge of by any Police Officer from any person in connection with any enquiry receipt should be given to that person by the Police Officer.

13. Identification of property[37]

(a) Where any property recovered in a search or otherwise and alleged or suspected to have been stolen is of a common place nature, in regard to the identification of which reasonable doubt could arise, test identification shall be held. Every precaution shall be taken to prevent the witness or witnesses seeing it before the test identification are held.

(b) In dacoity and other important cases; the test should whenever possible be carried out in the presence of a Magistrate in ordinary cases or when no Magistrate is available, it should be carried out in the presence of two or more respectable persons

33. Rule 165(d) of Bihar Police Manual

34. Rule 165(e) of Bihar Police Manual

35. Rule165(f) of Bihar Police Manual

36. Rule165(g) of Bihar Police Manual

37. Rule166 of Bihar Police Manual

unconnected with the case, who shall be asked to satisfy themselves that the conditions of the tests have precluded the possibility of collusion.

(c) An officer, at least of the rank of inspector shall, whenever possible, attend every test identification in important cases to see that it is properly conducted. The investigating Officer though his presence may be necessary outside, shall not be present while the test is in progress unless it is found impossible to secure the presence of an inspector or a Magistrate

(d) The articles of suspicious property to be identified shall be mixed up with other articles of a similar kind and the witness shall be invited to select those which he is able to identify and having done so to state by what marks or other means he is able to identify them. Each identification shall be made out of sight and hearing of other identifying witnesses.

(e) Identification parade of property. —This shall be conducted according to procedure prescribed. The identification chart of property shall be similar to the identification chart of persons.

14. Search of person arrested[38]

When persons are searched under Section 51(1) CRPC and the police take charge of articles, a receipt shall be granted to the prisoner and his signature obtained in token of its receipt. A list of such articles shall be attached to the charge-sheet form. The prosecutor shall see that prisoners hold such receipts.

15. Malkhana

- Keys of the malkhana and lock-up[39]

Malkhana doors and chests shall be provided with secure locks, the keys of which shall be kept by the officer-in-charge. The key of the lock up shall remain with the sentry on duty.

- Malkhana register[40]

(a) A register shall be kept in police Court office.

(b) In this shall be entered stolen property sent up for identification, property found on under trial prisoners: property such as weapons, other than arms and ammunition forwarded as exhibits in criminal trials; unclaimed property taken possession of by the police under Section 25 (Act V of 1861 corresponding to section 74 of Bihar Police Act 2007), and suspicious property sent in under Section 457

38. Rule 234 of Bihar Police Manual

39. Rule 78 of Bihar Police Manual

40. Rule 307 of Bihar Police Manual

CRPC, Arms and ammunition shall be entered in the arms register prescribed. When these are exhibits of a case, a reference to the entries in the arms register shall be made in the Malkhana register.

(c) When cash or property is sent to the Court office, the police-station officer shall fill the prescribed form in duplicate and send it as a chalan to enable the Court officer to write up the Malkhana register.

(d) Court officer to keep keys of Malkhana. —For the safe custody of such property, a secure room, to be called the Malkhana, shall be provided. Its keys shall be kept by the Court Malkhana in charge who is answerable that no one takes away or tampers with the property or exhibits. A strong box with a good lock for ornaments, money or documents shall be kept in the room. Every article shall be neatly labeled to tally with the number in the register. In order to avoid incidence of burglaries and embezzlement there should be no hole for entrance of any type of light and where such an entrance is found, this shall be closed. An iron safe shall be embedded on the verandah by the side of the main door so that it is in full view of the sentry posted there. The double lock system shall be introduced in the Malkhana room whose keys shall be kept both by the Court officer and the- Assistant Sub- Inspector who carries on the work concerning the Malkhana register. The In charge of the guard shall examine the lock in presence of the Court officer and note the fact in the guard duty register and the Court officer shall countersign it. The police officer deputed to the guard on rounds at night shall check the locks and note his remarks in the guard duty registers. The arms and ammunition as soon as they are exhibited in Court should be sent to the Magazine at police center for safety with the permission of the Court. The Superintendent shall keep proper vigilance on properties to be produced in sessions Courts as exhibits and shall also depute the employees of the available Court staff for this. At the same time he shall arrange for vigilance with the help of peons, orderlies, etc after requesting the Court. Every inspecting officer shall make complete check of above orders during his inspection.

(e) Custody of fire-arms and ammunition. —All items of fire-arms and ammunition received in Court Malkhana shall be sent to Malkhana located in Headquarters of Superintendent of Police for safe custody, except those which are required every day for production in the Court.

(f) In cases where the property sent up is given back to the owners, the order for return shall be entered. The judicial officer ordering the disposal of the property shall initial has order. The receipt of the person receiving the property shall be taken in the register.

(g) Valuables to be kept in treasury. —When property is no longer required by the Courts, such portion of it as consists of cash, bullion, gold and silver ornaments, or other valuable articles of small compass, shall be deposited in the treasury, articles other than cash being kept in a separate small box in charge of the treasurer.

(h) Perishable property.—Orders shall be taken to convert perishable unclaimed property into cash at the earliest date the law allows.

(i) Prisoner property. —Court officers shall see that station officers comply the rule and bring to notice all cases of failure to forward lists of property found on prisoners and to grant those receipts.

(j) An accused person shall be allowed to take only strictly necessary clothing into the lock-up.

(k) On 1st January each year the numbers of all outstanding items shall be entered in red ink at the commencement of the entries for the current year. All orders concerning them shall continue to be made against the original entry and only the date of final disposal shall be noted against the red ink entries.

(l) With a view to help in protection of antiques, these should be kept safely and properly in the State Museum at Patna pending investigation or trial or afterwards if they are found unclaimed or recovered during investigation of any case. If any stolen idol or religious scripture is recovered and is produced as an exhibit in a case, due care should be taken that religious sentiments are not hurt in handling it. For State Police Criminal Museum and Crime exhibitions, instruments or other articles connected with cases sent up for trial as may be considered useful as exhibits of educational value, should be sent thereafter obtaining orders from Court,

(m) The Malkhana items should be physically verified annually and a certificate to this effect should be given in the Malkhana register accordingly. Inspecting Prosecutors like D. P. and Sr. D. P. should also make thorough verification of Malkhana items at the time of inspection of the Court Office.

(n) Exhibits concerning absconder: —Orders for disposal of such long pending exhibits (say 15 years or more) should be obtained from the Court concerned and in the unlikely circumstances of their being required later on the order of disposal can be produced as a proof of existence of the exhibit.

Note—When it becomes necessary to keep articles in Court Malkhana which are not connected with police cases, its entries shall be made in a separate Malkhana register and preferably these shall be kept in a separate apartment in Malkhana or according to availability in a separate room.

16. Arrest or recovery of property by district police in railway cases[41]

The district police shall give immediate information to the railway police of property found or offenders arrested by them in cases committed within the jurisdiction of the railway police and hand over such property and offenders to the railway police. Similarly, the railway police shall give immediate information of arrests in district cases and hand over property and offenders to the district police. In any serious case the Superintendent of district police shall take up the investigation himself, or direct one of the assistants to do so, until the arrival of the Superintendent, Railway Police, when the case shall be made over to him.

III. The Railway Protection Force Manual

It describes the manner in which various property recovered by the RPF has to be dealt with

Chapter 1

Rule 5.21. If stolen railway property is recovered from a vehicle, then the vehicle would also be seized.

Rule 5.32. The accused can claim release of his personal belongings at RPF post after obtaining bail by putting the court order which must be returned. The unclaimed belongings have to be disposed in accordance with court order.

Rule 32.1(ii) If an article from inside the package of booked consignment has been recovered, then, on application of the party, the court will order for its open delivery to the party claiming.

Rule 32.4 If the recovered property is a perishable item, like grapes, pomegranate, apple, mango, vegetables, fish, etc, then it will be auctioned, after having obtained permission from the concerned Railway Court by giving an application in writing for its quick disposal.

Rule 37 Malkhana and disposal of the seized case property kept in the Malkhana

Rule 37. 1 Malkhana- A room or hall provided at each RPF Post in which the property recovered during the legal proceedings by RPF under Railway Property (Unlawful Possession) Act, Railways Act or any other act in which RPF is authorized for taking action, is stored.

Rule 37.10 After the limitation of appeal period, on getting orders of the court for disposal of the property, the case property will be handed over to the concerned department.

Rule 37.12 If the case property is perishable it must be auctioned.

Rule 37.13 If the case property is of the nature that it is necessary to dispose of, then, pursuant to Section 457(1) of the Code of Criminal Procedure, on getting order from the court regarding disposal of property, the same shall be handed over to the owner after keeping a sample thereof.

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41. Rule 496 of Bihar Police Manual

Rule 37.15 – If no order of disposal is obtained from court, the property has to be kept secure.

Rule 37.25 and 37.26 If any case property kept in the Malkhana is rotting or getting destroyed, on getting the order of court for disposal, the same should be disposed of.

Chapter 2

Rule 15 deals with the procedure of unclaimed articles in Railway premises. It provides for deposit of unclaimed cash, jewelries, and valuables in district nazarat in case nobody turns up for claiming the same even after pronouncement on public announcement system. The return to the claimants should be made on proper verification on *supurdginama.*

Chapter 3

Rule 2.11 provides that if after enquiry, no offence is proved, then for disposal of the recovered property an application be moved before the court through proper channel.

Chapter 7

Rule 4.7 provides that the recovered property of the drugged victim passenger be handed over to GRP.

Chapter 11

Rule 1.2 Foreign goods, prohibited goods and animals must be seized.

Rule 1.4 In case of recovery of smuggled goods from train, if the article relates to customs department, it should be handed over to that department.

Rule 1. 5 The animal recovered, such as the two-headed snake, turtle, peacock, deer, animal‘s skin, teeth, animal‘s horn, bird and sandalwood, will be handed over to the forest department.

Rule 1. 6 If foreign currencies and gold are recovered, then it will be handed over to the Customs department.

Rule 2. 8 If any intoxicating substances are found in the recovered goods, then it will be handed over to the Narcotic Control Bureau (NCB) after preparation of seizure note.

IV. Criminal Court Rules of Hon’ble High Court of Judicature at Patna :

Criminal Court Rule 101 provides that :

(a) Criminal Courts in making orders under Sections 452, 457 or 458 of the Criminal Procedure Code for the disposal of counterfeit coin, should consider whether the coin should not be forwarded to the nearest Treasury or Sub- Treasury Officer with directions to him to deal with it in a manner similar to that prescribed by rule 1 of the Rules issued by the Government of India, in the Department of Finance and Commerce.

(b) The above instructions should be held to apply also to any implements such as dies, moulds, etc., used in coining. When in any case, such coins or implements are forwarded to a Treasury Officer, a copy of the judgment delivered in the case with which they are connected, should at the same time be forwarded to that officer.

V. Civil Court Rules of Hon'ble High Court of Judicature at Patna

Rules 121-122 deals with procedure of attachment and upkeep of the property attached. Rules 123 to 137 deal with the procedure of sale.

Rule 121 provides for the requirement of payment of fees for attachment.

Rule 122 - A register should be maintained by the Nazir in the prescribed Form showing the securities, jewelery and other valuable articles in his custody. A separate register should also be maintained in prescribed form, for ordinary movables and live-stock attached in execution cases.

Rule 123 – Procedural requirement and furnishing of particulars for an application for order for sale

Rule 124 – In case of sale of immovable property, particulars of its area

Rule 125 – Procedure for sale and proclamation

Rule 126 – Selection of Newspaper for proclamation

Rule 127 – Day fixing for sale

Rule 128 – List of property to be sold and notice thereof

Rule 129 – Timing for sale

Rule 130 – Different days for sale of movable and immovable property

Rule 131 – Nazir to conduct sale in presence of presiding officer

Rule 132 - Prospect of good prices and saving of expenses in conveyance and carriage for sale of live stock, agricultural produce, articles of local manufacture, and of other things commonly sold at country markets

Rule 133- Procedure for sale of guns

Rule 134 – Procedure for sale of house or building in cantonment area

Rule 135 – Procedure regarding sale certificate and its disposal

Rule 136 – Particulars of sale certificate

Rule 137 – If there are sales under Sections 164 and 165 of the Bihar Tenancy Act, 1885, the certificate of sale should state that the tenure or holding, and not the right, title and interest of the judgment debtor therein, has been sold.

VI. Bihar Prevention of Beggary Act 1981

This Act provides for maintenance, disposal, return and destruction of the property found on search on a beggar

Section 8 - Articles and money found on search and inspection to be entered in register

Section 9 - Disposal of articles by destruction, sale, burning, or storing after disinfection

Section 10 - Staff not to purchase articles auctioned

Section 11 - Disposal of articles after passing of Court's order

VII. Bihar Juvenile Justice (Care and Protection of Children) Rules 2017

These rules provides for disposal of property found in Institutions during search.

Rule 68 - Person in charge or authorized functionary may search the institution and seize the prohibited articles. If the seized articles are not required in any inquiry or departmental action against any officer or in any criminal investigation and proceedings, the competent court may order that all such articles may be destroyed or disposed of according to the nature of the articles[42].

Rule 70 enlists certain things as Prohibited Articles.

Rule 72 provides the manner in which the seized articles may be disposed.

The money or valuables belonging to a child shall be disposed of in the following manner, namely:

On receipt of a child in an institution, the Person-in-charge shall deposit the money belonging to the child in the bank account of the child;

The valuables, and other articles, if any, shall be kept in safe custody;

When such child is transferred from one institution to another, all his money, valuables and other articles, shall be transferred along with the child to the Person-in-charge of the institution to which he has been transferred together with a full and correct statement of the description thereof;

At the time of release of such child, all valuables and other articles kept in safe custody and the money deposited in the name of the child shall be handed over to the parent or guardian, as the case may be, with an entry made in this behalf in the register and signed by the parent or the guardian;

When a child in an institution dies, the valuables and other articles left by the deceased and the money deposited in the name of the child shall be handed over by the Person-in-charge to the parent or guardian of the child;

A receipt shall be obtained from such person for having received such money, valuables and other articles; and

42. Rule 68(3) of the Bihar J J Rules 2017

If no claimant appears within a period of six months from the date of death or escape of a child, the valuables and other articles and money deposited in the name of the child shall be disposed of as per the decision taken by Management Committee under rule 39 of these rules.

CHAPTER IV

RESTITUTION IN INDIAN LAW

Any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. This necessitated the evolution of the concept of restitution.

1. International Covenant governing restitution.—The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides that-

- The offenders or responsible third parties in appropriate cases should make available fair restitution to the victims, their families or dependents. This restitution should be inclusive of the return of property or an equivalent payment for the harm or loss suffered, reimbursement of expenses incurred due to the victimization, provision for services and restoration of rights[43].
- These practices should be reviewed by the government, in order to consider restitution as an option of sentencing in criminal matters, along with other criminal punishments[44].
- If the public officials or other agents acting in an official or quasi-official capacity violate national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims[45].
- Abuse of power should be forbidden by incorporating such norms into the national law and provision for remedy to victim of abuse be made which should be inclusive of restitution and/or compensation, and necessary material, medical, psychological and social assistance and support[46]

43. Article 8: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Adopted by General Assembly resolution 40/34 of 29 November 1985 available at https://www.un.org/ruleoflaw/blog/document/declaration-of-basic-principles-of-justice-for-victims-of-crime-and-abuse-of-power/

44. Article 9, ibid

45. Article 11, ibid

46. Article19, ibid

2. Restitution in Indian Law.—Concept of restitution is an integral part of Civil law where section 144 of the CPC[47] provides the procedure for restitution. Preservation of case property during the pendency of the civil or criminal case is necessary for the purpose that the court may pass appropriate order with respect to delivery of the property to the entitled person at the conclusion of the case proceedings. Provisions like temporary injunction, attachment have been found in abundance in civil law. Order XXXIX rule 7 CPC specially provides that the court may order for detention, preservation, inspection of subject-matter of suit[48]. Destruction, wasting away of the property will ultimately make the outcome of the case meaningless as nothing could be available in the hands of the court with respect to which an order may be passed. The successful party may eventually feel defeated due to being deprived of the fruits of a decree.

This philosophy is not alien to the criminal law as well. The CRPC contains several provisions, which seek to reimburse or compensate victims of crime, or bring about restoration of property or its restitution. One of the important provisions is monetary compensation to victims of crime or any bona fide purchaser of property under section 357 (1) CRPC When a Court imposes a sentence of fine, it may order that the fine recovered to be applied, in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is recoverable by such person in a Civil Court, or in compensating the bona fide purchaser of the property for the loss of the same if the property is restored to the possession of the person entitled to. If the property has been the subject of theft, criminal misappropriation, criminal breach of trust, cheating or, of having dishonestly received or retained or, of having voluntarily assisted in disposing of stolen property knowing or having reason to believe the same to be stolen.

The object and scheme of the various provisions of the Code appear to be that where the property which has been the subject-matter of an offence is seized by the police it ought not to be retained in the custody of the Court or of the police for any time longer than what is absolutely necessary. As the seizure of the property by the police amounts to a clear entrustment of the property to a Government servant, the idea is that the property should be restored to the original

47. S. 144. CPC - *Application for restitution*— (1) Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceedings or is set aside or modified in any suit instituted for the purpose the Court which passed the decree or order shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified, and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order.

Explanation.—For the purposes of sub-section (1) the expression "Court which passed the decree or order" shall be deemed to include,— (a) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the Court of first instance; (b) where the decree or order has been set aside by a separate suit, the Court of first instance which passed such decree or order; (c) where the Court of first instance has ceased to exist or has ceased to have jurisdiction to execute, it, the Court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1)

48. Order XXXIX Rule 7 CPC

owner after the necessity to retain it ceases. It is manifest that there may be two stages when the property may be returned to the owner. In the first place it may be returned during any inquiry or trial. This may particularly be necessary where the property concerned is subject to speedy or natural decay. There may be other compelling reasons also which may justify the disposal of the property to the owner or otherwise in the interest of justice. The other stage is when the proceedings come to a finality and now the court has to decide who is the person entitled to the possession of the property. Entitlement to a property depends upon the peculiar facts and circumstances of each case and no inflexible rule in this regard could be hypothesized. As Section 452 CRPC provides for ordering the return of the property to the person entitled to possession thereto, inter alia other modes of disposition. Section 452 contributes towards the object of just and fair disposal of property by empowering the criminal court to pass order in respect of property by empowering the criminal court to pass order in respect of property produced before it or in its custody or related with the offence in question. Even right to interim custody of property by a person entitled is recognized under Sections 451 and 457 CR.P.C An innocent purchaser for value is sought to be reimbursed by Section 453 CRPC Restoration of immovable property under certain circumstances, is dealt with in Section 456 CR.P.C

Hon'ble Madras High Court in **Bharat Overseas Bank v. Minu Publication**[49] made reference to Sections 451, 452, 453, 456 and 457 of the Code to observe that these provisions seek to reimburse or compensate victims of crime and bring about restoration of the property or its restitution. The provision empowering seizure was necessary to preserve the property for the purpose of enabling the Criminal Court to pass suitable orders under the aforesaid provisions at the conclusion of the trial. These provisions not only regulate the seizure and retention of property but also accord to the owner of the seized property a consequential statutory remedy against undue retention and deprivation of the property.

Chapter XXXIV of the Code thus gains significance owing to the fact that it does contain the restorative provisions in tune with the accepted judicial norms the world over.

CHAPTER V

INTERIM CUSTODY OF PROPERTY

Ordinarily, disposal of property can be done through sale, transfer or relinquishment. But under criminal law, the property in question is not an ordinary property or article rather it is a property against which an offense has been committed or which has been used for the commission of an offense and the procedure followed for the disposal is also different.

Decisions to dispose of or divest a property or an asset require thorough examination and economic appraisal.

49. 1988 MLW (Cri) 106

A. Provisions under Section 451 of the Code of Criminal Procedure 1973

"S. 451 - Order for custody and disposal of property pending trial in certain cases -

When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Explanation. —For the purposes of this section, "property" includes — (a) property of any kind or document which is produced before the Court or which is in its custody; (b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence."

{Section 451 of CRPC 1973 corresponds to Section 516-A of 1898 CrPC}

- On plain reading of section 451 CRPC it is clear that the word Property has an inclusive connotation under this section. It includes any Property or document, either produced before the court or in its custody, regarding which an offence is committed or which is used for the commission of an offence. Thus the chapter specifically deals with disposal of the following four categories of property or document :-
  (1) Against which an offence has been committed;
  (2) Which has been used for committing an offence;
  (3) Which has been produced before the court;
  (4) Which is in the custody of the court
- When a criminal court exercises its jurisdiction under this section, following aspects become germane for consideration:
  (I) Any property must have been produced before the court during inquiry or trial
  (II) The court must have been called upon to make such order as it thinks fit for the proper custody of such property pending conclusion of the inquiry or trial.
  (III) Nature of property should be such that it is subject to speedy and natural decay or the court considers it otherwise expedient to order proper custody, pending conclusion of the inquiry or trial
  (IV) The court should consider about the necessity of recording such evidence as it thinks fit depending on the facts in each case.
  (V) Property can be disposed of either by sale or otherwise.

- The court can issue interim order for the proper custody and disposal of property or documents which fall within any one of the above categories. All documents or articles produced before any court for the purpose of evidence marked as documentary exhibits or material objects come under the term property. In case of perishable property, the court may order for sale or other disposition. The court may also order for sale of any property if it is expedient so to do in the circumstances of the case. Before passing any of the order, the court may record the evidence, if it appears necessary in the circumstances of the case.
- The court, however, has no jurisdiction to direct disposal of any property without producing it before the court in either physical or symbolic form. The symbolic production is done by filing records or reports about such seizure. If the seizure of a property is reported to the court, the Magistrate gets the jurisdiction to dispose of it as law prescribes. If anybody contends before the court that a particular property is involved in a case the Magistrate has the obligation to hear him. The court must determine whether such material would be given to a party or not, for the safe interim custody during the inquiry or trial based on the facts and circumstances of each case.
- A temporary custodian of the property in fact acts as a representative of the court. Temporary custody is opted for when it becomes physically quite impossible to produce it before the court. The trial court must decide the issue of custody in each case based on its facts and circumstances. The nature of property and the law relating to its use are important considerations while making an order in regard to the interim custody of the property in question. The property produced before an executive authority like District Collector under any special laws cannot be dealt with by the court under this chapter.
- On a plain reading of Section 451 CRPC, it can be seen that the power to order for custody and disposal of property pending trial has to be exercised by thecourt by applying judicial discretion and the arrangement once made thereunder is not even final till the conclusion of inquiry or trial. The court is having a right to terminate the entrustment, get back the property from the person to whom it was given and entrust it to somebody else whom the court deems fit. In cases of rival claims for interim custody, preference of one person over the other does not settle any right to ownership or possession.

B. Criminal Court Rules

Criminal Court Rules of Hon'ble High Court of Judicature at Patna also provides for disposing the articles admitted in evidence. Rule 71 provides that such of the material exhibits as are not sent up with the record to the Hon'ble High Court should not be returned or destroyed until the period for filing an appeal has expired, or, if an appeal is filed, until the appeal has been decided. Rule 131 provides that the article admitted in evidence, shall not be returned, or

destroyed until the period for appeal has expired, or until the appeal has been disposed of, if an appeal be preferred against the conviction and sentence. Rule 132 provides that whenever an article, which has been admitted in evidence, is returned, or destroyed, a note of the fact shall be made in the column for remarks

C. Similar Provision in Army Act

Provision similar to that of S. 451 CRPC, is also found in Section 150 of the Army Act which provides for order for custody and disposal of property pending trial by a Court Martial. It says that when any property regarding which any offence appears to have been committed, or which appears to have been used for the commission of any offence, is produced before a court-martial during a trial, the court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the trial, and if the property is subject to speedy or natural decay may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Decisions of Hon'ble Court concerning interim custody of property

1) Exercise powers u/s 451 CRPC expeditiously

In the case of **Smt. Basavva Kom Dyamangouda vs State Of Mysore And Anr**[50] Hon'ble Apex court has observed that the object of the Code seems to be that any property which is in the control of the court either directly or indirectly should be disposed of by the court and a just and proper order should be passed by the court regarding its disposal. In a criminal case, the police always act under the direct control of the court and have to take orders from it at every stage of an inquiry or trial. Therefore, the court exercises an overall control on the actions of the police officers in every stage where it has taken cognizance. The property ought not to be retained in the custody of the Court or of the police for any time longer than what is absolutely necessary. As the seizure of the property by the police amounts to a clear entrustment of the property to a Government servant, the idea is that the property should be restored to the original owner after the necessity to retain it ceases. It has been directed to exercise power under section 451 CRPC at the earliest to avoid acrimonious situation.

2) Property lost – Payment of value

It is also observed in Smt. Basawa Kom Dyanmangouda Patil case that where the property is stolen, lost or destroyed and there is no prima facie defence made out that the State or its officers had taken due care and caution to protect the property, the Magistrate may, in an appropriate case, where the ends of justice so require, order payment of the value of the property.

3) The Landmark Judgment concerning interim custody of property

50. AIR 1977 SC 1749, [1977] 4 SCC3 58

51. Ibid at 51

Hon'ble Apex Court Judgment in the case of **Sunderbhai Ambalal Desai** and **C.M. Mudaliar Vs. State of Gujarat**[52] passed on 1 October, 2002 has been proved to be a landmark judgment in the legal history of India so far as disposal of case property during pendency of the case is concerned. Hon'ble Court have been pleased to hold that Section 451 clearly empowers the Court to pass appropriate orders with regard to such property, such as (1) For the proper custody pending conclusion of the inquiry or trial;

(2) To order it to be sold or otherwise disposed of, after recording such evidence as it thinks necessary;

(3) If the property is subject to speedy and natural decay to dispose of the same.

It has also been observed that the powers under Section 451 should be exercised expeditiously and judiciously. It would serve various purposes, namely: -

- Owner of the article would not suffer because of its remaining unused or by its misappropriation;
- Court or the police would not be required to keep the article in safe custody;
- If the proper panchnama before handing over possession of article is prepared, that can be used in evidence instead of its production before the Court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail; and
- This jurisdiction of the Court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articlesThe Hon'ble Court also pleased to give clear guidelines in the matter of custody and release of valuable articles, currency notes, vehicles, liquor, and Narcotic drugs during pendency of the case.

1. Valuable Articles and Currency Notes

With regard to valuable articles, such as golden or sliver ornaments or articles studded with precious stones, it is observed that it is of no use to keep such articles in police custody for years till the trial is over. In such cases, Magistrate should pass appropriate orders as contemplated under Section 451 CRPC at the earliest. For this purpose, if material on record indicates that such articles belong to the complainant at whose house theft, robbery or dacoity has taken place, then seized articles be handed over to the complainant after: -

(1) Preparing detailed proper panchanama of such articles:

(2) Taking photographs of such articles and a bond that such articles would be produced if required at the time of trial; and

(3) After taking proper security.

52. AIR 2003 SC 638; 2003 (4) PLJR (SC) 244, (2002) 10 SCC 283

For this purpose, the Court may follow the procedure of recording such evidence, as it thinks necessary, as provided under Section 451 CR.P.C The bond and security should be taken so as to prevent the evidence being lost, altered or destroyed. The Court should see that photographs or such articles are attested or countersigned by the complainant, accused as well as by the person to whom the custody is handed over. Still however, it would be the function of the Court under Section 451 CRPC to impose any other appropriate condition.

In case, where such articles are not handed over either to the complainant or to the person from whom such articles are seized or to its claimant, then the Court may direct that such articles be kept in bank lockers.

Similarly, if articles are required to kept in police custody, it would be open to the SHO after preparing proper panchnama to keep such articles in a bank locker.

In any case, such articles should be produced before the Magistrate within a week of their seizure. If required, the Court may direct that such articles be handed over back to the Investigating Officer for further investigation and identification; however, in no set of circumstances, the Investigating Officer should keep such articles in custody for a longer period for the purpose of investigation and identification.

For currency notes, similar procedure can be followed.

2. Vehicles

Hon'ble Apex Court pleased to observe that it is of no use to keep such seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of applications for return of such vehicles. In case where the vehicle is not claimed by the accused, owner, or the insurance company or by third person, then such vehicle may be ordered to be auctioned by the Court. If the said vehicle is insured with the insurance company then insurance company be informed by the Court to take possession of the vehicle which is not claimed by the owner or a third person. If Insurance company fails to take possession, the vehicles may be sold as per the direction of the Court. The Court would pass such order within a period of six months from the date of production of the said vehicle before the Court. In any case, before handing over possession of such vehicles, appropriate photographs of the said vehicle should be taken and detailed panchnama should be prepared.

3. Seized liquor

Prompt action should be taken in disposing it of after preparing necessary panchnama. If sample is required to be taken, sample may be kept properly after sending it to the chemical analyser, if required. But in no case, large quantity of liquor should be stored at the police station. No purpose is served by such storing.

4. Narcotic drugs

For its identification, procedure under Section 451 CrPC should be followed of recording evidence and disposal. Its identity could be on the basis of evidence recorded by the Magistrate. Samples also should be sent immediately to the Chemical Analyser so that subsequently, a contention may not be raised that the article which was seized was not the same.

Procedure to be adopted when Accused refused to sign on panchnama :

Hon'ble Apex Court visualized a situation where the accused may refuse to sign/endorse. When the accused disputed that he was not involved in the offence or he was disputing the property or he had certain contentions as regards the property, the same should be endorsed in the photograph and his signature should be obtained though with his objection. In this way the interest of the prosecution, the property owner and the right of the accused would be protected

5. Hon'ble Apex Court direction with respect to seized vehicles

Further Directions with respect to seized vehicles in conformity with Sunder bhai case was given by Hon'ble Apex Court in **General Insurance Council and ors. Vs. State of Andhra Pradesh and ors**[53]

1. Insurer may be permitted to move a separate application for release of the recovered vehicle as soon as it is informed of such recovery before the Jurisdictional Court. Ordinarily, release shall be made within a period of 30 days from the date of the application. The necessary photographs may be taken duly authenticated and certified, and a detailed panchnama may be prepared before such release.

2. The photographs so taken may be used as secondary evidence during trial. Hence, physical production of the vehicle may be dispensed with.

3. Insurer would submit an undertaking/guarantee to remit the proceeds from the sale/ auction of the vehicle conducted by the Insurance Company in the event that the Magistrate finally adjudicates that the rightful ownership of the vehicle does not vest with the insurer. The undertaking/ guarantee would be furnished at the time of release of the vehicle, pursuant to the application for release of the recovered vehicle. Insistence on personal bonds may be dispensed with looking to the corporate structure of the insurer.

Hon'ble Apex Court also observed that the seized vehicles kept in open in various police stations not only occupy substantial space but also prone to natural decay due to weather conditions. It gradually loses its road worthiness lying stationary. Besides expensive spares are either stolen or cannibalized making them unfit for being plied on road. Hon'ble Apex court directed the authorities to ensure macro implementation of the statutory provisions and supervision over each police stations on these matter.

53. (2010) 6 SCC 768

Hon'ble Delhi High Court emphasizes observance of guidelines :

Hon'ble Delhi High Court in the case of **Manjit Singh vs State, 214 (2014) DLT 646**[54] emphasized upon the suggestions of the committee for disposal of properties circulated amongst the courts across Delhi. The Hon'ble Court underlined the importance of observance of the suggestions which are as follows:

1. Liquor Bottles/Pouches :

Upon production of any such article by the police before the court either during the course of inquiry or trail the court should direct the immediate disposal of all such bottles/pouches after retaining a sample thereof for the purposes of trial. Even photographs of the entire lot of the seized liquor bottles/pouches can be taken so as to show as to in what condition they were seized. A detailed inventory of the articles should also be prepared mentioning therein the condition of the bottles/pouches in which they were seized. If deemed necessary the court can also issue a notice to the accused before passing of any such order. Subsequently, during the course of trial such representative sample bottle/pouch along with the photographs of the case property articles and the inventory so prepared can be held to be sufficient in place of production of entire lot of case property articles. After retaining the sample bottle and taking of photographs besides the preparation of inventory as above the case property should be ordered to be disposed of.

2. Jewelry Articles :

As regards the Jewelry articles and such other valuable articles the photographs of the same should be taken before their release to the sapurdar. An inventory of the Articles should also be prepared wherever necessary the court may also get the said jewelry articles valued from a Government approved valuer. Thus, during the course of trial the actual production of the jewelry articles should not be insisted upon and the photographs along with inventory so prepared should suffice for the purposes of evidence.

3. Currency Notes :

In respect of the currency notes recovered, if in the opinion of the court, any person is lawfully entitled to claim them then they should be released to such person. In the other eventuality money can be ordered to be deposited in a nationalized bank. However, before releasing it to a private person or getting it deposited with a nationalized bank the Photostat of all such currency notes can be obtained with their numbers noted down or their denomination may simply be noted down. The bank as well as the private person, who is entrusted with the currency notes, should be allowed to use those currency notes and the production of those very currency notes should not be insisted upon during the course of trial. The directions in this regard may vary from case to case as per the discretion of the court. The courts may also ask the sapurdar for furnishing of an indemnity bond.

4. Vehicles Involved in Accident/Theft Cases :

54. Decided on 10/09/2014in connection with Crl.M.C. 4485/2013 and Crl.M.A. No.16055/2013

Vehicles involved in road accident cases or theft cases may also be ordered to be released to rightful owner and at the time of release, photographs of the vehicles should be taken and during the course of trial the actual production of the vehicles should not be insisted upon. Photographs should suffice for the purposes of evidence during the course of examination of various witnesses. In case no one comes forward to claim any vehicle then police should inform the court about all such vehicles lying unclaimed at their police station and the court should pass necessary orders for their auction as per the provisions of CRPC with a direction to deposit the money recovered from the auction in Government Treasury.

5. Stridhan Articles :

In cases under Section 498-A IPC also the actual production of case property articles should not be insisted upon and their photographs should stand suffice for the purposes of evidence during the course of examination of various witnesses.

Hon'ble Delhi High Court observed that these guidelines may also be extended in respect of all kinds of case property. The terms and conditions on which any such property is released or is ordered to be disposed of can vary depending upon the facts and circumstances of each case and within the broad framework of these guidelines the actual production of case property should not be usually insisted upon unless and until the same is necessary for a just and expeditious disposal of a case. The courts may be left at their discretion to impose different conditions though the condition should not be such which in itself may prove to be cumbersome for any party to comply with. The courts whenever deem necessary may also ask for an indemnity bond from the superdar.

6. Hon'ble Kerala High Court supplementary guidelines - Jewelry & Currency :

In the case of **Suresh Serve v. State of Kerala**[55] Hon'ble Kerala High Court has observed that it may be humanly impossible to visualize all probable situations under which the power vested in a criminal court under Section 451 CRPC could be sought to be invoked. There cannot be any enumeration of straight- jacket formulae suiting all the situations. Hon'ble Court framed additional points in respect of disposal of money and jewelry by invoking section 451 CRPC in supplement to the guidelines of Hon'ble Apex Court in **Sunderbhai Ambalal Desai case** *(Supra)*.

- ✓ Normally, currency notes can be returned to a claimant, if, after taking such evidence as the court deems fit in the facts and circumstances in each case, he could establish a prima facie right to get the money released. The court shall, in that event, take adequate measures to prevent the evidence being lost, altered or destroyed.
- ✓ If, in a given case, currency note/notes happen to be a material piece of evidence, e.g. a blood stained currency note involved in a murder case, its release under Section 451 CRPC may result in destruction of evidence. In such cases, courts should be

55. 2020 SCC OnLine Ker 1730

cautious to see whether return of the currency note/notes would adversely affect trial of the case and it may decline the request.

- ✓ In the case of jewelry, apart from the preparation of a proper panchanama of the articles, taking photographs, etc., following aspects also may be considered depending on the facts in each case:
  - If, in a case, the allegation is that one or two gold ornaments have been stolen or snatched away from the defacto complainant, a criminal court invoking Section 451 CRPC after taking necessary evidence may release the article with a direction to produce the same in the same condition, especially when there is a rival claimant for the ornaments. If there is no rival claimant and no dispute is raised by the accused regarding the nature, shape, weight, etc. of the ornaments in question, in appropriate cases, the court may even return the same without a condition to produce them in the same condition on a later date.
  - In a case involving theft of huge quantity of gold ornaments from a jewelry store or from a jewelry manufacturing unit, the court should take extra precautions to see whether the claimant has established, by cogent evidence, a strong prima facie case to show his entitlement for staking the claim. In such cases, there ought to be records to support his claim. If there are sufficient documentary evidence showing his unquestionable entitlement to the articles, especially in a case where there is no rival claimant for the jewelry, we find no reason for imposing a condition that the entire jewelry shall be produced in the same condition, as and when directed. If it is established by evidence that the ornaments claimed by him are stock in trade in the jewelry store, no earthly purpose will be served by returning them to the claimant by imposing such restrictions. Hence, such a condition need not be imposed in all cases, disregarding the factual situation in each case.

7. Custody contemplated is interim and representative :

(i) Interim custody to owner – Representative custody of court

In **V. Parakashan v. K. P. Pankajakshan**[56] It is observed that S. 451 enables the Magistrate to provide for interim custody of property pending conclusion of inquiry or trial. It is only a temporary arrangement and contemplates only an interim provision to provide custody with a proper person with liability to produce the property back as and when directed by the Court. The maximum duration of the arrangement is only till conclusion of the inquiry or trial and the main object is to protect or preserve the property pending trial. Even if the person entrusted with interim custody is the owner, his possession or custody during the period of entrustment is only as representative of the Court and not in his independent right.

56. 1985 CriLJ 951

(ii) Custody of vehicle with registered owner - interim and on behalf of Court :

In **Rajendra Prasad v. State of Bihar**[57] Hon'ble Apex Court has observed in the case that though the title of the vehicle is in dispute, but the vehicle is exposed to heat and cold in open police compound. The vehicle was temporarily entrusted with the ostensible name-holder in the registration certificate to be kept on behalf of the Court till the Court passes the order regarding disposal of the property on conclusion of the trial.

8. Inquiry u/s 451 CRPC means every pending matter including Investigation :

In the case of **Thariyath Versus Fr. George**[58] Hon'ble Kerala High Court observes that the distinction between inquiry and investigation is evident from their respective definitions given in the Code. An inquiry must be a proceeding by a Magistrate or court while an investigation relates to the steps taken by a police officer or persons other than a Magistrate. Inquiry is meant to include everything done in a case by a Magistrate. The term inquiry has a very wide connotation under the Criminal Procedure Code and includes every step taken by the Magistrate other than the trial conducted under the Code. For the purpose of S. 451 of the Code it has to be presumed that the 'inquiry' referred to therein only means some pending matter before the Magistrate. The term "inquiry" has been used only to mean a pending proceeding before the Magistrate. This term has to be understood according to the context in which it has been used. The definition of term 'inquiry given in the Code, means only some steps taken by Magistrate other than in trial. It is important to note that there is no other provision in the Code to dispose of properties produced by the police before the Magistrate during investigation stage. If a narrow interpretation is given to S. 451 of the Code it would only work injustice to the parties. The inquiry referred to in S. 451 of the Code includes all steps taken by the Magistrate before the trial begins.

9. Power under section 451 can be invoked only for property produced :

In the case of **Sameer Subhash Pednekar v. State of Maharashtra**[59] Hon'ble Bombay High Court has observed that If any vehicle is released by the Magistrate in favor of any person in exercise of his powers under section 457 CRPC then subsequent petition by another party under section 451 CRPC can't be entertained since power under S. 451 can be invoked only for return of the property which is produced before the Magistrate in an inquiry or trial.

10. Order passed u/s 451 CRPC only after physical or symbolical production :

In the case of **S. Sathyanarayana v. State of Karnataka**[60] Hon'ble Karnataka High Court observes that the Magistrate can pass an order under Section 451 of CRPC only after physical or symbolical production of seized material before the Court and only after hearing of both parties. A Police Officer has no power to seize the property when it is neither suspected to be

57. (2001) 10 SCC 88

58. 1987 SCC OnLine Ker 224 : (1987)1 KLT 513

59. 2010 SCC OnLine Bom 124 : (2010) 5 MahLJ 135

60. 2003 CriLJ 1983

stolen or which may be found under the circumstances creating suspicion of commission of any offence unless discovery of property leads to suspicion of an offence having been committed. Unless the property so seized is not incriminating or if the property is not involved in any offence nor any offence is disclosed after the seizure of the property, it is not open to the Police Officer to seize and keep the property to himself or when it is produced before the Magistrate, it shall be released at once in favour of the person from whom it is seized.

11.Case property to be maintained in serious cases

- In the case of **Surendra Pandey v. State of Bihar**[61] Hon'ble Patna High Court has observed that the vehicle in question is a relevant material exhibit and may not be released that too while trial is already going on. In view of the fact that trial is already continuing and the vehicle in question is a material exhibit, it would not be proper to either interfere with the impugned order or for directing to release the vehicle in question.
- In the case of **Free Legal Aid Committee v. State of Bihar**[62]**,** Hon'ble Patna High Court has observed that if in the opinion of the Court seized property is required for use at the time of enquiry or trial property shall not be released, otherwise it may be released on furnishing adequate security.
- In the case of **Sarjoo Prasad vs State of UP**[63] Hon'ble Allahabad High Court has held that a case property, particularly in serious cases such as murders, has to be maintained in the same condition as far as possible for being produced, if so required, as evidence in the trial for because in a given case it may cause some difficulty in the trial, if the said material exhibit is not present or is not produced.
- In the case of **Hemant Rai v. State of M. P.**[64] Hon'ble Madhya Pradesh High Court observes that the vehicle involved is seized as evidence and as the property seized is the matter of evidence before the trial Court, therefore it is not appropriate to release the said vehicle at this stage.

12. Bank Account is property – Police may seize or prohibit operation :

(i) In the case of **State of Maharashtra v. Tapas D. Neogy**[65] Hon'ble Apex Court has observed that if the bank account would not be seized, then the entire money deposited in the bank may be siphoned off by the accused. The money may be found to be the outcome of the illegal gratification at the end of the trial. The court would have no power to get the money back which

61. 2012 SCC OnLine Pat 974

62. (1982) BLJ 241

63. 1990 CriLJ 123

64. 2020 SCC OnLine MP 945

65. (1999) 7 SCC 685, 1999 CriLJ 4305

has direct link with the commission of the offence committed by the accused. Hence the bank account of the accused or any of his relation is 'property' within the meaning of Section 102 of the Criminal Procedure Code and a police officer in course of investigation can seize or prohibit the operation of the said account if such assets have direct links with the commission of the offence

(ii) In the case of **Nevada Properties Private Limited Vs. State of Maharashtra and Ors.**[66] Hon'ble Apex Court has observed that the bank account of the accused or any of his relations is "property" within the meaning of Section 102 of the Code of Criminal Procedure and a police officer in course of investigation can seize or prohibit the operation of the said account if such assets have direct links with the commission of the offence. It was also observed that the money, as per Clause (7) of Section 2 of the Sales of Goods Act, 1930, is neither goods nor movable property, albeit Section 22 of the Indian Penal Code defines the term 'movable property' to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth. The expression 'movable property' has not been specifically defined in the Code. In terms of Section 2(y) of the Code, words and meanings defined in the Indian Penal Code would equally be applicable to the Code. Money, therefore, would be property for the purposes of the Code. Money is not an immovable property.

(iii) In the case of **Teesta Atul Setalvad v. State of Gujarat**[67] Hon'ble Apex Court has observed that the investigating Officer was in possession of materials pointing out circumstances which create suspicion of the commission of an offence. He could legitimately seize the bank accounts after following the procedure prescribed in sub-Section (2) and sub-Section (3) of Section 102. The Investigating Officer after issuing instructions to seize the stated bank accounts submitted report to the Magistrate. It is not appropriate to de- freeze the stated bank accounts pending investigation of the case. Indisputably, the investigation is still in progress. Hon'ble Court afforded liberty to apply for de-freezing of the bank accounts, once the investigation is complete and police report is submitted to the concerned Court,

(iv) In **Bharath Overseas Bank v. Minu Publication**[68]**,** Hon'ble Madras High Court observed that the expression 'property' would include the money in the bank account of the accused and there cannot be any fetter on the powers of the police officer in issuing prohibitory orders from operating the bank account of the accused when the police officer reaches the conclusion that the amount in the bank is the outcome of commission of offence by the accused. Excluding the money in the bank from the ambit of property would be troublesome in investigation of crime.

13. Interim custody of jewelry :

(i) Release of jewelry – bank guarantee not improper

66. AIR 2019 (SC) 4554

67. (2018) 2 SCC 372

68. 1988 MadLW (Crl) 106

Hon'ble Kerala High Court has observed in **Suresh Serve case**[69] that the jewelry items involved are of a considerable value hence there is nothing wrong in ensuring bank guarantee for its release.

(ii) Jewellry – Evidence to establish prima facie entitlement

Hon'ble Kerala High Court in **Suresh Serve case**[70] directed the lower court to allow the claimant to adduce evidence to establish a strong prima facie entitlement to the property. It may also ascertain whether there is any rival claimant for the gold ornaments involved in the case. After considering the entire evidence on record, the trial court shall take a decision as to whether the petitioner should be directed to produce the articles before the court in the same condition as and when required by the court. For arriving at a proper conclusion, the court below shall consider whether the ornaments were the stock in trade in the jewelry store belonging to the petitioner.

(iii) Interim custody of jewels – Entitlement of Finance Company

In the case of **S. Arun kumar vs The State**[71] Hon'ble Madras High Court has observed that the Court of Law can take photographs of valuable articles and the same being attested or counter- signed by the Complainant, accused as well as by the person to whom the custody is handed over. Moreover, the possession of valuable articles like silver or gold ornaments should be restored to the individual from whom it was taken by a criminal act of theft. Even a bona-fide purchaser of such stolen property cannot acquire any title to it. Finance Company is legitimately entitled to stake its rightful claim for interim custody of the jewels and cash in question and only the aspect of possession and right of possession alone should be kept in mind. It also denounced imposing harsh, burden-some and onerous conditions for release of the articles.

(iv) No Counter claim over ornaments – returned to goldsmith

In the case of **Jhaverilal Popat Dedhia vs State of Maharashtra**[72] Hon'ble Bombay High Court has observed that it is a matter of experience that even in Jeweler's shops some articles do lie without there being entry of it because, those articles are handed over to jewelers for repairs. Some jewellers may not be smart enough to record their description in the register carefully, so as to prove the ownership. They are simpletons even in cities who are, not aware of such eventualities. When there is no counterclaim made over such articles and when a mention has been made about those articles in the FIR and when those articles have been identified by goldsmith, jewelers or a shop keeper and when that identification has been accepted by Court as proper and valid, such articles should be returned to them on bond. Keeping in view the possibility of appeals, revisions and further proceedings, whenever such articles are returned to such claimants- complainant on bond, they should maintain its nature as it is and whenever directed by

69. Supra at56

70. Ibid

71. Decided on11/01/2016 in connection with Crl.R.C. (MD). No. 6 of 2016

72. 2003(3) MhLJ 221

the Court should produce for its perusal or its inspection. At the same time the photographs of such articles are taken by such complainant or the claimants and those photographs should be kept in the record of the Court. If the ornaments are detained in Court for months together the persons from whose possession, they have been taken out suffer very much. On account of keeping of those ornaments in muddemal room those ornaments' look, luster, beauty fineness of quality diminishes. Therefore, such attitude should not be adopted, unless urgently required.

14. Currency notes :

(i) Seized money not required for investigation – released :

In the case of Prakash Jha vs State of Bihar[73] Hon'ble Patna High Court directed that if the seized money was not required in the investigation or for the purpose of the court, it should be released unconditionally.

(ii) Release in favor of Bank :

In the case of State Bank of India vs Rajendra Kumar Singh & Ors[74] Hon'ble Apex Court observes that the property in coins and currency notes passes by mere delivery and it is the clearest exception to the rule Nemo dat quod non habat[75]. This exception was carved out in the interest of commercial necessity. But the exception only applies if the transferee of the coin. or currency notes takes in good faith for value and without notice of a defect in the title of the transferor. Hon'ble Court directed its return in favor of the Bank.

(iii) Release in favor of Petitioner :

In the case of **Savita Devi Vs State of Bihar**[76] Hon'ble Patna High Court directed the release of Government currency in favour of the petitioner after:

(a) Preparing detailed proper panchnama of such articles; (b) taking photographs of such articles and a bond that such articles would be produced if required at the time of trial; and (c) after taking proper security.

15. Detaining vehicle merely for exhibit not fair :

In the case of **Matadin Sharma vs. The King**[77] Hon'ble Patna High Court observed that it was not fair or just that the truck of a businessman should be detained for nearly nine months merely for use as an exhibit in the case. The vehicle was ordered to be released.

73. 2011 (2) PLJR 369

74. AIR 1969 SC 401

75. It means "no one gives what he doesn't have". It is a legal rule which provides that purchase of a possession from someone who has no ownership right to it also denies the purchaser any ownership title.

76. 2008 (3) PLJR 575

77. AIR 1949 Pat 44

16. LIC policies are property – May be released on condition :

In the case of **Mohammad Quasim Ahmad vs State**[78] Hon'ble Patna High Court has observed that the LIC policies are covered within the definition of property as per section 451 CRPC and same may be released conditionally.

17. Deposit as condition precedent of bail not amenable to section 451 CrPC :

In the case of **K. Govindaraj vs State**[79] Hon'ble Madras High Court observed that deposit of Rs.12,00,000/- was a condition imposed in the bail application. This deposit can't be modified or altered by the Magistrate, by directing return of the said amount to the petitioner in exercise of power under section 451 CR.P.C

18. Registration Certificate Book (RC Book) surrendered - not to be returned

In the case of **M/S. Kalai Selvi Agencies vs State**[80] Hon'ble Madras High Court observed that the RC book surrendered in the court couldn't be returned without filing a proper application in this regard under relevant provisions.

19. Expiry of license or pollution certificate and insurance does not disentitle owner :

In **Sanjeet Mahto vs State of Bihar**[81] Hon'ble Patna High Court observes that the certificate of registration is in the name of the petitioner. Merely because the licence of the petitioner or certificate of pollution or certificate of insurance of the motorcycle, which is in the custody of police had expired, the prayer for release of the motorcycle ought not to have been rejected. Even after expiry of licence or aforesaid certificates, the petitioner did not loose the status of ownership of the motorcycle, in question.

20. Acceptance of final report in a different case not affect release of Iron Ore :

In the case of **The State of Karnataka vs M/S Vedanata Limited**[82] it is observed by Hon'ble Apex court that the seizure of the iron ore was in different proceeding in which proceeding Order dated 08.05.2015 was passed. When release of iron ore on an application filed by the State under Section 451/457 CRPC was in different proceeding, there was no effect or consequence of acceptance of the final report in other proceedings. The respondent was given the liberty to file an appropriate application before the jurisdictional criminal court for release of seized iron ore by establishing its existence and its ownership right over the same.

21. Immediate exercise of powers to release diesel, subsequent initiation of confiscation proceedings not to affect release :

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78. 2009 (3) PLJ R56

79. Decided on 2 February, 2015 in Case number 1136 of 2014

80. Decided on 18 April, 2016 Criminal Revision 639 of 2016

81. Decided on 29 August 2017 in connection Criminal Misc. 41067 of 2016

82. Decided on 06/03/2018 in Criminal Appeal . 348-356 OF 2018 (Arising Out of SLP (Crl.) 2398 of 2018)

In the case of **Chandrashekhar Singh vs. State of Bihar**[83] it is observed by Hon'ble Patna High Court that the diesel stands seized only in the criminal case and is therefore in the custody of the concerned court. Hence, the Magistrate concerned should immediately exercise powers under section 451 or 457 CRPC considering the fact that due to passage of time, the quality of the diesel may get deteriorated. It is also observed that there is no information of initiation of confiscation proceedings hence subsequent initiation of such proceeding will not stand in the way of magistrate exercising such powers.

22. Trial court to release diesel and tanker :

In the case of **Shivangi Fuels & another vs The State of Bihar and Others**[84] Hon'ble Patna High Court directed the trial court to exercise powers under Section 451 read with 457 of the CRPC in light of the guidelines laid down by Hon'ble Apex court and release the diesel and tanker on conditions.

23. Financier may take custody of Vehicle :

(i) In the case of **K A Mathai vs Kora Bibbi kutty & Anr**[85] it was held by Hon'ble Apex Court that if installments were not paid by the hirer in pursuance of hire purchase Agreement, the financier had right to resume possession even if the Agreement did not contain the clause of resumption of possession.

(ii) In the case of **Bharath Metha Vs. State by Inspector of Police Chennai**[86] it was observed by the Hon'ble Apex Court that under the hire purchase laws, the hirer can become the owner of the vehicle by exercising the option to purchase after paying the entire amount due and till that time the financier is the owner. The financier is also entitled to possession of the vehicle since he is the owner.

(iii) In the case of **M/s. Shriram Transport Finance Co. v/s. R. Khaishiulla Khan & ors**[87] Hon'ble Karnataka High Court has held that where the vehicle is seized by a financier on the hirer committing default in payment of installments stipulated under the Hire Purchase Agreement, the financier is entitled to an interim custody of the vehicle in an application u/s. 451 CR.P.C Merely existence of registration certificate in the name of hirer who is in possession of the vehicle in pursuance of such an Agreement, does not make him absolute owner having all the proprietary rights.

(iv) In the case of **Satpal Singh Ajit singh Bajaj vs Kalyani Trading Co**[88], it was observed by the Hon'ble Gujrat High Court that since the loans preferred on the vehicle not discharged by the hirer, the financier has the preferential charge to have interim custody of the vehicle.

83. 2013 (2) PLJR 112

84. Civil Writ Jurisdiction Case No. 3852 of 2013 decided on 14-03-2013

85. 1996 SCC 281

86. AIR 2008 SC 1970

87. 1993 CriLJ 1069

88. (2001) 3 GLR 2243

24. Compensation in certain cases :

(i) Illegal Seizure of Vehicle :

In the case of **Devendra Rai Vs State Of Bihar**[89] Hon'ble Patna High Court observed that the abuse of statutory power for illegal aims virtually stands proved and directed the State to pay a compensation of Rs. 50,000/- to the petitioner to be later realized from the officers whom the State feels are responsible for such harassment and also to take action against the guilty parties.

(ii) Unauthorized detaining of vehicle :

In the case of **R G Holdings Vs State of Bihar**[90] it was observed by the Hon'ble Patna High Court that only on a vague suspicion or surmises a vehicle is detained for months and wrong imposition of a fine for which the respondent had no jurisdiction. Later on, payment of compounding fee was made a condition precedent for release of the vehicle. This mala fide act caused irreparable loss to the owner. The officer must be accountable in matters of exercise of jurisdiction especially when it extend to such drastic powers which could completely ruin a person. The Enforcement Officer could not have detained the vehicle under his Authority but was immediately required to forward it to the competent Criminal Court for prosecution and leave the matter. In utter disregard of statutory provisions all steps were taken to detain the vehicle and deprive the owner the right to use their vehicle. It violates the owner rights under Articles 300A, 14 and 19 of the Constitution. The owner is entitled to compensation and state is answerable and liable to pay compensation/damages for acts of its officers.

25. Dispute over custody of Property :

(i) Court may take custody

In the case of **Shanmugavel Vs. Eswari & ANR**[91] Hon'ble Apex court observed that initially the property was released in favor of brother in law of the deceased with consent of the deceased widow. Later on widow filed petition to seek the custody for herself. Hon'ble Apex Court confirmed the order of the Magistrate to keep the custody of the vehicle with the court till disposal of the criminal case.

(ii) Aggrieved to intervene in civil suit pending for title over vehicle

In the case of **Manoj Vs. Shriram Transport Finance Co. Ltd**[92] it was observed by Hon'ble Apex Court that the order delivering possession of the property to the petitioner is subject to any variation to be made by the civil court. If the financier was aggrieved by the order directing release of the vehicle in favour of the petitioner, who continues to be the registered owner of the vehicle, it is open for the financier to approach the civil court in the pending civil suit for interference.

89. 2009 (2) PLJR 903

90. 2008 (2) PLJR 538

91. (2019) 15 SCC 572

92. JT 2002 (1) SC 293

(iii) Rival claim of ownership – to be established before civil court :

In the case of **Rajalingam vs. Vangala Venkata Rama Chary**[93] Hon'ble Andhra Pradesh High Court observed that when there was rival claim as to the ownership of the property, parties should be directed to establish their claim before the competent Civil Court as to the ownership of the property.

26. Sale of Property – A trend to preserve resource :

(i) Sale of Excavator Allowed :

In the case of **Srei Equipment Finance Private Limited Vs. State Of Bihar**[94] It was directed by the Hon'ble Patna High Court to get photographs of the vehicle taken at Kolkata and deputation of an officer duly authorized to get his statement recorded before the Court with regard to the genuineness ofthe photographs and the same shall then be marked as exhibit by the Court in accordance with law. The same shall be read as evidence in lieu of marking of the excavator/asset. The petitioner shall then be at liberty to sell the excavator/asset through a process which ensures that it fetches the maximum price and furnish the details thereof.

(ii) Seized property having no evidentiary value – Permission for sale :

In **K.W. Ganapathy v. State of Karnataka**[95] the Hon'ble Karnatka High Court observed that due to the accused absconding and the indefinite and uncertain situation pestering the complainant prompted him to make an application to permit him to alienate the car. It is also observed that when the property has no evidentiary value and only the value of the property is to be properly secured for passing of final order under Section 452 CRPC, the necessity of keeping such properties intact by imposing onerous conditions, prohibiting its alienation or transfer would not be necessary in law. With the advanced technology, it is not necessary that the original of the property inevitably has to be preserved for the purpose of evidence in the changed context of times. The reception of secondary evidence is permitted in law. Movable property of any nature can be a subject matter of photography and taking necessary photographs of all the features of the property clearly is not a impossible task. Besides, the mahazar could be drawn clearly describing the features and dimensions of the movable properties which are subject matters of criminal trial. The rightful owners, who have lost the property by an act of crime even after detection and recovery are continued to be prevented from beneficial possession and enjoyment of the same by the archaic conditions imposed as a regular routine despite the changed context of scientific developments. In order to ensure the recovery of value, it is necessary that the Trial Court shall take all necessary diligent steps to get the market value of the property, correctly assessed the photography of the property properly taken depicting all its features and dimensions and before

93. (1996(2) ALD (Crl) 868) relying the Hon'ble Madras High Court judgment in Muthaiah Muthirian V. Vairaperumalmuthirian (AIR 1954 Mad 214)

94. 2014 (1) PLJR 79

95. ILR 2002 KAR 3751

the property is delivered to the interim custody, the photographs have to be certified by the Magistrate. Further necessary bonds and security to be taken from the person to whom interim custody is to be given for the value of the property in order to ensure prompt recovery of value from the person to whom interim custody is given. Having once given the interim custody to the person who is supposed to be the owner of the property, depriving him to effectively use and exercise the lawful ownership rights would be unlawful.

(iii) Permission granted to bank to sell tractor :

In Canara **Bank Vs State Of Punjab And Anr**[96] Hon'ble Court observed that property brought before a Court during the course of an inquiry or a trial would be case property and therefore, to decline permission, to sell on the sole ground, that the property is case property would be a negation of the provisions of Section 451 of the CR.P.C The property being case property, is no doubt a relevant consideration but except where fact and circumstances of a case so warrant it cannot be a sole circumstance, to decline permission to sell. Each case must be decided on its own peculiar facts and circumstances. Since keeping the tractor as it is would make it a junk, the bank wanted to sell it. The sale of the tractor would benefit both the bank and the accused. The bank would be able to recover a part of the loan advanced and the civil liability of the accused would stand correspondingly reduced Hon'ble Court granted the permission to sell the tractor.

(iv) Financier permitted to sell the vehicle after photography :

- In **Sundaram Finance Ltd. v. State of Tamil Nadu**[97], Hon'ble Madras High Court held that the return of vehicles and permission for sale thereof should be the general norm rather than the exception it is today. The clear dictate of the Hon'ble Apex Court in this regard is followed more in the breach than in observance. Given the facilities of the modern day, there hardly is any scope to think that evidence relating to vehicles cannot be held in altered form. Causing of photographs and resort to videography, together with recording such evidence as befits a particular case would well serve the purpose. In cases where return of vehicles is sought and the claim therefor is highly contested, resort to sale of vehicle and credit of the proceeds in fixed deposits pending disposal of the case would be to the common good. None gain when the mere shell or the remnants of the vehicle are returned to the person entitled thereto, after completion of the trial. Several vehicles have not been claimed after completion of trial, because of the worthless state they have been reduced to. It is but natural to expect that a person eventually entitled would rather have the sale proceeds together with interest, than nothing at all. It is directed to take photographs of the vehicle and record Panchnama thereof. After that the claimant shall be at liberty to sell the vehicle.

96. 2006 CriLJ 86

97. (2011) 1 MWN (Cri) 437

- In the case of **Cholamandalam Finance vs State and Others**[98] Hon'ble Madras High Court agreed with the ratio of **Sundaram** *(supra)* and granted the financier permission to sell the vehicle.

(v) Permission to sell computers :

In the case of **Lenovo India (P) Ltd vs The State**[99] Hon'ble Madras High Court granted permission to sell the case-properties involving release of Lenovo Desktop Computers and Lenovo Laptop Computers.

(vi) Permission to sell refrigerators :

In the case of **Shyam Lohia v. State of Bihar**[100] Hon'ble Patna High Court observes that the Company is undeniably the owner of the refrigerators. The accused persons from whose possession the refrigerators have been recovered have also not claimed the refrigerators in question. The Company wants to sell the refrigerators in its financial interest. Section 451 CRPC mandates that if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of. It is expedient in the interest of justice to protect the interest of the property owner. Non compliance of the directions of the Hon'ble Supreme Court or Hon'ble High Court creates confusion in administration of justice and undermines the majesty of law. Keeping idle the refrigerators will make them waste and useless and no customer would like to buy them because of the same being obsolete. Since the case committed to court of sessions, the Hon'ble Court directed the sessions court to fix a date for production of refrigerators in question and cause photographs of the refrigerators to be taken and record panchnama thereof. Permission to sell the refrigerators then is granted. The photographs and panchnama prepared shall be read as evidence in lieu of producing the refrigerators as material exhibits.

27. Vehicle at NHAI work - Bank Guarantee not to be insisted for release :

In the case of **State of Kerala v. A. A. Ali**[101] Hon'ble Supreme Court held that the building was demolished for the purpose of National Highway development. The application filed by the respondent was for release of the vehicle under Section 451 CRPC the High Court is justified in holding that the bank guarantee for the alleged loss need not be insisted for releasing a vehicle involved in the process. The learned Magistrate is directed to release the vehicle without insisting the condition regarding bank guarantee.

28. Condition like discharge of the guarantor in release order not proper :

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98. Crl. R.C. (MD) Nos. 74 & 75 of 2011 decided on 18.10.2011

99. Decided on 20/11/2013 in CrO P 27812 of 2013

100. 2015 SCC OnLine Pat 8714

101. (2019) 14 SCC 800

In **Ramesh Chand Jain v. State of Haryana**[102] it is observed by Hon'ble Apex Court that civil liability of the registered owner of the vehicle to repay the loan to the financier bank and the guarantor is not relevant for the purpose of an order under section 451 CRPC for interim custody. It is held that the conditions imposed on the owner to exonerate the guarantors for release of vehicle not proper.

29. Custody of vehicle to transferee :

In the case of **Kishan Kagde v. Baldeo Singh**[103] Hon'ble Bombay High Court observed that where the complainant transferee filed a theft case against the transferor with respect to the motor vehicle, the documents presented by the complainant clearly show that the ownership of the vehicle is transferred to the complainant and he is in the possession. The custody of such vehicle should be given to the complainant transferee and not the accused.

30. Passport :

(i) Passport is property :

In the case of **Nrisingha Murari Chakraborty vs State of West Bengal**[104], Hon'ble Apex Court observes that passport is a tangible thing and is capable of ownership. There can be no doubt that it is "property". It is property of the State so long as it is with the passport issuing authority and has not been issued to the person concerned and, after issue; it becomes the property of the person to whom it has been granted.

(ii) Court or Police can't impound passport :

In the case of **Suresh Nanda vs Central Bureau of Investigation**[105] Hon'ble Supreme Court observes that there is a difference between seizing of a document and impounding a document. A seizure is made at a particular moment when a person or authority takes into his possession some of property which was earlier not in his possession. Thus, seizure is done at a particular moment of time. However, if after seizing of a property or document the said property or document is retained for some period of time, then such retention amounts to impounding of the property/or document. Court or the police has no power to impound passport.

In **Mewalal Chowdhary vs Union of India**[106] Hon'ble Patna High Court held that neither charge sheet was filed, nor cognizance of offence was taken. It cannot be said that a criminal case is pending which warrant impounding of passport under section 10 (3) (e) of the passport Act.

31. Examination Admission Card / Certificate of various natures :

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102. (2007) 15 SCC 126

103. 1977 MahLJ 656

104. AIR1977 SC 1174

105. 2008 CriLJ 1599

106. 2019 (4) PLJR 600

In the case of **Abhayanand Mishra vs The State of Bihar**[107] It is held by Hon'ble Apex Court that the admission card has no pecuniary value, but it has immense value to the candidate for the examination. Without it he cannot secure admission to the examination hall and consequently cannot appear at the Examination. This card is 'Property'.

In **Queen Empress v. Appasami**[108] it was held that the ticket entitling the accused to enter the examination room and be examined for the Matriculation test of the University was 'property'.

In **Queen Empress v. Soshi Bhushan**[109] it was held that the term 'property' included the written certificate to the effect that the accused had attended, during a certain period, a course of law lectures and had paid up his fees.

In re **Packianathan**[110] it was held that the health certificate was "property" within the meaning of section 415 of the Penal Code and that if a person dishonestly and fraudulently induced the Health Officer to deliver it to him, he was guilty of an offence.

In the case of **Local Government v. Gangaram**[111] where the accused obtained a certificate from the Deputy Inspector of Schools by stating untruly that he had passed the examination, it was held that the certificate was 'property' and the accused was guilty of an offence.

32. Order of assessment of Income Tax :

In the case of **Ishwarlal Girdharlal Parekh v. State of Maharashtra and others**[112] it is held by Hon'ble Apex Court that the order of assessment received by an assessee was "property", since it was of great importance to the assessee, as containing a computation of his total income and tax liability. The word "property" did not necessarily express that the thing, of which delivery was dishonestly desired by the person who cheats, "must have a money value or a market value, in the hand of the person cheated". It was held that "even if the thing has no money value, in the hand of the person cheated, but becomes a thing of value, in the hand of the person, who may get possession of it as a result of the cheating practised by him, it would still fall within the connotation of the term 'property'.

33. Copyright Act and computer offence CPU not released

In **Jakir Khan v. State of M. P.**[113] Hon'ble Madhya Pradesh High Court has observed that the computer of the applicant was seized for an offence punishable under Sections 63 & 67-

107. AIR1961 SC 1698

108. (1889) ILR 12 Mad. 151

109. (1893) ILR 15 All. 210

110. AIR 1920 Mad. 131

111. AIR 1922 Nagpur 229

112. [1969] 1 SCR 193

113. 2017 SCC OnLine MP 1611

A of Copyright Act. The CPU contains incriminating matters which is the subject matter of evidence, therefore, the same cannot be given on interim custody to the applicant.

34. Semi processed films negative – Not property regarding which offence committed :

In the case of **Sajan K. Varghese v. State of Kerala**[114] Hon'ble Apex Court has observed that Section 451 deals with the disposal of property produced before any criminal Court during any inquiry or trial and the powers of the Court to pass orders for the custody and disposal of the property pending trial. It is observed that the seized semi processed films and the negatives are not themselves items of property regarding which offence have been committed.

35. Books :

In the case of **Philip Spratt v. Emperor**[115] Hon'ble Allahabad High Court observed that it was obvious that these works would be works which would supply the material on which the accused could write the articles on Russia which were among the activities of which he had been found guilty.

36. Boats and nets :

In **Sheik Dawood v. Velayuda Semmanotti,**[116] Hon'ble Madras High Court held that property regarding which an offence had been committed included within its meaning moveable property regarding the possession of which a quarrel or a fight is begun whatever may be the offence that might ultimately be committed in the course of the quarrel or the fight. Here the quarrel was with regard to some boats and nets and it was with regard to this property that the offence had been committed.

37. Printing press not used for sedition :

In **Abinash Chandra Bhattacharjee v. Emperor**[117], it was held that a printing press could not be said to have been used for the commission of the offence of sedition in as much as the offence was in the publication and not printing, the press being a remote instrument.

38. Release of Crane by the magistrate proper :

In the case of **Kohinoor Pulp and Paper (P.) Ltd. vs. State of Assam and Others**[118] Hon'ble Gauhati High Court has observed that Magistrate has exercised the power conferred under section 451 CRPC and rightly granted the interim custody of crane to the registered owner who was not a party to the agreement entered into with the petitioner. There was no error or illegality in the order of interim release.

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114. (1989) CriLJ 897 : AIR 1989 SC 1058

115. AIR 1934 All 207

116. AIR 1928 Mad 194

117. 6 CriLJ 293

118. (2019) 7 Gau LR 121

39. Coal :

In the case of **Baban Upadhyay v. State of West Bengal**[119] Hon'ble Calcutta High Court observes that it was of no use to keep the seized articles at the police station for an indefinite period and, directed the Magistrate to pass appropriate orders for returning the seized coal after being satisfied with the papers regarding ownership of the seized coal as would be furnished by the petitioner.

40. Interim custody under section 451 is not a finding on title :

In the case of **Shahud-Ul-Haque vs. The State of West Bengal**[120] Hon'ble Calcutta High Court observed that the articles seized were of very common nature and the Magistrate had not given any finding that any party had a better claim of title on them. When he was not in a position to decide on the spot as to who was the actual owner of the goods before their seizure, he could have kept them in the custody of any one including a third party. In the absence of any decisive factor the property should have normally been left in the custody of the person from whom they were seized. By giving custody of the seized articles, no question of title had been decided and no stigma would attach for seizure of the articles from his custody.

41. CJM to pass order after inquiry :

In the case of **Sulekh Chand Versus Suresh Chand**[121] Hon'ble Supreme Court directed that the properties should be sent to the CJM, Muzaffarnagar who thereupon would make a thorough inquiry by giving sufficient opportunity to both the parties and pass appropriate orders according to the law in respect of the properties along with other articles.

42. Accused admitted in AIIMS – Rejecting release of vehicle not proper :

In the case of **Dhananjay Kumar Pandey vs State of Bihar**[122] Hon'ble Apex Court observed that the accused was not absconding but was admitted in AIIMS. Hence rejection of the release petition on the ground that the accused was absconding was not proper.

43. S. 451 CRPC can't be used to deny shareholder the right to vote :

Hon'ble Delhi High Court observed in the case of **Babita Gupta vs. State & Anr**[123] that in case voting rights in respect of the shares is denied, the shareholding pattern in the company will undergo a complete change. It will affect the management and control of the company. There was no urgency to pass the said interim order when the learned trial court itself was of the opinion that the individual shareholders have right to be heard and should be given hearing.

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119. (2015) 1 CalLJ 500

120. 1993 SCC OnLine Cal 91 : (1993) 2 CalLT 379

121. 1991 CriLJ 469

122. (2000) 9 SCC 209

123. 2010 SCC OnLine Del 3427

44. No prohibition on second application under chapter XXXIV CRPC :

In the case of **Rati Ram v. State of H. P**[124] Hon'ble Himachal Pradesh High Court observed that there was no prohibition or statutory bar for filing second application under Chapter XXXIV for release of property, but such petition could be entertained only in exceptional circumstances. Maintainability and entertaining of second application always depend upon the facts and circumstances of each case. It would not be possible to put all the facts and circumstances in a strait jacket formula and each and every case has to be decided in its given circumstances on the basis of settled law of the land.

CHAPTER VI

SPECIAL ACTS – CUSTODY AND RELEASE OF SEIZED PROPERTY

Disposal of articles and vehicles seized in the matter connected to the provisions contained in one or the other special Act has always been a debatable issue. Legislation like Essential Commodities Act, Indian Forest (Bihar Amendment) Act, Wild Life Act, Customs Act, Income Tax Act, Bihar Prohibition and Excise Act and Motor Vehicles Act are some such legislation which provide special mechanism for disposal of the seized property. Stringent provisions regarding release of property have been introduced in some of the legislation. The concept of confiscation of seized property was also introduced. Jurisdiction of Criminal Courts is sometimes barred in this legislation.

1. Provisions of Cr.P.C give way to Special Acts :

- Section 4 of the Cr.P.C provides that the offence under the IPC shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions contained in CR.P.C While offence under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner of place of investigating, inquiring into, trying or otherwise dealing with such offence.
- Section 5 of the Code of Criminal Procedure provides that nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

  The saving clause in the CRPC clearly rules that the procedure prescribed in the CRPC will not affect any special power or jurisdiction conferred or any special procedure prescribed in any other special or local law. It clearly mandates that the provisions of Special law shall prevail over the general provisions of CR.P.C

124. 2018 SCC OnLine HP 453

2. Bihar Prohibition and Excise Act :

Certain important provisions regarding custody, confiscation and disposal of property in the Act are enumerated in the table below

Section 56	Things liable for confiscation[125]
Section 57	Power of Collector, court, authorized officer, excise commissioner to order sale or destruction of articles before confiscation which are subject to natural decay or of trifling value.
Section 58	Procedure for confiscation of seized article by District Collector.
Section 60	Bar of jurisdiction in confiscation - Whenever any liquor, material, still, utensil, implements or apparatus or any receptacle, package, any animal cart, vessel, or other conveyance used in committing any offence, is seized or detained, no court shall have, jurisdiction to make any order with regard to such property.
Section 61	Confiscated articles to vest with the Collector
Section 62	If any liquor or intoxicant is found in any premises it is liable to be sealed. If the said premises are temporary structures, it may be demolished.
Section 73	Power to enter, inspect, search and seize
Section 81	Duty of police to accept seized articles and arrested persons
Section 82	Reports of arrests, seizures and searches

Decisions of Hon'ble Courts concerning disposal of seized property :

State legislature competent to enact Amendment

In the case of **Oma Ram Vs. State of Rajasthan and ors**[126] It is observed by Hon'ble Apex Court that though the Rajasthan Excise Amendment Act incidentally trenches into some of the provisions of the Evidence Act, the Indian Penal Code and CRPC, in its pith and substance, it is an integral scheme of the Act, which falls within Entry 8 read with Entries 64 and 65 of List II of the Seventh Schedule of the Constitution. Under Article 246(3), the State legislature was competent to enact the Amendment Act. Therefore, the assent of the President is not necessary. Even assuming that some of the provisions incidentally trespass into the field of operation of the Central provisions falling in the Concurrent List, which empower both Parliament and the State

125. Any intoxicant or liquor unlawfully imported, transported, manufactured, sold, stored, possessed, material, utensil, implement, apparatus, package or covering and or the other contents of such receptacle, package or covering for the purposes of storing, manufacturing or labeling such intoxicant or liquor; Any animal, vehicle, vessel or other conveyance used for carrying any intoxicant or liquor ; Any premises used for storing or manufacturing any liquor or intoxicant or for committing any other offence

126. (2008) 5 SCC 502

legislatures to enact the law, the assent given by the President made Sections 57-A and 57-B valid. The Gazette Notification of the Amendment Act has been assented to by the President.

General provisions of CRPC yield to special provision of Excise Act :

In the case of **Government of NCT Delhi versus Narender**[127] Hon'ble Apex Court observed that general provision of Section 451 of the Code with regard to the custody and disposal of the property or for that matter by destruction, confiscation or delivery to any person entitled to possession thereof under Section 452 of the Code or that of Section 457 authorizing a Magistrate to make an order for disposal of property, if seized by an officer and not produced before a criminal court during an inquiry or trial, however, has to yield where a statute makes a special provision with regard to its confiscation and disposal. Relying upon the judgment in the case of **State of Karnataka v. K.A. Kunchindammed**[128] and **Oma Ram v. State of Rajasthan**[129]**,** Hon'ble Apex Court pleased to held that Section 451, 452 and 457 of the Code must yield to the special provisions of the Excise Act and the criminal court has no power to deal with the interim custody of the vehicle or its release.

Confiscation under Excise Act – Provisions of CrPC inapplicable :

In the case of **Mustafa vs. The State of Uttar Pradesh**[130] Hon'ble Apex Court has observed that the Collector has exclusive jurisdiction to confiscate the vehicles and in case the seized things are subject to speedy wear and tear or natural decay, he may order to sell the same in the manner prescribed under sub-section (3) of Section 72 of the Act. The order of the Court in sub- section (8) of Section 72 of the Act is after conclusion of the prosecution which is different from the seized things which are subject to speedy wear and tear or natural decay as contemplated by sub-section (3) of Section 72 of the Act. Since the procedure of confiscation of the vehicle is prescribed under the Act, it is the provision of the Act which will be applicable and not Chapter XXXIV of the Code. Section 5 of the Code saves special or local laws or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force. The power of release of the property produced before any criminal court whether interim or final in terms of Sections 451, 452 or 457 of the Code will not be available to court except the order in respect of distribution of sale proceeds. Therefore, the power under Sections 451, 452 or 457 of the Code available to criminal court or Magistrate is inconsistent with the provisions contained in the Act regarding disposal of the property not only in respect of pending trial but also after the conclusion of the trial. Therefore, the power of the Collector to confiscate the seized thing or animal is independent of prosecution.

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127. 2014 (1) SCALE 116

128. (2002) 9 SCC 90

129. (2008) 5 SCC 502

130. https://www.sci.gov.in/supremecourt/2018/12367/12367_2018_10_1501_16122_Judgement_20-Aug-2019.pdf

All statutory remedy to be exhausted before invoking writ jurisdiction :

In the case of **State of Kerala Vs. C.A. Jabbar**[131] the trial court rejected application on ground that vehicle was entrusted to concerned excise authority for purpose of confiscation, the excise authority directed to furnish bank guarantee for release of vehicle and High Court directed for release of vehicle after executing bond. It was held by Hon'ble Apex Court that according to judicial principle, if the alternative remedy is available, writ jurisdiction of court should not be exercised.

Provisional release of vehicle seized in cases of drunken driving :

In the case of **Bilal vs. State of Bihar**[132] Hon'ble Patna High Court has observed that in in cases of drunken driving; no recovery from the vehicle; recovery of less than commercial quantity; where ex-facie, vehicle is not liable to be confiscated; where there is inordinate delay in initiating proceedings for confiscation of the vehicle etc., state is directed to provisionally release vehicle/ property, subject to initiation / conclusion / finalisation of the confiscatory proceedings.

It is also observed in the same case that confiscation proceedings must be concluded not later than 30 days on appearance of the petitioner and the petitioner will make himself available in the office of the appropriate authority. If proceeding cannot be concluded, it shall be open for the authority to take such measures for release of the vehicle in question by way of interim measure, on such terms as may be deemed appropriate. If eventually, the appropriate authority arrives at a conclusion that the property is not liable to be confiscated, it shall be open for the petitioner to seek damages in accordance with law and have appropriate proceedings initiated against the erring officials/officers.

Confiscating authority to decide preliminary applicability of section 56 to seized articles seized from drunken person etc. :

In the case of **Diwakar Kumar Singh versus The State of Bihar & Ors**[133] Hon'ble Patna High Court has observed that the confiscating authority shall record a positive finding whether provision of Section 56 will apply in cases where the petitioner is found or the vehicle is found to be used by a person in drunken condition and no liquor is seized from the vehicle or when the vehicle is not used for transportation of liquor. It shall be mandatory for the confiscating authority to decide this issue before passing any order on the confiscation proceedings. Without deciding the aforesaid issue as apreliminary issue, further proceedings in the confiscation proceedings shall be prohibited. If the concerned authority passes confiscation order without addressing this issue first, contempt proceedings may be initiated against the concerned authority.

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131. 2009 (6) SCALE 659

132. Decided on 16 December, 2019 in connection with CWJC. 16032 of 2019

133. Decided on 22.03.2018 in CWJC No. 5049 of 2018

Compensation may be awarded in case of illegal seizure :

In the case of **Shobha Devi vs the State of Bihar & Ors[134].** Hon'ble Patna High Court has observed that there was no recovery of liquor from the vehicle and it was a case, in which, the occupants of the vehicle were alleged to be in drunken condition and were creating nuisance, though were liable to be arrested. In any event, the vehicle was not required to be seized, since it was not liable to be confiscated. It is a fit case to pay adequate compensation to the petitioner being owner of the vehicle, to the tune of Rs.75,000/- (seventy-five thousand) and the said compensation amount must be recovered from the pocket of the police officer, who was responsible for such illegal seizure.

Trucks carrying liquor to other state :

In the case of **CTI Infrastructures vs State OF Bihar[135]** Hon'ble Patna High Court has observed that the concerned authorities have a bounden duty to implement the law on prohibition in the State, they also have a duty to safeguard the constitutional rights available to the citizens of this Country and which cannot be interfered with either on whims or on mechanical application of the law even when the documents support a valid transportation from the originating station until its destination. A simple cross over to the territory of the State is not to be eyed with suspicion unless there are reasons to back such suspicion and which in the present case is absolutely lacking. Hon'ble Court directed the confiscating authority and/or the designated court to ensure release of the truck together with the goods loaded thereon, failing which the petitioner would be entitled to a cost quantified at Rs. 10 lacs payable by the Excise Department, Govt. of Bihar.

In the case of **Mahadev Carriers Private Limited vs State of Bihar[136].** Hon'ble Patna High court has observed that the authorities in seisin with the enforcement of prohibition laws should have exercised prudence rather than mechanical application of the provisions of law to seize goods which are lawfully transported. The order of seizure was set aside and the trucks were released.

Truck detained in police station – release :

In the case of **Amirlal Ray vs State of Bihar[137]** it is observed by Hon'ble Court that no purpose would serve lying the detained truck in police thana and ordered it to be released in favor of the owner on conditions.

Protection of state interest – Provisional Release of vehicle confiscated but not sold :

In the case of **Mukesh Kumar Jha vs The State Of Bihar & Ors[138]** Hon'ble Patna High Court observes that the vehicle has not been auctioned sold pursuant to the confiscation order and

134. Decided on 24/10/2019 in CWJC 15003 of 2019

135. Decided on 21 May, 2019, Civil Writ Jurisdiction Case No. 10439 of 2019

136. Decided on 01 April 2019, Civil Writ Jurisdiction Case No. 2866 of 2019

137. 2019 (3) PLJR 1106

138. Decided on 17 December, 2018 Civil Writ Jurisdiction Case No. 5171 of 2018

it is is lying under open sky loosing its road worthiness. It would be better for protection of the interest of the State till the exhaustion of the statutory remedy, the vehicle should be provisionally released with a rider that if the appeal is not preferred within the given period of 30 days, the confiscating authority shall be at his discretion to proceed further in terms of the confiscation order.

Vehicle seized by private party – Provisionally released :

In the case of **Irfan Alam v. State of Bihar**[139] Hon'ble Patna High Court observed that the seizure has not been made by the appropriate authorities, as stipulated under Section 73(e) of the Act. The seizure claimed to have been made by a private person, subsequently, who handed over the seized vehicle to the police. Hence, it can neither be inferred that the recovery of liquor was made from the vehicle in question nor the vehicle was being used for carrying the liquor, making it liable for confiscation under Section 56(b) of the Act. In such circumstances, the whole confiscation proceeding appears to be only empty formality. Hon'ble court also notes that usually release of the vehicle is not directed after commencement of confiscation proceeding but taking into the facts that neither the seizure has been made by the competent authority nor it appears that the report under Section 58(1) of the Act has been submitted by the seizing or detaining authority, no useful purpose will be served in allowing the vehicle to rot under open sky. Moreover, keeping the vehicle in such condition and allowing to reduce it into a junk, would ultimately result into waste of public money. The seized vehicle is ordered to be released provisionally on conditions.

3. Narcotic Drugs and Psychotropic Substances Act 1985 :

Some of the relevant provisions respecting seizure and dealing with property as contained in Narcotic Drugs and Psychotropic Substances Act are enumerated here

Section	8 A	Prohibition of certain activities relating to property derived from offence
Section	11	Narcotic drugs and psychotropic substances are not liable to distress or attachment for the recovery of any money under any order or decree of any court or authority.
Section	41	Power to issue warrant and authorization
Section	42	Power of entry, search, seizure and arrest without warrant or authorization.
Section	43	Power of seizure and arrest in public place
Section	44	Power of entry, search, seizure and arrest in offences relating to coca plant, opium poppy and cannabis plant.
Section	45	Procedure where seizure of goods liable to confiscation not practicable.
Section	48	Power of attachment of crop illegally cultivated
Section	49	Power to stop and search conveyance

139. 2020 SCC OnLine Pat 253

Section	50	Conditions under which search of persons shall be conducted.
Section	52	Disposal of persons arrested and articles seized
Section	52 A	Disposal of seized narcotic drugs and psychotropic substances
Section	55	Police to take charge of articles seized and delivered
Section	57	Report of arrest and seizure
Section	60	Liability of illicit drugs, substances, plants, articles conveyances to confiscation and
Section	61	Confiscation of goods used for concealing illicit drugs or substances
Section	62	Confiscation of sale proceeds of illicit drugs or substances
Section	63	Procedure in making confiscations
Section	68 Q & 73	Bar of jurisdiction

Decisions of the Hon'ble Court touching disposal of property seized under NDPS Act

NDPS – vehicles seized must not be released :

In the case of **Union of India v. Dinesh Kumar Verma**[140] Hon'ble Apex Court held that the vehicles which were seized in connection with offence under NDPS Act must not be released during pendency of trial.

Owner or her husband not accused – Release of truck :

In the case of **Mahadev Das Vs Union Of India**[141] It is observed by Hon'ble Patna High Court that neither the owner of the truck nor her husband has been made accused in the case, it is directed that the truck may be released in favour of the owner and custody thereof be given to the husband, on furnishing sufficient security as also filing of an undertaking.

Release of vehicle on conditions pending trial:

In the case of **Sukhdev Singh vs The Union Of India & Anr**[142] Hon'ble Patna High Court observes that so far as the power to confiscate the truck in question under Section 60 of the NDPS Act is concerned, it is a settled legal position that Section 60 of the NDPS Act would come into play after conclusion of trial. In case, the trial court comes to a conclusion that the accused persons are guilty of the offences under the NDPS Act, the vehicle used in the illegal trade of contraband articles can be confiscated. If the truck is not released and kept idle in an open space

140. (2005) 9 SCC 330

141. 2008 (4) PLJR 47

142. Decided on 18 September, 2017 in Criminal Miscellaneous No.40514 of 2016

during pendency of the trial, it shall become a piece of scrap. The vehicle is ordered to be released on conditions.

NDPS Act not exclude operation of S. 451/457 CRPC :

In the case of **B.S. Rawant, Asst. Collector of Customs, Bombay Versus Shaikh Abdul Karim and another**[143] Hon'ble Bombay High Court observes that the vehicle has not been produced before the Magistrate. The vehicle has also not been taken charge of by virtue of any warrant issued. It is clear that an officer of the Customs has seized this vehicle under section 42 read with 43 of the NDPS Act, 1985 and by virtue of section 53 he is empowered as if he is an officer-in-charge of a police station. Under section 55 he shall take charge of and keep the same in safe custody and the vehicle shall be detained or kept sealed within the local area of the police station and the same shall be "pending the orders of the Magistrate". Section 51 of the NDPS Act, 1985, says that the provisions of the Criminal Procedure Code will not apply, if they are inconsistent with the provisions of this Act in respect of warrants issued and arrests, searches and seizures made under this Act. These provisions not exclude the operation of section 451 or 457(1) of the CR.P.C Undersections 60 and 63 such an article or vehicle used for the purpose of commission of an offence under this Act is liable for confiscation. In other words, the Article or the vehicle must be available at the time of the trial or at the end of the trial for the purpose of confiscation. It does not mean that the vehicle shall always remain at the concerned police station pending the trial. Since there is no provision under the Act prohibiting interim custody and if section 451 or 457(1) of the CRPC is not inconsistent with the provisions of this Act, it will be applicable.

In the case of **Kishore Kumar Choudhury vs State Of Orissa,**[144] Hon'ble Orissa High Court observes that provision in Section 51 of the Act makes it clear that the provisions of the CRPC will not apply if they are inconsistent with the provision of the Act in respect of warrants issued, arrests, searches and seizures made under the Act. There is provision in Section 55 of the Act interdicting an Officer-in-charge of a Police Station to take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of the Police Station and which may be delivered to him. There is no express provision in the act for release of the property like vehicle or conveyance in interim custody of a rightful owner. Provision contained in Section 51 of the Act does not expressly bar operation of the provision of the CRPC if they are not inconsistent with the provision of the Act. Taking into consideration the stage of the confiscation proceeding in the scheme of the trial as provided under Section 60(3) of the Act, safe custody of the articles seized and delivered to a police officer under Section 55 of the Act pending order of the Magistrate, absence of any specific provision in the Act for release of valuable articles like vehicle etc. in the interim custody of the registered owner and especially in view of the mandate for confiscation of a vehicle or conveyance after the trial is concluded and further fact that the commercial price of such an article is to be protected in the interest of justice, operation of Sections 451 and 457 CRPC is not specifically excluded by Section 51 of the Act.

143. (2005) 9 SCC 330

144. Decided on 20 March, 2017,Criminal Revision 71 of 2017

In the case of **Abhijeet Kumar v. State of Uttarakhand[145],** Hon'ble Uttarakhand High Court observes that in the absence of any provision, which bars from release of any vehicle seized, there appears no reason to keep the vehicle in Police custody until the conclusion of the trial. There are various issues related with the upkeep of such articles specially a vehicle. This Court is of the view that the provision of Section 60 of the Act at all does not debar from releasing a vehicle during pendency of the trial. The provision of Section 60 of the Act and Section 451 of the Code, act in different spheres. It is the matter of interim custody only".

Protection of innocent owner envisaged under NDPS Act :

In the case of **B.S. Rawant, Asst. Collector of Customs, Bombay Versus Shaikh Abdul Karim and another[146]** Hon'ble Bombay High Court observes that the object of the Act is to see that the vehicle which is used for such an offence is not made available to the persons who have indulged in these activities. They shall not have the benefit of such a vehicle. By and large if an accused person is himself the owner of the vehicle and he uses such a vehicle for the purpose of conveying the drugs, then of course, it is possible for the prosecution to contend that it is against the interest of justice that such a vehicle be given to the accused pending the trial. But in a given case, it might be that a vehicle belonging to an innocent owner is stolen by the accused and in that event, later on, if the vehicle is intercepted and seized by the officer, it does not mean that such an owner has to wait till the trial is completed, for the purpose of getting an order of return of the vehicle from the Magistrate. In such cases, subject to a guarantee that the vehicle becomes available for the purpose of confiscation, if any, the Court has necessarily the jurisdiction to pass an order for interim custody either under section 451 or 457(1) of the CRPC, as the case may be. An order under section 451 of 457(1) of the CRPC guarantees return of the vehicle at time of the final hearing of the matter, or as and when called upon by the Court, it secures, subject to certain terms and conditions, the interim custody of the vehicle, pending the trial. In fact, the operation of section 451 or 457(1) of the CRPC comes into existence only after the vehicle is seized and brought into, safe custody, as provided under section 55 of the Act. If that is so, it cannot be said that section 451 or 457(1) of the CRPC is not any way inconsistent with the scheme of the Act. If two interpretations are possible in respect of any provision of law, particularly where it seeks to affect one's property or liberty, one depriving them altogether unreasonably and the other ensuring them without defeating the object of law, the latter will have to be preferred to the former. The NDPS Act does not contemplate exclusion or extinction of an innocent owner's right. He has a right to be heard both under section 60(3) and under section 63 of the Act, with a further right of appeal under section 63(3) of the Act. That must necessarily mean that in a deserving case he has a right to interim custody, which, in the absence of any provision under the Act, can only be granted by the exercise of powers either under section 451 or under section 457(1) of the CR.P.C

145. 2019 SCC OnLine Utt 265

146. 1989 SCC OnLine Bom 33

4. Essential Commodities Act 1955 :

Salient Provisions of the Act :

This Act was enacted with a purpose to ensure adequate supplies of food items essential for survival. Stringent provisions have been introduced in the Act to deal with contraventions of the Law. Certain salient provisions of the Act with respect to seizure and confiscation are discussed here.

Section 6 – A[147] provides for confiscation of food grains, edible oil seeds etc and 6 – B provides for the procedure of notice.

147. 6A. Confiscation of foodgrains, edible oilseeds, edible oils, etc. –

(1) Where any essential commodity is seized in pursuance of an order made under section 3 in relation thereto it shall be reported without any unreasonable delay to the Collector of the district in which such essential commodity is seized and the Collector may, if he thinks it expedient so to do, inspect or cause to be inspected such essential commodity, whether or not the prosecution is instituted for the contravention of such order and the Collector, if satisfied that there has been a contravention of the order, may order confiscation of

(a) the essential commodities so seized;

(b) any package, covering or receptacle in which such essential commodity is found; and

(c) any animal, vehicle, vessel, or other conveyance used in carrying such essential commodity:

Provided that, without prejudice to any action which may be taken under any other provision of this Act, no foodgrains or edible oilseeds seized in pursuance of an order made under section 3 in relation thereto from producer shall, if the seized foodgrains or edible oilseeds have been produced by him, be confiscated under this section.

(2) Where the Collector, on receiving a report of seizure or in inspection of any essential commodity under sub-section (1) is of the opinion that such essential commodity is subject to speedy and natural decay or that it is otherwise expedient in the public interest so to do, he may order the same to be sold at the controlled price, if any, fixed under any law for the time being in force.

(3) In the case of foodgrains, where there is no controlled price, the Collector if he thinks fit, may order the foodgrains seized under sub-section (1) to be sold through fair price shops at the price fixed by the Central Government or the State Government, as the case may be, for the sale of such foodgrains to the public through these shops or may order such foodgrains to be sold by public auction.

(4) The Collector shall whenever it is practicable so to do having regard to the nature of the essential commodity take and reserve sample of the same in the prescribed manner before its sale or distribution.

(5) Where any essential commodity is sold as aforesaid the sale proceeds thereof, after deduction of all expenses of the sale or auction, as the case may be, shall

(a) where no order of confiscation is ultimately passed by the Collector; or

where an order passed on appeal under sub-clause (1) of section 6-C so requires; or

(b) in the case of prosecution being instituted for the contravention of the order in respect in the case of prosecution being instituted for the contravention of the order in respect of which an order of confiscation has been made under this section and where the person concerned is acquitted, be paid to the owner thereof or the person from whom it is seized:

(c) Provided that in the case of foodgrains sold through fair price shops in accordance with sub-sections (2) and (3) the owner shall be paid for the foodgrains so sold, the price fixed by the State Government, for retail sale of such foodgrains through such shops less all expenses of sale or auction under sub-sections (2) and (3).

(6) Not withstanding anything to the contrary contained in the Code of Criminal Procedure, 1973 (2 of 1974) when Collector or the appellate authority is seized with the matter under this section no Court shall entertain any application in respect of essential commodities, any package, covering, receptacle, any animal, vehicle or other conveyance used in carrying such commodities as far as its release, distribution, etc., is concerned and the jurisdiction of Collector or the appellate authority with regard to the disposal of the same shall be exclusive.

Section 6 – E - Bar of jurisdiction in certain cases.

Whenever any essential commodity is seized in pursuance of an order made under section 3 in relation thereto, or any package, covering or receptacle in which such essential commodity is found, or any animal, vehicle, vessel or other conveyance used in carrying such essential commodity is seized pending confiscation, the Collector have jurisdiction to pass orders. The Civil Court has no jurisdiction to make orders with regard to the possession, delivery, disposal, release or distribution of such essential commodity, package, covering, receptacle, animal, vehicle, vessel or other conveyance.

Section 12 B prohibits civil court from granting injunction against the order.

Decisions of Hon'ble Courts concerning the power to release seized articles and other allied matters.

Jurisdiction of Criminal Court ousted in confiscation proceedings :

In the case of **State of Maharashtra vs Manishkumar Babulal Biyani**[148] Hon'ble Bombay High Court held that the provisions of Section 6-E and 7 of the Essential commodities Act show that the jurisdiction of the Court or Tribunal or any other authority is ousted only if the essential commodity is seized and confiscation proceeding under Section 6-A is pending before the Collector and /or before the State Government.

In the case of **Vishnu Prasad Vaishnav vs State of Chattisgarh**[149] Hon'ble Chattisgarh High Court has held that whenever any essential commodity is seized under an order made in exercise of powers conferred by Section 3 of the Essential Commodities Act, in relation thereto, no Court, Tribunal or Authority shall have jurisdiction to make any order with regard to possession, delivery, disposal, release or distinction of such essential commodity saved and except the Collector pending confiscation under Section 6-A of the Essential Commodities Act, therefore, in

(7) The State Government may, by notification in the Official Gazette, authorise any officer not below the rank of Sub-divisional Magistrate, to discharge all or any of the functions of a Collector under this section.

(8) The Collector shall for the purposes of this Act have the same powers as are vested in a Court under the Code of Civil Procedure, 1908 (5 of 1908), when making enquiries under this section in respect of the following matters, namely:

(a) receiving evidence on affidavits;

(b) summoning and enforcing the attendance of any person and examining him on oath; and

(c) compelling the production of documents.

(d) Summoning and enforcing the attendance of any person and examining him on oath; and

compelling the production of documents

(9) All enquiries and proceedings under this section before the Collector and the appellate authority shall be deemed to be judicial proceeding and while discharging functions under this section the Collector and the appellate authority shall be deemed to be a Court.

Explanation. - For the purposes of this section the Collector shall include Additional Collector and any officer specially authorised under sub-section (7). Bihar Act 9 of 1978

148. 1998 (1) MHLJ 431

149. 2015 (1) CGBLJ 40

the matter of making orders with regard to disposal of seized vehicle in pursuance of the order made under Section 3 of the Act, only the Collector or Judicial Authority as case may be shall have jurisdiction to make order with regard to disposal of such vehicle.

Pending confiscation - Collector not empowered to order release in owner's favour :

In the case of **Shambhu Dayal Agarwala Vs. State of West Bengal & Anr**[150] Hon'ble Apex Court held that whenever any essential commodity is seized pending confiscation under Section 6-A of the E.C, Act, the Collector has no power to order release of the commodity in favour of the owner. It held that no unqualified and unrestricted power has been vested on the Collector to release the commodity in the sense of returning it to the owner or person from whom it was seized even before the proceeding for confiscation stood completed and before the termination of the prosecution in the acquittal of the offender. Such a view would render Clause (b) of Section 7(1) totally nugatory and would completely defeat the purpose and object of the Act. The view that the Act itself contemplates a situation which would render Clause (b) of Section 7(1) otiose where the essential commodity is disposed of by the Collector is misconceived. Section 6-A of the E.C. Act does not empower the Collector to give an option to pay, in lieu of confiscation of the essential commodity, a fine not exceeding the market value of the commodity at the date of seizure, as in the case of any animal, vehicle, vessel or other conveyance seized along with the essential commodity. Only a limited power of sale of the commodity in the manner prescribed by Sub- section (2) of Section 6A is granted. The power conferred by Section 6-A(2) to sell the essential commodity has to be exercised in public interest for maintaining the supply and for securing equitable distribution of essential commodities. Only a limited power of sale of the commodity in the manner prescribed by Sub-section (2) of Section 6A is granted. This shows that the legislature did not intend to confer a power on the Collector to return the essential commodity to the owner or the person from whose possession it was seized.

Only writ jurisdiction available to interfere in the confiscation proceedings under Essential Commodities Act :

In the case of **Baleshwar Ray vs State of Bihar**[151] Hon'ble Full bench of Hon'ble Patna High Court pleased to hold that no Court, even the High Court under the extraordinary powers under Section 482 of the CRPC, shall have any jurisdiction to direct for release of any seized article during the pendency of the confiscation proceedings. Article 226 of the Constitution of India provides power to the High Court to issue writs to any person or authority, including in appropriate cases, any Government, for the enforcement of any of the rights conferred by Part-III and for any other purpose. Article 227 of the Constitution of India provides the power of superintendence over all Courts and Tribunals throughout the territories in relation to which any High Court exercises its jurisdiction. The powers of the High Court under Articles 226 and 227 of the

150. (1990) 3 SCC 549

151. 2018 (4) PLJR 970

Constitution of India cannot be curtailed under any circumstance, as the power flows from the Constitution itself. No statutory bar can affect the power of the High Court under Articles 226 and 227 of the Constitution of India. Despite such wide and untrammeled powers, without any circumcision by external restrictions, the Courts have evolved certain self-imposed limits while exercising these powers. The High Courts, normally, would not go beyond justified inhibitions under any Statue except where there is a complete jettisoning of rule of law or under exceptional circumstances which demand timely judicial interdict. This inhibition is basically ordained, keeping in mind that there is a national weal behind any valid piece of Legislation incorporating and inhering in it, the social objective behind any Legislation. Though, no limitations or fetters have been put on the powers of the High Court under Articles 226 and 227 of the Constitution of India, as the High Courts perform as sentinel on the qui-vive, but such power is not to be exercised casually and without coming to the conclusion that non- exercise of such power would lead to positive injustice. Times without number, it has been held by the High Courts that only under condition of a person establishing that substantial injustice has or is likely to ensue, such extraordinary powers can be exercised. It needs no adumbration that the plenary powers of the High Court have only to be exercised in the interest of justice. Thus, an order of release may be passed under Article 226/ 227 of the Constitution of India, even pending confiscation proceedings, but only when it is established before the Court that the procedure prescribed and the law in that regard has been completely flouted and that there is complete violation of the procedure prescribed for confiscation, viz., notice to the offender before confiscation, allowing him opportunity of giving written representation and affording hearing on the issue to him and that such injustice cannot be remedied without the exercise of the extraordinary power. Under Article 226 of the Constitution of India, the Court will not go into the disputed question of facts. Thus, the powers directing for release of the vehicles or goods, during the pendency of the confiscation, can only be sparingly exercised under monstrous situations and circumstances when injustice occurs because of non-fulfillment of the conditions for confiscation.

No procedural violation – seized goods not to be released :

In the case of **Mohammad Jahangir vs. The State of Bihar**[152] Hon'ble Patna High Court observes that the release of goods seized should not normally be ordered in exercise of jurisdiction under Articles 226 and 227 of the Constitution of India. It is only in rare and exceptional cases that such a direction would be issued. If the seizure is wholly outside the provision of the Control Order or the EC Act an order for release of the commodity can be passed in exercise of jurisdiction under Article 226 of the Constitution of India. There is nothing to demonstrate flouting of any procedure in seizure or notice or substantial injustice or exceptional circumstance to invoke the writ jurisdiction. Hon'ble Court decided that no case for issuance of mandamus for the release of bags containing wheat during the pendency of the confiscation proceeding is made out in view of

152. Civil Writ Jurisdiction Case No. 4479 of 2020 Decided on 30/04/2020

judgment of Hon'ble Apex Court in **Shambhu Dayal Agrawal case** *(supra)* and Hon'ble Full bench judgment in **Baleshwar Roy Vs. State of Bihar case[153].**

Mere reporting is sufficient, not actual physical production :

In the case of **Kanhai Lal Bhagat vs. The State of Bihar and Ors[154]** it is observed by Hon'ble Patna High Court that It cannot be conceived that the intention of Parliament was that, before the power under that section could be exercised, the seized food grains, which might weigh several thousand quintals in some cases, have to be physically produced before the Collector. This does not mean physical production of the articles in question in every case: what it means is that the seizure of the articles in question should be reported to the Collector.

Collector not empowered to release vehicle till conclusion of trial and, if no prosecution launched, till he decides not to confiscate :

In the case of **Baleshwar Ray vs State of Bihar[155]** Hon'ble Patna High Court has been pleased to hold that the Collector does not have the authority to release the vehicle even after the confiscation proceedings are over and there is no order of confiscation of the vehicle as it must await the verdict of the Court where the prosecution has been launched and the Court concerned only has the power to direct for its forfeiture. If the vehicle is released by the Collector, then it shall not remain in actual physical position for the Court to pass any order of forfeiture. The Collector does not have the power to release the vehicle, vessel or other conveyance till the conclusion of the criminal prosecution and if no prosecution is launched, until when the Collector decides not to confiscate the vehicle, and if the order of confiscation is passed, then only on the annulment of the aforesaid order of confiscation by the Appellate Authority.

District Magistrate competent to pass order of confiscation :

In the case of **Baleshwar Ray vs. State of Bihar[156]** Hon'ble Patna High Court observes that the District Magistrate-cum- Collector while passing the order of confiscation under the Essential Commodities Act is not passing an order of punishment or penalty and therefore, it cannot be said that the District Magistrate would not be competent to pass an order of confiscation as the 'confiscation' is not an order of 'punishment' or 'penalty'.

Confiscation order of vehicle justified, but not the sale thereof :

In **Bishwanath Singh & Ors. vs. State of Bihar & Ors[157]**. Hon'ble Patna High Court observes that the seized vehicles were sold pending confiscation proceedings. Hon'ble Court though justified the order of confiscation on the ground that the police report clearly disclosed that

153. Supra at152

154. 1976 BBCJ 15

155. Supra at 152,154

156. Ibid

157. 1978 (26) BLJR 717

huge quantity of food grains was being carried in the vehicles and since the Collector had taken note of the aforesaid police report, it would be presumed that the Collector was satisfied that the order in that regard, under Section 3 of the Act, was contravened and that the petitioners were not agriculturists or consumers. However, the sale of the vehicle was not justified on this view that if ultimately the criminal case would fail, then the vehicles will have to be returned to the owner thereof.

Difference between forfeiture of the property with respect to which the offence under Essential Commodities Act committed and the forfeiture of the any other property :

In the case of **Baleshwar Ray vs The State Of Bihar & Ors**[158] Hon'ble Court has been pleased to clarify the minute difference between forfeiture of the property with respect to which the offence under Essential Commodities Act committed and the forfeiture of any other property. A distinction in this regard has been made between forfeiture of any property or vehicle/conveyance. A property in respect of which the order is said to have been contravened is required to be forfeited to the Government, but package, covering or receptacle in which the property is found or the vehicle/conveyance used in carrying the property could be forfeited only by the specific order of the Court.

No finding as to violation of statutory order – confiscation quashed, vehicle released :

In the case of **Ranjit Kumar vs State of Bihar**[159] Hon'ble Patna High Court observes that merely the food grains bags found bearing F. C. I. marking does not mean that there is any violation of any statutory order. In absence of any finding of any violation of any statutory order, the order of confiscation cannot be sustained. The petitioners' Tractor with Trailor has to be released to the petitioners.

Distinction between the word RELEASE and RETURN in EC Act :

In the case of **Shambhu Dayal Agarwala**[160] It has been held by Hon'ble Apex Court that while debarring courts, tribunals and other authorities from exercising power in relation to the seized commodity, power is conferred on the Collector or the State Government concerned under Section 6-C, to make orders with regard to the possession, delivery, disposal, release or distribution of such commodity, etc. This power can be exercised pending confiscation. The power conferred by this section is unqualified. The word 'release' is preceded by the words 'possession, delivery and disposal' and followed by the word 'distribution'. The setting and context in which the word 'release' is used makes it clear that it is not used in the sense of 'return'. In the first place as pointed out earlier it would completely defeat the purpose and object of the Act if the essential commodity seized for suspected contravention of the order made under Section 3 is returned to the owner or person from whom it was seized even before the confiscation proceedings

158. Supra at 152, 154, 156, 157

159. 2014 (1) PLJR 74

160. Supra at 151

were completed. There could be no question of releasing the commodity in the sense of returning it to the owner or person from whom it was seized even before the proceeding, for confiscation stood completed and before the termination of the prosecution in the acquittal of the offender.

Interim release of vehicle – subject to final outcome of confiscation :

In the case of **Ravi Kumar Patel vs. State of Bihar**[161] Hon'ble Patna High court observed that allowing the vehicles to turn obsolete would benefit none rather it would only lead to losses and directed the provisional release of the vehicles subject to furnishing of supporting papers of ownership and security as deem fit and proper by the authorized officer and which release obviously would be subject to final outcome of the confiscation proceedings.

5. Forest Act 1927 :

Provisions under Forest Act and Bihar Amendment Act: The object of the Act is to preserve the vegetation which is crucial for existence of life. Some of the relevant provisions of legislation governing forest matters are reproduced hereinafter

Indian Forest (Bihar Amendment) Act 1989 :

Section 56	Disposal on conclusion of trial for forest related offence, of produce in respect of which it was committed.
Section 57	Magistrate's power to order confiscation of property in case of offender not traced and power to make over to the person entitled
Section 58	Procedure as to perishable property seized under section 52 by Magistrate
Section 59	Appeals
Section 60	Property when to vest in Government
Section 61	Saving of power to release in certain cases
Section 81	Failure to perform service may lead to confiscation of such share

Bihar Private Forest Act 1947 :

Provisions have also been made under this Act to preserve forest and regulating the use of forest produce. Some of the important provisions are reproduced here

Section 51	Seizure of property liable to confiscation
Section 53	Power to release property seized under Section 51
Section 54	Trees, timber, forest-produce, tools, etc, when liable to confiscation
Section 55	Disposal on conclusion of trial for forest offence of produce in respect of which it was committed.
Section 56	Procedure when offender not known or cannot be found
Section 57	Procedure as to perishable property seized under Section 51

161. 2015 (1) PLJR 844

Section 59 Property when to vest in the [State] Government.

Section 60 Saving of power to release property seized

Bar of Jurisdiction :

Section 52 C of Indian Forest (Bihar Amendment) provides that no Court, tribunal or authority except the authorized officer will have jurisdiction to make orders with regard to possession, delivery, disposal or distribution of the property, on receipt of intimation about initiation of proceeding for confiscation of property by the Magistrate having jurisdiction to try the offence. If two or more courts have jurisdiction to try forest offence, then on receipt of intimation by one of the Courts of Magistrates having such jurisdiction shall be construed to be receipt of intimation under that provision by all the Courts and the bar to exercise jurisdiction shall operate on all such Courts. This however does not affect the powers of certain officers to release.

Decisions of Hon'ble Courts touching various issues on the subject :

Release of Sandalwood – Proper course u/s 451 CRPC and not writ jurisdiction :

In the case of **S. P. Forest Cell, Adyar and anr. Vs. M/S. Kannans Co**[162] involving sandalwood It is observed by Hon'ble Apex Court that the seized goods have been produced before the concerned criminal court, then for the custody of the same Section 451 of the Criminal Procedure Code is the proper course. This Section empowers the criminal court to order for custody and disposal of property pending trial. Even if there be a dispute as in the present case whether the seized good is the property in the pending criminal case it is that criminal court alone who would be competent to adjudicate and decide the issue and writ jurisdiction should not be invoked.

S. 451 CRPC not applicable in Forest Act

In the case of **Laxmi Prabha Rakesh vs. State of U.P.**[163] and Another it is observed by Hon'ble High Court of Allahabad that section 52D of U. P. Act 1 of 2001 to the Indian Forest Act, 1927 as applicable in State of U. P. is similar to the Section 52C of M. P. Act (25 of 1983) of the Act, 1927.Relying on the decision of **State of M. P. v. Uday Singh**[164], it is held that the jurisdiction under Section 451 CRPC is not available to the Magistrate and the petition was rightly rejected.

Mere accusation of forest offence – Not divest the court of power to release :

In the case of **State of M.P. Vs. Madhukar Rao**[165]; Hon'ble Apex court observed that the provisions of Section 50 of the Act and the amendments made thereunder do not in any way

162. (2001) 9 SCC 209

163. 2020 SCC OnLine All 135

164. 2019 SCC OnLine SC 420

165. 2008 (1) SCALE 231, reiterated with approval in Chief Conservator of Forest Versus J. K. Johnson & Ors. In CIVIL APPEAL NO. 2534 OF 2011 decided on 17/10/2011, (2011) 10 SCC 794

affect the Magistrate's power to make an order of interim release of the vehicle under Section 451 of the Code. It was held that the provision of Section 39(1)(d) would come into play only after a court of competent jurisdiction found the accusation and the allegations made against the accused as true and recorded the finding that the seized article was, as a matter of fact, used in the commission of offence. Any attempt to operationalise section 39(1)(d) of the Act merely on the basis of seizure and accusations/allegations leveled by the departmental authorities would bring it into conflict with the constitutional provisions and would render it unconstitutional and invalid.

Provisions of special Act prevail upon general power of court to release

In the case of **Divisional Forest Officer and anr. vs. G.V. Sudhakar Rao and ors[166].** Hon'ble Supreme Court observed that the general provisions of CRPC investing a Magistrate to make an order for disposal of property seized by a Police Officer and not produced before a Criminal Court during an inquiry or trial, must necessarily yield where a statute makes a special provision with regard to forfeiture of any property and its disposal. It is also observed that only because a criminal case was filed by the forest range officer didn't imply that the Authorised Officer (DFO) was bereft of his power and authority to direct confiscation of the seized timber and the implements etc. under Sub-section (2A) of Section 44 of the Act if he was, satisfied that a forest offence had been committed. It is also held that combined reading of the various subsections of Section 44, Section 45 and Section 58A of the Act make it clear that the legislature provides for two separate proceeding before two different forums and there is no conflict of jurisdiction. The conferral of power of confiscation of seized timber or forest produce and the implements etc. on the Authorized officer under Sub-section (2A) of Section 44 of the Act on his being satisfied that a forest offence had been committed in respect thereof, is not dependent upon whether a criminal prosecution for commission of a forest offence has been launched against the offender or not. It is a separate and distinct proceeding from that of a trial before the Court for commission of an offence.

Magistrate not empowered to order interim release under Forest Act:

In the case of **State of Karnataka v. K.A. Kunchindammed[167]**, Hon'ble Apex Court has observed that where the Authorized Officer is empowered to confiscate the seized forest produce on being satisfied that an offence under the Act has been committed thereof the general power vested in the Magistrate for dealing with interim custody/release of the seized materials under CRPC has to give way. The Magistrate while dealing with a case of any seizure of forest produce under the Act should examine whether the power to confiscate the seized forest produce is vested in the Authorized Officer under the Act and if he finds that such power is vested in the Authorized

166. AIR 1986 SC 328

167. (2002) 9 SCC 90

Officer then he has no power to pass an order dealing with interim custody/release of the seized material. If in such cases power to grant interim custody/release of the seized forest produce is vested in the Magistrate then it will be defeating the very scheme of the Act.

No interim release of Vehicles seized under the Act :

In the case of **Harun v. State of Rajasthan**[168] It is held by Hon'ble Rajsthan High Court that the vehicle seized under the provisions of the Forest Act cannot be released during the pendency of trial on supurdgi to the registered owner by the Magistrate, where the trial is pending, in view of specific bar to jurisdiction of Court under section 52C of the Act. But, the bar to jurisdiction operates only when a Magistrate receives intimation under sub-section (4) of Section 52 about initiation of proceedings for confiscation.

In the case of **Ghatge Patil Transport Limited, vs The State of Maharashtra case**[169] Hon'ble Bombay High Court has observed that when any vehicle was seized on the allegation that it was used for committing a forest offence, the same shall not normally be returned to a party till the culmination of all the proceedings in respect of such offence, including confiscatory proceedings.

Bank Guarantee minimum condition for release in forest cases :

In the case of **State of Karnataka v. K. Krishnan**[170] it is observed by Hon'ble Apex Court that in matters relating to forest offence the provisions of the Act should be strictly complied with and generally the seized forest produce and the vehicle, boat, tools etc. used in commission of forest offence shouldnot be released and even if the Court directed to release the same, the authorized officer must specify reasons therefor and must insist on furnishing of bank guarantee as the minimum condition.

Stone dust loaded on truck with valid challan, confiscation improper :

In the case of **Arvind Kumar Singh vs State of Bihar**[171] It is held by Hon'ble Patna High Court that the trucks loaded with stone dust having valid challan for transportation wrongly confiscated overlooking these facts. The order of confiscation was set aside and trucks were released on conditions.

In the case of **Digvijay Kumar Singh vs. State of Bihar**[172] It is held by Hon'ble Patna High Court that the confiscation order passed by the forest authority was without proper consideration of the fact that the driver was having a valid challan. The vehicle was ordered to be released provisionally on conditions.

168. 2015 SCC OnLine Raj 3740
169. Writ Petition No.1426 of 2007 decided, on 29 November,2007
170. 2000 CriLJ 3971
171. 2019 (2) PLJR 912
172. 2019 (3) PLJR 881

Stone chips are not forest produce :

In **Alok Kumar Singh vs State of Bihar**[173] Hon'ble Patna High Court observes that stone chips are not forest produce, rather it comes under minor minerals. Section 33, 41 and 42 of the forest Act are not applicable. The trucks loaded with the stone chips are ordered to be released.

Quick Lime Is Not A Forest Produce :

In the case of **M/s Pappu Chemicals & Minerals & Anr. vs The State of Bihar**[174]**,** it is observed by the Hon'ble Patna High Court that quicklime is calcium oxide and not calcium carbonate. Calcium oxide can be had by converting calcium carbonate through heating process. Therefore, until such time heat is applied to calcium carbonate, calcium carbonate remains calcium carbonate. Even thereafter the same remains calcium carbonate, until the heating process converts the same into calcium oxide. Heating process changes the chemical composition of lime stone into quicklime and accordingly, calcium carbonate becomes calcium oxide.

Release of vehicle on Bank guarantee, not improper :

In the case of **Sriprakash @ Pinku Singh vs. State of Bihar**[175] Hon'ble Court refused to entertain the petition and held that the order of furnishing bank guarantee by the concerned authority for the release of the vehicle seized for offence under forest Act was not faulted.

Initiation of confiscation ousts the criminal court jurisdiction :

In the case of **State of West Bengal v. Sujit Kumar Rana**[176] Hon'ble Apex Court observes that once a confiscation proceeding is initiated the jurisdiction of the criminal court in terms of Section 59-G (Bengal Amendment) of the Act gets barred. The provisions of S. 482 CRPC is not applicable, however there does exist power of Judicial Review by the High Court.

In the case of **State vs Vijay Kumar**[177]**,** it is held by Hon'ble Patna High Court that in the case involving forest offence, the jurisdiction of criminal court has been ousted with regard to entertaining and considering the matter of release once a confiscation proceeding has been initiated in terms of section 52 C.

In the case of **Enamul Haque and others vs. The State of Bihar and others**[178] Hon'ble Patna High Court (Ranchi Bench) observes that if it is accepted that in spite of provision of Section 52C the Criminal Court will have power to pass interim order of release of the forest produce or the vehicle in such a situation the provisions of Section 52C will become otiose and redundant and very object of the amended provisions will be frustrated. The provisions of Code of criminal

173. 2019 (4) PLJR 236

174. 2009 (2) PLJR 500

175. 2013 (3) PLJR 11

176. 2004 (2) PLJR 96

177. 2012 (2) PLJR 676

178. 1995 SCC OnLine Pat1:(1995)2 PLJR 153

Procedure dealing with the disposal of the property have to give way to the special provisions contained under the Forest Act as brought by the State Amendment. Hon'ble Court relied on the Hon'ble Apex Court Judgment in the case of **Divisional Forest Officer v. G. V. Sudhakar Rao**[179] and hold that once the confiscation proceeding has been initiated and the matter has been brought to the notice of the Magistrate, by the authorized forest officer the jurisdiction of the Criminal Court is ousted to pass any order for disposal of the property which includes forest produce as well as the vehicle etc. used in the commission of the offence.

In the case of **Md. Akhtar and Ors. vs State of Bihar and Ors**[180] Hon'ble Patna High Court observes that when confiscation proceedings are initiated after seizure of the specified forest produce, the Magistrate has no power to order release of the vehicle.

Writ Jurisdiction not curtailed by S 52 – C :

In the case of **Enamul Haque and others vs. The State of Bihar and others**[181] Hon'ble Court observes that Articles 226 & 227 of the Constitution of India are one of such provisions which can be curtailed only by amendment in the Constitution. The State amendment brought by State Act cannot curtail or take away this power. Yet this power has to be exercised on well established principles and not arbitrarily. The object must be to see that authorities and tribunals act within the bound of their jurisdiction. No writ can be issued to frustrate the object of the Act or to make a valid statutory enactment otiose and redundant. In cases where on the face of material it appears that the confiscation proceeding is unjustified and wholly illegal then it can be used to rescue the aggrieved persons but issuance of writ in all the cases releasing the vehicle or forest produce during the pendency of the confiscation proceeding before the authorised officer under the Forest Act will result in miscarriage of justice. It will frustrate the object of the Act. When the parties approach court for release of the forest produce or the property including vehicles used in commission of the offence with regard to which the confiscation proceeding is pending, direction to the confiscating agency may be given to dispose of the proceeding at an earliest for the simple reason that once the confiscation proceeding is concluded the aggrieved person has right of appeal and the Appellate Court has power to pass an interim order. The provisions of Section 52 clearly shows that the legislature never intended that the forest produce and the articles used in commission of the offence should be released in course of confiscation proceeding. However, when there is unreasonable delay resulting in miscarriage of justice the Court in appropriate case may release the vehicle till the conclusion of the confiscation proceeding with a clear stipulation that if an order for confiscation has been passed after conclusion of the confiscation proceeding the vehicle and the forest produce should be produced before the confiscating authority.

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179. Supra at 167

180. 1995 (2) East Cr.C. 345

181. Supra at 179

Intimation of confiscation – Power of CrPC not available :

In the case of **State of Madhya Pradesh vs. Uday Singh and others**[182] Hon'ble Supreme Court observes that the Madhya Pradesh amendments to the Indian Forest Act 1927 are infused with a salutary public purpose. Protection of forests against depredation is a constitutionally mandated goal exemplified by Article 48A[183] of the Directive Principles and the Fundamental Duty of every citizen incorporated in Article 51A(g)[184]. It is also observed that By isolating the confiscation of forest produce and the instruments utilized for the commission of an offence from criminal trials, the legislature intended to ensure that confiscation is an effective deterrent. The absence of effective deterrence was considered by the Legislature to be a deficiency in the legal regime. As an effective tool for protecting and preserving environment, these provisions must receive a purposive interpretation. The avarice of humankind through the ages has resulted in an alarming depletion of the natural environment. Hon'ble Court has pleased to hold that upon receiving the intimation of the initiation of the confiscation proceedings, the jurisdiction of the magistrate is barred by virtue of Section 52-C (I) . Hence neither the power under section 482 CRPC nor the power under section 451 CRPC was available once the authorized officer-initiated confiscation proceedings.

Seizure of vehicle not in protected forest – Release :

In the case of Universal Engineers vs State of Bihar[185] it is observed by Hon'ble Patna High Court that it would appear from the notice, initiating confiscation proceeding that the place of seizure has not been mentioned as any protected forest area. On the contrary, the notice states that the truck was seized from Falgu - Rajgir road. It is also not in dispute that the driver produced a challan issued by a lease holder for quarrying stone metals for which he seems to have valid licence. Even if challan issued by lease holder is false, it would be latter, who would be responsible for the same. There is no material to allege that the owner was at least aware about the challan might be fake. Even assuming the prosecution case to be true, there is no material to show that the petitioner was having any knowledge that the metal chips are being extracted from the forest area or from unleased land. Rather, the driver was instructed to load metal chips from valid lease holder. The truck has already remained in seizure for over nine years. A reasonable satisfaction is not a state of mind attained or established independently of nature and consequences of the facts to be proved. Hon'ble court directed to release the truck.

Statute doesn't exclude confiscation of vehicle :

In the case of **State Of Madhya Pradesh vs Swarop Chandra**[186] Hon'ble Apex Court

182. AIR 2019 SC 1597

183. Article 48(A) : "The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country."

184. Sub-clause (g) of Article 51A provides : "It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures."

185. 2010 (3) PLJR 678

186. Decided on 24 September,1996 in Civil Appeal No. 1380 of 1988

observes that when the Act is made with a view to prevent illicit transportation of the forest produce or the specified forest produce and seizure and confiscation have been provided for, it couldn't be said that the legislature intended to exclude the confiscation of the container, vehicle or receptacles or boats, carts or tools, used for carriage of the specified forest produce in contravention of the provisions of the Act.

No evidence for illegal use of vehicle – Collector Order to release upheld

In the case of **Banshi Singh vs. State of Bihar**[187] Hon'ble Patna High Court observes that there is no material, or statement to show that the vehicle was being illegally used, with the knowledge or consent of petitioner. The vehicle was standing in petitioner's name and not in his son's name. Order of Principal Secretary, Department of Environment and Forest is set aside and the order of the Collector, Aurangabad to release the vehicle is upheld.

Saw mill and shesham logs released

In **Raj Kumar Mistry vs State of Bihar**[188] Hon'ble Patna High Court held that the confiscating officer failed to consider the peculiar facts of the case and passed the order in a mechanical manner. The seized articles were ordered to be released.

Confiscation of MICA set aside

In **Mani Ram vs Emperor**[189] Hon'ble Patna High Court held that no evidence was led in the case, and from the nature of the complaint and the question put to the accused, the accused were not asked to meet a charge of having obtained mica by illicit means, hence order of confiscation was not proper.

Finding of forest officer undisturbed, No interference in confiscation order

In the case of **State of West Bengal v. Gopal Sarkar**[190] Hon'ble Apex Court observed that the finding recorded by the authorized forest officer that the bandsaw and implements in question were used in commission of the forest offence relating to the illicit felling and removal of the timber remained undisturbed. The position of law that is manifest on a reading of the provision of the statute is that if tools, implements, vehicles etc. seized were used in commission of the forest offence alleged, it is open to the authorised officer to pass order of confiscation under Section 59-A (3) and such order must not be interfered with.

Composition mere exempt prosecution, but not clear the character

In the case of **Biswabahan Das v. Gopen Chandra Hazarika and Ors**[191] Hon'ble Apex Court observes that the provisions as laid down in Section 62(1) of the Assam Forest Regulation,

187. 2009 (1) PLJR 289

188. 2019 (3) PLJR 506

189. AIR 1937 Pat 257

190. (2002) 1 SCC 495

191. AIR 1967 SC 895

which has the marginal note "power to compound offences" with some provisions. Although the marginal note to Section 62 of the Assam Regulation is "power to compound offences" the word "compounding" is not used in Sub-section (1) Clause (a) of that section. That provision only empowers a forest officer to accept compensation for a forest offence from a person suspected of having committed it. The person so suspected can avoid being proceeded with for the offence by rendering compensation. In effect the payment of compensation amounts to acceptance of the truth of the charge. Sub-section (2) of Section 62 only protects such person from further proceedings, but has not the effect of clearing his character or vindicating his conduct. It was held that composition of an offence was permissible under the law, the effect of such composition should depend on what the law provided for. When dealing with an offence under the Forest Laws the Court is required to look to the conduct of the offender because an unscrupulous trader may try to transport forest produce illegally with the risk of being apprehended. If he knows that if the vehicle etc. is seized by the forest officials for contravention of forest laws and he will get scot free by releasing the vehicle on payment of merely a fine in lieu of confiscation of his vehicle, he may indulge in this kind of offence repeatedly. The legislature never intended that such type of owners of the vehicles will easily get their vehicles released by payment of a mere fine.

Meagre quantity of seized articles – No release on payment of fine

In the case of **Dilip Kumar Pandey vs State of Bihar And Ors.**[192] Hon'ble Division bench of Hon'ble Patna High Court observes that a vehicle, which is liable for confiscation under Section 52 of the Bihar Act, may be released on payment of the value of the vehicle and not otherwise. It can't be thought that a vehicle, which has been found illegally transporting any forest produce of meagre value, can be released merely on payment of the value of articles loaded on the vehicle by way of compensation. Sub-section (2) of Section 68 contemplates that the suspected person in custody shall be released and the property, if any seized, shall be released on payment of such sum of money or such value or both, as the case may be. Further no proceeding shall be taken against such person or property. Thus, from reading the procedure, it will be clear that intention of the legislature is to punish the owner of the vehicle etc. for committing a forest offence and statute does not provide release of vehicle by merely payment of fine. The value of the seized property, which is liable for confiscation, has to be paid and only thereafter the seized property can be released. It is also held that the confiscation of the vehicle is the immediate statutory consequence on the finding that a forest offence had been committed in respect of the seized vehicle, forest produce and tools etc. If this be the intention of the legislature in enacting different provisions for confiscation and compounding of offences, the Court cannot read differently by presuming the underlined intention of the legislature.

Precedence to Quasi judicial proceeding by DFO than administrative work

In the case of **Dhananjay Kumar and others vs. State of Bihar**[193] Hon'ble Patna High

192. 1998 (2) BLJR 1103

193. 2013 (4) PLJR 849

Court observes that the holding of quasi-judicial proceeding by the Divisional Forest Officer must take precedence over his administrative works, as it threatens the infringement of constitutional right of a citizen, and must be given priority to ensure time bound conclusion of the same as laid down herein. It is also observed that the Divisional Forest Officer should adopt the following procedure, in addition to the procedure laid down in the Act by State Amendment, in cases pending before him or instituted henceforth for some forest offence(s):

- After the vehicle is seized with or without incriminating articles from forest area on the suspicion of being used in commission of any forest offence and an FIR is instituted with the local police, the institution of the FIR and the seizure must be reported immediately to the competent authority for registering a forest case.
- On receipt of the report, the competent authority must register the case on that very day and thereafter get the ownership of the vehicle verified from the concerned Transport Office and send a registered notice along with seizure memo to the owner of the vehicle through registered post with acknowledgment due positively within two weeks. In the notice, the owner should be allowed two weeks time, from the date of receipt of the notice, to appear in the proceeding and file his defence. It is very common that the notices by post are not served or the noticee avoids to receive the same. Hence, simultaneously, with the issue of notice by registered post, the competent authority must get a notice published in the local newspapers with regard to seizure of the vehicle with the registration number, chassis number and engine number and other details as may be available and the date, place and time of seizure of the vehicle with brief of charges and the number of proceeding initiated in the matter. If within 15 days of publication of notice in the newspaper, the owner or any claimant of the vehicle does not appear before the competent authority in the proceeding, the competent authority shall be at liberty to proceed ex parte. If the competent authority is able to find out from the papers seized with the vehicle or from any source that the vehicle has been purchased under hire purchase agreement with any insurance company, he shall also send information to the said company, simultaneously, through registered post that the vehicle has been seized for forest offence(s) and is a subject of a confiscation proceeding before him.
- In case, the owner/claimant appears and files his defence totally denying seizure of his vehicle on the date, time and place alleged, the prosecution shall lead evidence first in support of the factum of seizure of the vehicle from a forest area at the particular time and date and loaded with incriminating article, if any. Once the prosecution produces evidence to this effect, onus will shift, in terms of Section 52(5) of State Amendment, on the owner/claimant of the vehicle to establish his defence of innocence.
- Evidence in the case must commence within 15 days of the filing of the defence by the

owner/claimant. Thereafter the proceeding should continue and progress without any unnecessary delay and must conclude within four months from the date of institution of the case before the competent authority.

- In case the proceeding does not conclude within the said four months, for no fault of the owner/claimant of the vehicle and in spite of his full co- operation, the competent authority shall release the vehicle on provisional basis together with its attachments, if any, to the owner of the vehicle on the following terms: —

  (i) He shall ascertain the depreciated value of the vehicle as on the date of institution of the case in his court, calculated by Insurance Company where the vehicle is insured or by any competent authority and shall direct the owner to furnish bank guarantee of that amount.

  (ii) He shall also direct the owner to furnish two sureties in his support out of which one should be a Government official.

  (iii) He shall also direct for deposit of security in the form of ownership papers of immovable property, standing in the name of the owner of the vehicle, equal to the depreciated value of the vehicle.

  (iv) He shall also direct the owner to furnish an undertaking that, on the date of final orders in the confiscation proceeding, he shall produce the vehicle with all its attachment, as released on provisional basis, and in the same condition, for any appropriate orders by the competent authority.

  (v) On the owner meeting all these conditions the vehicle with all its attachments shall be released to him on provisional basis within one week positively which shall be subject to the final result of the confiscation proceeding.

6. Bihar Special Court Act 2009

Important Provisions

This Act was enacted for constitution of special court for speedy trial of corruption cases under Prevention of Corruption Act 1988 and for confiscation of the properties involved. The Act provides for the procedure of appeal against sentence under section 9[194] and appeal against

194. Section 9 - Appeal against orders of Special Courts.—

(1) Notwithstanding anything in the Code, an appeal shall lie from any judgment and sentence of a Special Court to the High Court of Patna both on facts and law.

(2) Except as aforesaid, no appeal or revision shall lie in any court from any judgment, sentence or order of a Special Court.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of judgment and sentence of a Special Court. Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied for reasons to be recorded in writing that the appellant had sufficient cause for not preferring the appeal within the period.

confiscation order under section 17[195]. Section 22 provides that no suit or other legal proceedings shall be maintainable in any Court in respect of any money or property or both ordered to be confiscated under section 15[196]. Some of the relevant provisions of the Act are reproduced briefly

Section 13	Confiscation of property
Section 14	Notice for confiscation
Section 15	Confiscation of property in certain cases.
Section 16	Transfer to be null and void.
Section 17	Appeal against confiscation
Section 18	Power to take possession
Section 19	Refund of Confiscated money or property

Certain decisions of Hon'ble Courts

Confiscation of property not a punishment, not violative of constitution.

In the case of **Yogendra Kumar Jaiswal & Ors. v. State of Bihar & Ors**[197], It is held by

195. Section 17 - *Appeal.*—

(1) Any person aggrieved by any order of the authorised officer under this Chapter may appeal to the High Court within thirty days from the date on which the order appealed against was passed.

(2) Upon any appeal preferred under this section the High Court may, after giving such parties, as it thinks proper, an opportunity of being heard, pass such order as it thinks fit.

(3) An appeal preferred under sub-section (1) shall be disposed of preferably within a period of six months from the date it is preferred, and stay order, if any, passed in an appeal shall not remain in force beyond the prescribed period of disposal of appeal.

196. Section 15. *Confiscation of property in certain cases.*— (1) The authorised officer may, after considering the explanation, if any, to the show cause notice issued under section 14 and the materials available before it, and after giving to the person affected (and in case here the person affected holds any money or property specified in the notice through any other person, to such other person also) a reasonable opportunity of being heard, by order, record a finding whether all or any other money or properties in question have been acquired illegally.

(2) Where the authorised officer specifies that some of the money or property or both referred to in the show cause notice are acquired by means of the offence, but is not able to identify specifically such money or property, then it shall be lawful for the authorized officer to specify the money or property or both which, to the best of his judgment, have been acquired by means of the offence and record a finding, accordingly, under sub-section (1).

(2) Where the authorised officer records a finding under this section to the effect that any money or property or both have been acquired by means of the offence, he shall declare that such money or property or both shall, subject to the provisions of this Act, stand confiscated to the State Government free from all encumbrances: Provided that if the market price of the property confiscated is deposited with the authorised officer, the property shall not be confiscated.

(3) Where any share in a Company stands confiscated to the State Government under this Act, then, the Company shall, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or the Articles of Association of the Company, forthwith register the State Government as the transferee of such share.

(4) Every proceeding for confiscation of money or property or both under his Chapter shall be disposed of within a period of six months from the date of service of the notice under sub-section (1) of section-14.

(5) The order of confiscation passed under this section shall, subject to the order passed in appeal, if any, under section 17, be final and shall not be called in question in any Court of law.

197. (2016) 3 SCC 183

Hon'ble Apex Court that confiscation is independent of result of prosecution under the Prevention of Corruption Act, 1988 and the entire proceeding is meant to arrive at the conclusion whether money or some of the property in question has been acquired illegally and further any money or property or both have been acquired by the means of the offence. After arriving at the said conclusion, the order of confiscation is passed. The order of confiscation is subject to appeal under Section 17 of the Orissa Act. That apart, it is provided under Section 19 where an order of confiscation made under Section 15 is modified or annulled by the High Court in appeal or where the person affected is acquitted by the Special Court, the money or property or both shall be returned to the person affected. Thus, it is basically a confiscation which is interim in nature. Confiscation is not a punishment and hence, Article 20(1) is not violated.

Corruption case, seized vehicle – Order for release

In the case of **Manish Kumar vs The State Of Bihar**[198] Hon'ble Patna High Court directed the concerned lower court to get a report from the concerned transport office with regard to the rightful owner of the seized vehicles and after getting the registration/ownership properly verified, pass appropriate order for release of the vehicles to its rightful owner after taking adequate surety.

7. Indian Wild Life Act 1972

Important Provisions

The Act has been enacted with the solemn objective to preserve the wild life including flora and fauna. Some relevant provisions concerning the wild life property is summarized in the following table

Section 39	Wild animals, etc., to be Government property. No person can take such government property in his possession. If he receives any such property, he has to immediately hand it over to the concerned authority
Section 40	Declarations
Section 41	Inquiry and preparation of inventories
Section 42	Certificate of ownership
Section 43	Regulation of transfer of animal, etc
Section 44	Dealings in trophy and animal articles without licence prohibited
Section 48	Purchase of animals, etc., by licensee
Section 48 A	Restriction on transportation of wild life
Section 49	Purchase of captive animal, etc., by a person other than a licensee

198. Decided on 11/04/2014 in connection with Criminal Miscellaneous 49935 of 2013

Section 49 B	Prohibition of dealings in trophies, animal articles, etc, derived from scheduled animals.
Section 49C	Declaration by dealers
Section 50	Power of entry, search, arrest and detention
Section 51(2)	Forfeiture of properties with which offence committed on conviction

Decisions of Hon'ble Court concerning release in wild life Act

No forfeiture on composition of offence.

In the case of **Chief Conservator of Forest Vs. J. K. Johnson**[199] Hon'ble Apex Court observes that the items were seized in exercise of the power under Section 50(1)(c), the seized property has to be dealt with by the Magistrate under Section 50(4) of the 1972 Act. Hence specified officer empowered under Section 54(1) of the 1972 Act as substituted by Act 16 of 2003 to compound offences, has no power, competence or authority to order forfeiture of the seized items on composition of the offence by a person who is suspected to have committed offence against the Act.

Without notice to authorized officer, no order of release could be passed. In case of **The Authorized Officer and Assistant Conservator of Forests. vs. Sudhakar Jaisingh Chauhan**[200] Hon'ble Division Bench of Hon'ble Bombay High Court has held that in order to find out whether or not confiscation proceedings have initiated, the Magistrate should not proceed to pass any order unless notice is given to authorized officer. Section 50 of the Wild Life Protection Act empowers Chief Wild Life Warden, authorized officer, forest officer or police officer not below the rank of a Sub-Inspector to seize animal, meat, trophy, vehicle vessel or weapon used for commission of offence under Wild Life Protection Act. Under Section 4 of the Act, as soon as things are seized, the same shall be forwarded to the Magistrate under intimation to Chief Wild Life Warden. Under Sub-section 6, where any meat, trophy is seized under Section 51, the same can be disposed off under orders of Assistant Director of Wild Life Preservation or any officer authorized by Chief Wild Life Warden.

No liberal approach to release in wild life cases

In case of **State of Maharashtra .vs. Gajanan D. Jambhulkar**[201] Hon'ble Bombay High Court has made certain observations regarding manner in which discretion to release property is required to be exercised. It was observed that if the material prima facie does indicate involvement of the vehicle in commission of offence under the Wild Life Protection Act, the Magistrate would not be justified in ordering the release of vehicle as said vehicle would be liable for forfeiture at the

199. (2011) 10 SCC 794

200. 2007All Maharashtra Law Reporter (Criminal)181

201. 2002 Criminal Law Journal 349

conclusion of trial. Honourable Bombay High Court has cautioned that liberal approach in matter of release of vehicle would not only encourage but perpetuate the commission of more offences with regard to Wild Life.

Custody of vehicle - condition of bank guarantee not improper.

In the case of **Ayyub vs State of Rajasthan**[202] Hon'ble Rajsthan High Court observes that forest officers have got power to give 'superdari' only for captive animal or wild animal but not the vehicle and the power of Magistrate to release the seized vehicle on execution of surety bond is unaccepted. Authorized forest officers may give any captive animal or wild animal for custody on the execution of a bond for the production of such animal if and when so required. The forest officers under sub-Section (3A) of S. 50 have got power to give on 'Superdari' only captive animal or wild animal and not the vehicle. Hence Magistrate had no power to release vehicle only on execution of surety bond. The main object of the Act 1972 is to preserve and protect wild animals, birds and plants. Liberal approach in such matters with respect to the property seized, which is liable to confiscation, is uncalled for as the same likely to frustrate the provisions of the Act. The liberal approach in such matters would perpetuate the commission of more offences with respect to wild animals etc. and therefore, the Court may release the vehicle during pendency of the case and furnishing a bank guarantee should be the minimum condition. Thus, there is no illegality in the impugned order with regard to imposing a condition of furnishing bank guarantee of Rs. 40,000/.

8. Customs Act 1962

Important Provisions

The Customs Act 1962 is the successor to the Sea Customs Act 1878, the Land Customs Acts, 1925 and the Inland Bonded Warehouse Act 1896. This is the only Act which contains entire law relating to customs duty and matters related thereto. Chapter XIII of the 1962 Act provides the procedure for search, seizure and arrest while Chapter XIV deals with confiscation of goods and other related matters. Some of the relevant provisions are enumerated below

Section 100	Power to search suspected persons entering or leaving India,
Section 101	Power to search suspected persons in certain other cases.
Section 106	Power to stop and search conveyances.
Section 106A	Power to inspect.
Section 109	Power to require production of order permitting clearance of goods imported by land.
Section 110	Seizure of goods, documents and things.

202. 2003 CriLJ 2954

Section 110A	Provisional release of goods, documents and things seized pending adjudication.
Section 113 to 127	Confiscation related provisions

Decisions of Hon'ble Courts

Generally civil court has no jurisdiction to entertain matters related to customs properties. Since the customs essentially related to one or the other property, it becomes imperative to understand the issues involved with this Act in light of the decisions of Hon'ble Courts.

No jurisdiction of civil court in seizure involving customs Act

In the case of **P O Thomas v. Union of India**[203] Hon'ble Kerala High Court has observed that the court can not interfere at the stage of seizure by the custom officer. Inherent powers of the High Court should not be invoked for issue of directions to customs authorities for release of property seized, since customs officer functioning under the relevant Act is not a criminal court.

In the case of **Assistant Collector of Customs v. Kasam Mamad**[204] Hon'ble Gujarat High Court has observed that the jurisdiction of the civil courts to release the goods which are seized by the Custom Authorities are barred except in some exceptional circumstances. Officers of the customs department have power to seize the goods or vehicle on a reasonable belief that the goods are contraband goods and the vehicle in question is used as a means of conveyance in transportation of such contraband goods. There are administrative instructions to release the goods or vehicles pending investigation and inquiry by the officers of the customs department. The Act also makes the provisions for adjudication. The Customs Act creates a liability and provides for complete machinery for obtaining redress against erroneous exercise of jurisdiction by the customs authorities. Therefore, jurisdiction of the civil courts to release the seized goods or vehicle is by implication barred except in exceptional circumstances.

Goods seized – Neither notified nor smuggled – no jurisdiction of customs

In the case of **Rajeev Kumar AggarwaI vs CEGAT**[205] it is observed by Hon'ble Delhi High Court that the jurisdiction of the customs does not lie where the goods seized from the railway authorities were neither notified nor smuggled goods. Confiscation was set aside as custom authorities are not competent to go into the ownership's question. Hence, it was directed to restore the goods to the Railway Authorities.

Confiscation - Sanctity of legal proceedings

In the case of **Union of India v. Lexus Exports Pvt. Ltd**[206] Hon'ble Supreme Court observed that sanctity of legal proceedings cannot be whittled down on grounds of such

203. 1989 (44) ELT 414 (Ker.) 277

204. 1984 TaxLR 2424 (Guj). 279

205. 1997 (94) ELT 76 (Del.)

206. 1994 (71) ELT 348 (SC).

expediency. The proceedings of the seizure and confiscation are proceedings in rem. Until the culmination of the adjudication it is difficult to envisage any right on the part, of the person from whose possession the goods are seized to export them on the basis of a future title they expect to acquire by payment of redemption fine.

No parallel or alternate proceeding like civil suit permissible

In the case of **Tejman v. D.P. Anand and Others**[207] Hon'ble Calcutta High Court has observed that the aggrieved party must proceed by way of appeal and revision as provided in the Act itself. No parallel or alternate proceeding is permissible by way of a suit in a civil court. The legislature intended to oust the jurisdiction of civil court completely in respect of all adjudications under Section 182 and 188 of the Sea Customs Act. The ordinary civil courts which are only empowered to entertain suits and not specifically invested with power of supervision over other courts and tribunals have not been given supervisory jurisdiction. Section 9 of the Code of Civil Procedure empowers a civil court to try suits of a civil nature excepting suits of which cognizance is barred either expressly or implied. Supervisory functions can more appropriately be exercised by the superior courts i.e. the High Court and the Supreme Court. An ordinary civil court having no appellate or revisional power can hardly be considered to be the appropriate court to exercise the supervisory powers.

Jurisdiction of civil court to examine mala fide proceedings not excluded

In the case of **Union of India v. A.V. Narashimhalu**[208] Hon'ble Apex Court has observed that Constitutional Courts orders in writ of Certiorari is only of supervisory nature and it lies on the authorities who are exercising powers judicially or quasi-judicially. Normally, an action of an administrative authority interfering with the right to property may be challenged by resort to a civil court, yet, in the case of a right which depends upon a statute, the jurisdiction of the civil court to grant relief may by express provision or by clear implication of statute, be excluded. Where a statute re-enacts a right or liability existing at common law, and the statute provides a special form of remedy, exclusion of the jurisdiction of the civil court to grant relief in the absence of an express provision, will not be readily inferred. Where, however, a statute creates a new right or liability and provides complete machinery for obtaining redress against erroneous exercise of authority, jurisdiction of the civil court to grant relief is barred. However, the civil courts have jurisdiction to examine cases in which the customs authority has not complied with the provisions of the statute or the officer of customs has not acted in conformity with the fundamental principles of judicial procedure or has made an order which is not within his competence or where the order is alleged to be malafide, civil suits will be maintainable for obtaining appropriate relief.

Criminal Court has no jurisdiction to find the confiscation illegal

In the case of **Assistant Collector of Central Excise v. Kallatra Abdul Khader Haji and Others**[209] It is laid down by Hon'ble Kerala High Court that if, no appeal is filed against the

207. AIR 1965 Calcutta 517

208. (1969) 2 SCC 658

209. 1987 (32) ELT 479 (Ker.) 322

order of confiscation, then it becomes the final order of the Departmental Authorities. Section 126 of the Act provides that the confiscated goods shall thereupon vest with the Central Government. The Act provides remedy for the persons affected by the order of confiscation to file an appeal. In this case the Jeep was confiscated by the Departmental Authorities under the Customs Act and the same matter regarding the involvement of the Jeep in the illegal transaction was not argued before the magistrate and when the legality of the confiscation or claim for custody were not raised before him, there was no reason or occasion for the magistrate to find that the confiscation was illegal. Section 452 of the Code contains a general provision relating to disposal of property at the conclusion of a trial. It is the general rule of construction that a special provision in a special statute will override the general provision when the court is dealing with a matter concerning the special statute otherwise the special provisions will be rendered superfluous and meaningless. In such cases it is not for the courts to ignore the special provisions and resort to the general provisions.

No offence under customs Act – release the vehicle

In the case of **Bharat Ram vs. Union of India**[210] it is observed by the Hon'ble Patna High Court that the custom officials themselves did not find involvement of the petitioner in the alleged crime, Hon'ble Court directed to release the vehicle.

Betel nuts - Non notified item under customs Act

In the case of **Commissioner, Custom Department, Government of India, Patna v. Dwarika Prasad Agarwal**[211], Hon'ble Patna High Court held that betel nut was non-notified item and, as such, the onus to prove that the same was of foreign origin lay on Custom authority for its seizure.

Illegal seizure vitiates Confiscation

In the case of **Maa Saraswati Traders through the Legal Power of Attorney Versus the Union of India**[212] It is observed by Hon'ble Patna High Court that the order of detention and seizure of betel nuts and the trucks on which it was loaded are illegal, arbitrary and perverse. A confiscation proceeding arising from a seizure held to be illegal cannot be sustained nor can, in such a case, an objection regarding the maintainability of the writ petition be raised effectively.

Reasonable belief must be in priori for seizure

In the case of **M.G. Abrol v. Amichind Vallamji**[213] Hon'ble Bombay High Court observes that the Customs Officers should seize the goods in a reasonable belief that they are smuggled goods before the burden of proving that they are not smuggled goods could be on the person from

210. 2013 (3) PLJR 715

211. 2009 (2) PLJR 858

212. 2012 (2) PLJR 307

213. AIR 1961 Bombay, 227

whose possession such goods were seized. One may conceive of a number of ways in which a suspicion may arise in the mind of the Customs Officer that any particular person is possessed of smuggled goods. A belief, on the other hand, cannot arise merely in the circumstances in which a suspicion can arise. A belief in the existence of a thing requires a more solid foundation than in the case of a mere suspicion. It may be based upon some definite information acquired from a reliable source that a certain person is in possession of smuggled goods. The belief must be a reasonable one. So far as the point of time at which the reasonable belief should exist is concerned, whenever the goods are seized, the officer seizing the goods must at the time of seizure have a reasonable belief that the goods he was seizing were smuggled goods. Any subsequent acquisition of knowledge of such belief would be of no avail.

Accepting the order – Gold must be released

In **The Case Of Shivji Prasad Gupta Vs. Union Of India**[214] it is observed by Hon'ble Patna High Court that Having accepted the order containing the gold seized was of Indian origin and it was not violative of section 103 of the Customs Act by not challenging the order of the judicial member, the authorities are duty bound to release the seized gold and in the event they have already sold the seized gold then the present value thereof must be reimbursed to the petitioner as early as possible.

No order without issuing notice to the accused

In the case of **Ishwar Parasram Punjabi v. Union of India**[215] Hon'ble Delhi High Court has observed that since the disposal of case property can have very grave implication for an accused in so much as it may affect his defence that might be open to him, on facts or law, or even as identity or description of the case property, or as in this case, the Magistrate carries an inherent obligation that from whom the property is alleged to have been seized is given notice of the application moved by the customs Department and be heard before an order is passed thereon. Order passed by the Magistrate without notice to the petitioner on application under Section 110(1 A) of Customs Act, not sustainable. Under Section 451 of the Code of Criminal Procedure, the trial court has enough powers to order the sale of the case property produced before him during the trial pending the conclusion of the trial if, the property is subject to speedy and natural decay or if, it is otherwise expedient to do so. If, the custom authorities are facing the problem relating to the space and storage, the court can direct such sale in view of customs facing shortage of storage placement if, the goods are not subject to perishable.

Property to be preserved till final definitive order

In the case of **State of Gujarat Versus Memon Mahomed Haji Hasam**[216] It was observed by the Hon'ble Apex Court that though the state Government seized the vehicles

214. 2008 (3) PLJR 218

215. 1990 (48) ELT 224 (Delhi)

216. (1967) 3 SCR 938 : AIR 1967 SC 1885

pursuant to the power under the Customs Act. But the power to seize and confiscate was dependent upon a customs offence having been committed or a suspicion that such offence had been committed. The order of the Customs Officer was not final as it was subject to an appeal and if the Appellate Authority found that there was no good ground for the exercise of that power, the property could no longer be retained and had under the Act to be returned to the owner. There being a legal obligation to preserve the property intact and also the obligation to take reasonable care of it so as to enable the Government to return it in the same condition in which it was seized, the position of the State Government until the order became final would be that of a bailee. If that is the correct position once the Revenue Tribunal set aside the order of the Customs Officer and the Government became liable to return the goods the owner had the right either to demand the property seized or its value, if, in the meantime the State Government had precluded itself from returning the property either by its own act or that of its agents or servants. The fact that an order for its disposal was passed by a Magistrate would not in any way interfere with or wipe away the right of the owner to demand the return of the property or the obligation of the Government to return it. The order of disposal in any event was obtained on a false representation that the property was an unclaimed property. Even if the Government cannot be said to be in the position of a bailee, it was in any case bound to return the said property by reason of its statutory obligation or to pay its value if it had disabled itself from returning it either by its own act or by any act of its agents and servants in these circumstances.

Confiscation of Gold set aside, Gold belonged to owner

In the case of **Vijay Kumar V. Union of India (UOI) and Ors**[217] Hon'ble Patna High Court has observed that CEGAT has set aside the confiscation of the gold biscuits alleged to have been recovered from the possession of the Petitioners. There is no dispute that the CEGAT is the final court of fact of the custom matter until and unless stay of the order is not there. The order of confiscation stands set aside and as such gold validly belonged to the owner. Now they have come forward with a prayer to release the gold biscuits in their favour. In recent past the Hon"ble Supreme Court had specially in number of cases has held that under the relevant provision of order of custom and disposal pending trial the court should be gracious and expedition in releasing the seized articles under Section 451 of the Code. Admittedly by the order of CEGAT the gold has been confiscated which beings to the Petitioners and it is kept in "custody since past six years. Allowed the release of gold

For assuming jurisdiction, reason to believe must be established[218] Criminal Miscellaneous No. 30125 of 2003. 12-04-2004. In the case of Virendra Thakur Vs Union of India, Hon'ble Patna High Court observed that it was obligatory on part of the customs department first to establish "reason to believe" to assume jurisdiction in the matter and then to establish that it was

217. Criminal Miscellaneous No.30125 of 2003.12-04-2004

218. 2009 (3) PLJR 66

Nepali wood. it must be said that a reading of the Indo-Nepal Trade Treaty clearly shows that so far as timber of Nepali origin is concerned, the importation thereof is free from quantitative or qualitative restriction and is not liable to any duty of customs on importation into India. Such being the provision, one wonders that is the sense in alleging smuggling into India. No taxes or duties are being evaded; nothing that was prohibited is being done, the importation being free. Thus, the very foundation of seizure being without jurisdiction, the seizure cannot be sustained.

Confiscation to be ordered in exceptional cases

In the case of **Officer-in-charge, Customs, Berhampur Preventive Unit Vs. Minati Biswas and ors**[219] Hon'ble Calcutta High Court has observed that if the property seized was not produced before the court then the magistrate might have invoked the powers conferred under section 457 CRPC after recording conviction of the accused. The court should be slow to order confiscation of any article. Confiscation may be ordered only in exceptional cases for reasons of social safety or security. When the Customs Act, 1962 embodied elaborate provisions regarding confiscation, and when the said provisions are independent of the provisions of CRPC and are protected by the provisions of Section 5 of the Code, what the court could do is to deliver the seized articles to the competent authority.

Confiscation is immediate consequence of conviction

In the case of **Chern Taong Shang & Anr., Etc., Etc vs Commander S. D. Baijal & Ors**[220] Hon'ble Apex Court observes that it is not open to the Court to consider the graveness of the offence and other extenuating circumstances and to make no order for confiscation of the offending vessel concerned. Confiscation of the vessel is the immediate statutory consequence of the finding that an offence either under Section 10 or 11 or 12 has been proved and its master has been convicted. Section 13 is thus mandatory and it is not open to the Court as soon as the master of the vessel is convicted of an offence under Section 12 and is awarded penalty to refrain from making an order confiscating the offending vessel.

Magistrate not empowered to order on money seized by Income Tax

In **Union of India Versus Incharge Police Station, Janak Ganj**[221] Hon'ble Madhya Pradesh High Court observed that the money seized was on the order of the Income-tax Authority and warrant of authorization, Judicial Court suffered statutory handicap to deal with the money in any other manner then as contemplated under the special law. The police had not registered any case and the Income-tax Department on being apprised of the seizure had laid claim to that money and to custody thereof in accordance with provisions. Magistrate had no jurisdiction to inquire into the validity of the warrant of authorization for delivery of that money, to the Income-tax Officer.

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219. 1983 (12) ELT 798 (Cal)

220. 1988 AIR 603

221. 1990 CriLJ 1320

10. Motor Vehicles Act

The motor vehicles Act makes special provision with respect to impounding of document and seizure of vehicle and their release. It is worth while to have a look on these provisions.

Relevant Provisions

Section 206 of the Motor Vehicle Act provides the power of police officer to impound document, seizure of license and issuing an acknowledgment[222]. Section 207 of the Motor Vehicles Act provides the power to detain vehicles used without certificate of registration or without permit, its seizure and process of release[223]

Section 206 provides that if any motor vehicle carries a false identification mark or any licence, permit, certificate of registration, certificate of insurance or other document is a false document, then the police or any authorized officer may seize the mark or document and call upon the driver or owner of the vehicle to account for his possession of or the presence in the vehicle of

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222. *Power of Police Officer to impound document.-*

(1) Any Police Officer or other person authorized in this behalf by the State Government may, if he has reason to believe that any identification mark carried on a motor vehicle or any licence, permit, certificate of registration, certificate of insurance or other document produced to him by the driver or person in charge of a motor vehicle is a false document within the meaning of Section 464 of the Penal Code, 1860 seize the mark or document and call upon the driver or owner of the vehicle to account for his possession of or the presence in the vehicle of such mark or document.

(2) Any Police Officer or other person authorized in this behalf by the State Government may, if he has reason to believe that the driver of a motor vehicle who is charged with any offence under this Act may abscond or otherwise avoid the service of a summons, seize any licence held by such driver and forward it into the Court taking cognizance of the offence and the said Court shall on the first appearance of such driver before it, return the licence to him in exchange for the temporary acknowledgment given under Sub-section (3).

(3) A police officer or other person seizing a licence under sub-section (2) shall give to the person surrendering the licence a temporary acknowledgment therefor and such acknowledgment shall authorise the holder to drive until the licence has been returned to him or until such date as may be specified by the police officer or other person in the acknowledgment, whichever is earlier: Provided that if any magistrate, police officer or other person authorised by the State Government in this behalf is, on an application made to him, satisfied that the licence cannot be, or has not been, returned 94 to the holder thereof before the date specified in the acknowledgment for any reason for which the holder is not responsible, the magistrate, police officer or other person, as the case may be, may extend the period of authorization to drive to such date as may be specified in the acknowledgment

223. Power to detain vehicles used without certificate of registration permit, etc (1) Any Police Officer or other person authorized in this behalf by the State Government may, if he has reason to believe that a motor vehicle has been or is being used in contravention of the provisions of Section 3 or Section 4 or Section 39 or without the permit required by Sub-section (1) of Section 66 or in contravention or any condition of such permit relating to the route on which or the area in which or the purpose for which the vehicle may be used, seize and detain the vehicle, in the prescribed manner and for this purpose take or cause to be taken any steps he may consider proper for the temporary safe custody of the vehicle: Provided that where any such officer or person has reason to believe that a motor vehicle has been or is being used in contravention of Section 3 or Section 4 or without the permit required by Sub-section (1) of Section 66 he may, instead of seizing the vehicle, seize the certificate of registration of the vehicle and shall issue an acknowledgment in respect thereof.

(2) Where a motor vehicle has been seized and detained under sub-section (1), the owner or person in charge of the motor vehicle may apply to the transport authority or any officer authorised in this behalf by the State Government together with the relevant documents for the release of the vehicle and such authority or officer may, after verification of such documents, by order release the vehicle subject to such conditions as the authority or officer may deem fit to impose.

such mark or document. In case of belief that the driver may abscond, his license may be seized and he will be forwarded to the jurisdictional court. The court may return the license in exchange of temporary acknowledgment. Section 207 provides for detention and seizure of the vehicle on contravention of section 66 of the Act. According to Section 66(1) no motor vehicle can be used as a transport vehicle in any public place without there being a permit, for the purpose. If a motor vehicle is seized and detained for being used without permit then the owner of the vehicle may apply for release of the vehicle to the Transport Authority or any other authorised officer. After verification of such documents, the vehicle may be released subject to conditions.

Certain Decisions of Hon'ble Courts concerning power to release the seized vehicle under Motor Vehicle Act

Court is empowered to ratify the arrangement made by authorized officer or may make other arrangement

In the case of **Transport Commissioner, Andhra Pradesh vs Sardar Ali**[224] Hon'ble Supreme Court has held that seized vehicle may be released if the owner of the vehicle satisfies the authorized officer or person, that no offence such as that mentioned in S. 129-A had been or was being committed. This is subject to the second proviso to S. 129-A which bars the release of a vehicle seized for a contravention of the provisions of S. 22 unless the owner of the vehicle produces a valid certificate of registration under the Act in respect of the vehicle. If a complaint is filed before the Court empowered to take cognizance of the case and the case proceeded with. As soon as the complaint is laid, the Court acquires jurisdiction to pass appropriate orders regarding 'the custody' and the 'the disposal' of the vehicle. Section 4 (2) of the Code of the Criminal Procedure stipulates that offences under laws other than the Penal Code also are to be investigated, inquired into, tried and otherwise dealt with in accordance with the provisions of the Code of Criminal Procedure The provisions of Chapter XXXIV of the Code relating to 'Disposal of Property' are also therefore attracted in dealing with offences under the Motor Vehicles Act. The Court thus has the power at the conclusion of the case to make appropriate orders regarding the disposal of the motor vehicle regarding which an offence appears to have been committed. So far as the custody of the vehicle pending the conclusion of the case is concerned, the Court may either treat the arrangement made by the officer or person acting under S. 129-A as sufficient or may itself make further or other orders. Section 451 of the Code of Criminal Procedure empowers the Court, when any property is produced before it during any inquiry or trial, to make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial.

Seizure of Tourist Vehicle u/s. 129 A – Preparation of seizure list

In the case of the **Transport Commissioner, Andhra Pradesh, Hyderabad and anr. vs.**

224. AIR 1983 SC 1225

S. Sardar Ali[225] Hon'ble Apex Court observes that when an offence is committed under a law other than the Penal Code and that law does not itself regulate the procedure to be followed, there is no option but to look to the provisions of the Criminal Procedure Code for further action and to weave into a single texture the provisions of the code and the special law. It is observed that there is no infringement of fundamental right guaranteed by Article 19(1)(g) of the Constitution and Section 129-A of the Motor Vehicles Act is not ultra vires the constitution. It is also observed that in the case of a seizure under the Motor Vehicles Act, there is no provision for preparing a list of the things seized in the course of the seizure for the obvious reason that all those things are seized not separately but as part of the vehicle itself. But it is in the interests of the very officer or person seizing the vehicle, so that they may not be open to any charge being laid against them later, that such officer or person takes care to prepare a list of detachable things which are ordinarily not part of the vehicle and give a copy of the list to the person in-charge of the vehicle at the time of the seizure.

Carrying persons more than capacity is not violation of Permit

In the case of **State of Maharashtra v. Nanded-Parbhani Z.L.B.M.V. Operator Sangh**[226], Hon'ble Apex Court observes that the power of seizure conferred upon the appropriate authority is in fact a sovereign power of the State and has been delegated to the police officer in discharge of their duties of law enforcement and in the enforcement of an orderly society. The power, therefore, is required to be exercised with care and caution and the power has to be exercised only when the precondition for exercise of power is fully satisfied. the police officer would be authorized to detain a vehicle, if he has reason to believe that the vehicle has been or is being used in contravention of Section 3 or Section 4 or Section 39 or without the permit required under sub-section (1) of Section 66 or in contravention of any condition of such permit relating to the route on which or the area in which or the purpose for which the vehicle may be used. carrying passengers beyond the number mentioned in column 5, indicating the seating capacity, is not a violation of the conditions of permit relating to either the route or the area or the purpose for which the permit is granted.

Magistrate has no jurisdiction under MV Act

In the case of **Sharangdhar Sharma vs The State of Bihar And Ors.**[227] it is held by Hon'ble Patna High Court that if the vehicle is seized on the ground that it was being plied without having any permit then the route permit will be a relevant document, which will be required to be verified before any order of release is passed under Sub-section (2) of Section 207 of the Act. The object behind the enactment of such a stringent provision is quite apparent. Since a transport vehicle can neither be used nor permitted to be used except under and in accordance with the permit granted by the Transport Authorities under the provisions of the Act. Therefore, if a

225. Ibid, at 225

226. (2000) 2 SCC 69

227. 1992 (40) BLJR 393, 1992 CriLJ 2063

transport vehicle is seized on the ground that it was being used without a permit and if in fact, the owner of the vehicle had no permit, then under no situation the vehicle can be used or permitted to be used in any public place. As such, the release of the vehicle cannot be of any use to its owner. On the other hand, if the vehicle is released without there being any permit in his favour, there are always chances of its misuse in the sense that it can be plied again in violation of the provisions of the Act

It is held that the jurisdiction conferred on the Magistrate Under Section 457 of the CRPC cannot be exercised by the Magistrate in respect of the vehicles, which have been seized Under Section 207 of the Motor Vehicles Act because with regard to the seizure and release of Motor vehicles, specific provision has been made under the Special Act. As power of releasing the motor vehicle seized under the Act has been conferred on specified authorities, therefore, impliedly in this regard the power of the Magistrate, being a court of general jurisdiction, will stand excluded.

Section 207(2) and S. 457 CRPC operate in different fields

In the case of **Ashok Kumar Singh vs The Union of India & Ors**[228] Hon'ble Patna High Court succinctly discussed the provisions relating to release of the vehicle, i.e., section 457 of the CRPC and section 207, sub-section 2 of the Motor Vehicles Act. It is held that these two provisions are completely different and applicable in two different fields. Section 457 CRPC has application when vehicle is seized in connection with commission of some offence, but so far the release of vehicle under section 207, sub-section 2 of the Motor Vehicles Act is concerned, it relates to certain provisions under the Motor Vehicles Act. Contravention of which will effect the safety, security, loss of revenue and proper plying of the vehicles. Any commercial vehicle or transport vehicle, if seized for contravention of section 66 of the Motor Vehicles Act, if being used without a permit, in such cases, the vehicle can not be permitted to be used in any public place, unless permit is granted in favour of the owner, in connection with that vehicle. The Criminal Court can not issue permit in favour of the owner of the vehicle. As such, it is essential that before release of the vehicle, a permit is issued in favour of the owner. Simple release order in favour of the owner will be of no benefit for him, as he can not use the vehicle for commercial purposes. This is the reason that in case where vehicle is seized for violation of section 66 of the Motor Vehicles Act, its release order can be passed only by the authorities under the Motor Vehicles Act, who is also authorized to issue permit in favour of the owner of the vehicle.

It is also held that the jurisdiction under section 457 of the CRPC can not be exercised in respect of vehicles, which has been seized under section 207 of the Motor Vehicles Act, as a special provision has been made for this under the special Act. Any provision made under the Special Act will have to be exercised by same authority, which has specially been authorized following the same procedure, as provided under the Act. Section 207(2) of the MV Act doesn't curtail the power of Magistrate under section 457 of the CRPC, as these two provisions are completely different and area of operation under these two provisions are completely different.

228. Decided on 10 January, 2011 in Criminal Writ 719 of 1999

CHAPTER VII

ANIMALS - CUSTODY, RELEASE, DISPOSAL

Animal has been defined as any living creature other than a human being[229]. According to Indian Wildlife Act animal includes amphibians, birds, mammals and reptiles and their young, and also includes, in the cases of birds and reptiles, their eggs[230]. Bihar Preservation and Improvement of Animals Act 1955 defines animals means (i) bull, bullock, cow, heifer, buffalo, calf, sheep, goat and any other ruminating animals; (ii) poultry; and (iii) elephant, horse, camel, ass, mule, dog, swine and such other domesticated animals notified[231]. While the term Cattle includes elephants, camels, buffaloes, horses, mares, geldings, ponies, colts, fillies, mules, asses, pigs, rams, ewes, sheep, lambs, goats, and kids[232].

The General provisions for disposal of property is contained in chapter XXXIV of the CrPC, in addition, the Cattle Trespass Act 1871, the Prevention of Cruelty to Animals Act 1960 and corresponding Prevention of Cruelty to Animals Rules, Indian Wildlife Act, Bihar Preservation and improvement of Animals Act 1955 and corresponding Bihar Preservation and improvement of Animals Rules also provide detail guideline with respect to custody, maintenance, arrangement, disposal and destruction of animals. Certain provisions in Bihar Police Manual for keeping the animals have also been relevant.

Bihar Police Manual – Provisions related to Animals

(1) Rule 121 (f) provides the manner in which animals belonged to a person died intestate have to be dealt by the police. Horses, cattle, ponies, sheep and goats should not be sold by the police officer without the orders of the District Judge. They shall be placed in the nearest pound, and the Judge shall pass orders as soon as be receives the report, so as to prevent the possibility of the cost for keeping exceeding the value of the animal. When an animal is ordered to be sold it shall be sold, if possible, at a public market.

(2) Pounds[233]

(a) Officers-in-charge of police-stations shall sell all unclaimed impounded cattle brought to them for sale. (b) Officers-in-charge shall send notices of all reported stray cattle to the pound-keepers of their circle and shall also put up notices of such cattle on the notice-board of the station. (c) Officer-in-charge shall frequently visit and inspect cattle pounds in. his jurisdiction, to see that food and water are properly supplied to impounded cattle, and that a properstock of food is kept. (e) SI of police-

229. Section 2 (a) of Prevention of Cruelty to Animals Act

230. Section 2(1) of IndianWild life Act 1972

231. Section 2(a) Bihar Preservation And Improvement of Animals Act, 1955

232. Section 3 of Cattle Trespass Act 1871, Section 2(1) of Indian Forest Act also defines the cattle in the same phraseology

233. Rule 123 of Bihar Police Manual

stations shall keep a list of cattle reported strayed and inspecting officers shall examine it and see that those connected with theft are investigated.

RPF Manual – Provisions regarding Animals

1. Chapter 11

Rule 1.2 - Foreign goods, prohibited goods and animals must be seized.

Rule 1.5 - The animal recovered, such as the two-headed snake, turtle, peacock, deer, animal's skin, teeth, animal's horn, bird and sandalwood, will be handed over to the forest department.

Cattle Trespass Act 1871

1. Pounds and Pound Keepers

The Act provides for Establishment of pounds[234], Control of pounds[235], and Appointment of pound-keepers[236]. The Act enumerates the duties of pound keepers like to keep register and furnish returns[237] and to register seizures, when cattle are brought to a pound[238] and to take charge of and feed cattle[239].

2. Seizure of Cattle and impounding, Fines

If the cattle damages land or crop, it may be seized and impounded within 24 hours[240]. The Police is to assist in seizures by preventing resistance and rescues[241]. Cattle may be seized and sent to pounds if it damages public roads, canals and embankments, pleasure-grounds, plantations.[242] A fine may be levied for every head of cattle in the prescribed scale.[243]

3. Delivery and sale of cattle

When owner of the impounded cattle or his agent appears and claims the cattle, it may be delivered to him on payment of the fines and charges.[244] if cattle be not claimed within a week, it shall be reported to the police or any authorized officer who shall issue a proclamation for such cattle and issue notice. Even then if the cattle is not claimed within seven days it should be sold by

234. Section 4 of the Cattle Trespass Act 1871
235. Section 5 of the Cattle Trespass Act 1871
236. Section 6 of the Cattle Trespass Act 1871
237. Section 7 of the Cattle Trespass Act 1871
238. Section 8 of the Cattle Trespass Act 1871
239. Section 9 of the Cattle Trespass Act 1871
240. Section 10 of the Cattle Trespass Act 1871
241. ibid
242. Section 11 of the Cattle Trespass Act 1871
243. Section 12 of the Cattle Trespass Act 1871
244. Section 13 of the Cattle Trespass Act 1871

public auction[245] if the owner or his agent appears and disputes the seizure being illegal, it may be delivered to him on payment of charges and fines[246]. When owner refuses or omits to pay the fines and expenses the cattle may be sold in public auction. Any unsold cattle and balance of proceeds shall be returned to the owner[247]. The surplus of sale proceeds be sent to the concerned authority after deducting the necessary expenses, which shall be kept for three months and if there is no claim it will be treated as revenue of the state.[248]

4. Prohibition on purchase

The Act prohibits purchase of cattle by the officers and pound-keepers. The delivery of impounded cattle by pound keeper is prohibited except upon the manner prescribed or on the order of the civil court.[249]

5. Complaint and its procedure, Compensation

The Act provides for making of complaints[250] and its procedure[251] It also provides for compensation for illegal seizure or detention of cattle and may also release the cattle, if not released[252]. The compensation, fines and expenses may be recovered in the manner of fines[253]. The procedure prescribed in the Act doesn't prohibit suit for compensation with respect to damage of crops and produce by trespass of cattle in any competent court[254].

4. Indian Wildlife Act

The Act has been enacted to preserve the natural habitat of wild animals including flora and fauna. Section 9 of the Act prohibits hunting of wild animals except permitted in certain cases as contained in section 11 and 12. Some other relevant provisions are enumerated in Table 7[255] of the Chapter VI.

5. Indian Forest Act

Section 70 of the Act says that cattle trespass Act will apply - Cattle trespassing in a reserved forest any portion of a protected forest which has been lawfully closed to grazing shall be deem to

245. Section 14 of the Cattle Trespass Act 1871
246. Section 15 of the Cattle Trespass Act 1871
247. Section 16 of the Cattle Trespass Act 1871
248. Section 17 of the Cattle Trespass Act 1871
249. Section 19 of the Cattle Trespass Act 1871
250. Section 20 of the Cattle Trespass Act 1871
251. Section 21of the Cattle Trespass Act 1871
252. Section 22 of the Cattle Trespass Act 1871
253. Section 23 of the Cattle Trespass Act 1871
254. Section 29 of the Cattle Trespass Act 1871
255. Supra in this paper on page 85

be cattle doing damages to a public plantation within the meaning of section 11 of Cattle-trespass Act, 1871 (1 of 1871), and may be seized and impounded by Forest-officer or Police-officer.

Section 71 provides that the State Government may, notification in the Official Gazette, direct that, in lieu of the fines fixed under Cattle-trespass Act, 1871there shall be levied for each head of cattle impounded under section 70 of this Act such fines as it thinks fit and prescribed.

6. Prevention of Cruelty to Animals Act and Rules 1960

Procedure on seizure of animal

When an animal is seized, the concerned authority will tag it in proper manner and ensure its healthy condition . The jurisdictional magistrate, who is reported about such seizure of animal, may order for housing these animals in infirmary, pinjrapole, SPCA[257], Animal Welfare Organisation or Gaushala during the pendency of the litigation.

Procedure for release

If the accused or the owner wishes to get the animals released, the jurisdictional magistrate may order for execution of a bond of determined value[258] with sureties within three days and if the accused and owner do not execute the bond, the animal will be forfeited to infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala which may draw on from the bond on a fortnightly basis the actual reasonable cost incurred in caring for the animal from the date it received custody till the date of final disposal of the animal. In addition the accused and the owner may be directed to execute additional bond with sureties once eighty per cent of the initial bond amount has been exhausted as cost for caring for the animal.[259]

Seized vehicle will be security[260]

If a vehicle is involved in an offence under the Act, the vehicle will be held as a security. If the owner and the accused do not have the means to furnish the bond, the magistrate shall direct the local authority to undertake the costs involved and recover the same as arrears of land revenue.

Deemed relinquishment

In case the investigating officer, after the investigation, couldn't ascertain the owner or the accused, though finding the case true, then the magistrate will direct the local authority to undertake the animal and it would be a deemed relinquishment by the owner[261].

256. Section 3 of the Prevention of Cruelty to Animals Act

257. SPCA- Society for Prevention of Cruelty to Animals Constituted under the Rules

258. Determined value is the cumulative value sufficient to cover all reasonable cost incurred and anticipated to be incurred for transport, maintenance and treatment of the animal based on the input provided by the jurisdictional veterinary officer

259. Rule 5 of the Prevention of Cruelty to Animals Rules

260. Sub rule (4) of Rule 5 of the Prevention of Cruelty to Animals Rules

261. Rule 6 of the Prevention of Cruelty to Animals Rules

Conviction deprives ownership

If the accused pleads guilty or is convicted, he will be deprived of the ownership of the animal and the seized animal will be forfeited to the infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala already having custody for proper adoption or other disposition. In case the accused is found not guilty of all charges, the seized animal shall be returned to the accused or owner of the animal and the unused portion of any bond amount executed shall be returned to the person who executed the bond.[262]

Disposal of Animals by destruction or Adoption

The infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala having custody of the animal during the litigation or post litigation may euthanize the animal in its custody in accordance with section 13 of the Act[263]. Where the animal has been forfeited to the infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala after conviction, abandonment or voluntary relinquishment, as the case may be, the animal shall be put up for adoption[264]. The adoption of animal not creates an irrevocable right to the person adopting the animal. The infirmary, pinjrapole, SPCA, Animal Welfare Organization or Gaushala may inspect the animal frequently. In case it finds that the person who has adopted the animal is not providing sufficient care or it has reasons to believe that an offence under the Act or any cattle preservation law is anticipated, then the infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala shall take possession of the animal.

The Act provides the procedure for destruction of, stray dogs[265] and, diseased, incurable and severely injured animals[266]. Infirmaries may be appointed to take care of animal. The magistrate may order for destruction of the animal if the veterinary doctor certifies that the animal is incurable. Such animal must not be released except upon a fitness certificate. All such costs will be paid by the owner which may be recovered from his as arrear of land revenue. If the owner doesn't take the animal within specified time, the animal may be sold and proceeds shall be applied in payment of the cost. The surplus amount may be remitted to the owner on application[267].

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262. Rule 8 of the Prevention of Cruelty to Animals Rules
263. Rule 9 (1) of the Prevention of Cruelty to Animals Rules
264. Rule 9 (2) of the Prevention of Cruelty to Animals Rules
265. Section 11 (3) (b) of the Prevention of Cruelty to Animals Rules Act
266. Section 13 of the Prevention of Cruelty to Animals Rules
267. Section of the Prevention of Cruelty to Animals Rules 1960

7. Bihar Preservation and Improvement of Animals Act 1955 and Rules 1960

Prohibition on slaughter

Section 3[268] of the Act prohibits slaughter of cow[269], calf[270], bull[271], bullock[272] or she-buffalo[273].

Destruction of Animals

Proviso to Section 10 (1) of the Preservation of Animals Act provides that if the animal is found infective it may be seized by the veterinary offcer. Any person entitled to such animal may get it released on payment of the expenses incurred on its upkeep. If nobody claims the animal, the animal and it is not infective, the same may be sent to the pound.

Section 19 provides destruction of animals if it is affected with any prescribed contagious diseases.

Provisions regarding bull

Section 27 provides that the bull unclaimed may be sent to pinjrapole after castration and may be sold. Such sale proceeds shall be credited to the consolidated fund of state. If the owner appears after the sale, it shall be disbursed to him after deducting the necessary expenses otherwise the bull may be released in his favor on payment of expenses. But the owner shall not be entitled to anything. If the bull dies before the sale or before it is delivered to the owner.

Disposal of unclaimed animals under sub-section (3) of Section 10.[274] - In case the owner fails to remove the animal within the time given in notice, the animal shall be sold by public auction and the sale proceeds shall be paid to the owner or remitted to him by money order, if his whereabouts is known, after deducting the money order commission and the expenses incurred

268. Section 3 - Notwithstanding anything contained in any law for the time being in force of in any usage or custom to the contrary, no person shall slaughter or cause to be slaughtered or offer or cause to be offered for slaughter a cow, calf, bull, bullock or she-buffalo; Provided that the prescribed authority may, subject to such condition as may be prescribed, allow the slaughter of –(i) a bull or bullock which is over twenty five years of age or which has become permanently incapable of breeding or yielding milk, if the permanent incapability has been caused deliberately

    2(ii) a she buffalo which is over twenty five years age or which has become permanently incapable of breeding or yielding milk, if the permanent incapability has not been caused deliberately; Provider further that the State Government may, by general or special under and subject to such conditions as it may think fit to impose, allow the slaughter of any such animal for any medicinal or research purpose

269. Section 2(g) "cow" means a female above the age of three years belonging to the species specified in clause (c), but does not include a she buffalo

270. Section 2 (e) "calf" means a female or a castrated or uncastrated male, of the age of three years and below belonging in the species specified in clause (c);

271. Section 2 (c) "bull" means an uncastrated male above the age of three years belonging to the species of bovine cattle

272. Section 2 (d) "bullock" means a castrated male above the age of three years belonging to the species specified in clause (c);

273. Section 2 (l) "she-buffalo" means a female above the age of three years belonging to the species specified in clause (c), but it does not include a cow

274. Rule 8 of Bihar Preservation and Improvement of Animals Act.

over its maintenance and sale. If the whereabouts of the owner is not known the entire sale-proceeds shall be deposited in the nearest Treasury or Sub-treasury.

Destruction of animals in certain circumstances[275] If the Veterinary Officer certifies in writing that an animal is affected with tuberculosis, Johne's disease or rabies, he shall either destroy the animal himself, or cause it to be destroyed or deal with as prescribed.

Detention and disposal of a bull seized[276]- The bull seized shall be detained in a pinjrapole or infirmary for not less than fourteen days from the date of its seizure and after it has been castrated and marked. It the owner may claim the bull or the sale proceeds if the bull is sold.

A cursory perusal of the provisions mentioned in the foregoing paragraphs clearly shows that the legislation provided certain safeguards and special procedure for custody, release and disposal of animals both interim and otherwise. Before disposing of any application concerning animals, the court must be circumspect in passing any order keeping in view the provisions.

Some important decisions of Hon'ble Courts concerning Animals

Buffalo Calves not prohibited animals - Vehicle carrying the calves released

In the case of **Multani Hanifbhai Kalubhai vs. State of Gujarat and anr**[277] Hon'ble Apex Court observes that without a certificate from competent authority, no animal could be slaughtered. But 'buffalo calf' has not been mentioned as prohibited animal. In such circumstance, the prohibition relating to release of vehicle before a period of six months as mentioned in Section 6B(3) of the Amendment Act is not applicable since the appellant was transporting 28 buffalo calves only. In view of the same, it is not advisable to keep the seized vehicle in the police station in open condition which is prone to natural decay on account of weather conditions. In addition to

275. Rule 12 of the Bihar Preservation and Improvement of Animal Rules provides for Destruction of animals in certain circumstances – If the Veterinary Officer certifies in writing that an animal is affected with tuberculosis, Johne's disease or rabies, he shall either destroy the animal himself, or cause if to be destroyed or deal with it in the following manner :-

(i) In case of suspected tuberculosis, the Veterinary Officer shall conduct or cause to be conducted intra dermal test which may be repeated on the animal and if, after such test, he is satisfied that the case is a positive one, he shall immediately - (a). segregate the animal from other animals; (b). stop the use of the milk of the animal if the milk of such animal has been proved to be infective by a laboratory test; and (c). Destroy by burning all the dung and urine of the infected animal.

(ii) In case of suspected Johne's disease, the Veterinary Officer shall carry out or cause to be carried out intra dermal test which may be repeated on the animal and if, after the test, he is satisfied that the animal is suffering from Johne's disease he shall get the animal removed to the nearest Gosadan.

(i) In the case of suspected rabies, he shall – (a). forthwith isolate the affected animal and keep it under observation for a period of ten days; and (b). if the animal dies within the said period, conduct the post-mortem examination and send portion of the brain to the nearest Pasteur Institute or recognized Government laboratory for histo-pathological examination.

Explanation – For the purpose of destroying an animal it should either be shot dead or killed by painless injection

276. Rule 21 of Bihar Preservation and Improvement of Animals Rules

277. Criminal Appeal No.219 of 2013 (Arising out of S.L.P. (Crl.) No. 8971 of2012)

the above interpretation, whatever be the situation, it is of no use to keep the seized vehicle in the police station for a long period. Custody of Sheep and goats with owner

In the case of **Bharat Amratlal Kothari and another Versus Dosukhan Samadkhan Sindhi & others**[278] Hon'ble Apex Court has observed that illegality of search and seizure of the goats and sheep can only be determined at the stage of final disposal of the trial but not in interim stage when the application is to be heard for interim custody of the muddammal under Section 451 read with Section 457 of the Code of Criminal Procedure, 1973. Since the prosecution cannot prove that the animals were subjected to cruelty by the accused as no marks of cruelty would be found. The trade is not prohibited by any law. The owners are entitled to interim custody of goats and sheep seized in the case during the pendency of the trial.

Insufficient Penalty – Violation with impunity

In the case of **Animal Welfare Board of India v. A. Nagaraja & Ors**[279] Hon'ble Apex Court observed that every species has a right to life and security, subject to the law of the land, which includes depriving its life, out of human necessity. Animals' well-being and welfare have been statutorily recognised under Sections 3 and 11 of the Act and the rights framed under the Act. Right to live in a healthy and clean atmosphere and right to get protection from human beings against inflicting unnecessary pain or suffering is a right guaranteed to the animals under Sections 3 and 11 of the PCA Act read with Article 51-A(g) of the Constitution. Right to get food, shelter is also a guaranteed right under Sections 3 and 11 of the PCA Act and the Rules framed thereunder, especially when they are domesticated. The right to dignity and fair treatment is, therefore, not confined to human beings alone, but to animals as well. The right, not to be beaten, kicked, over-ridden, over-loaded is also a right recognized by Section 11 read with Section 3 of the PCA Act. Animals also have a right against human beings not to be tortured and against infliction of unnecessary pain or suffering. Penalty for violation of those rights is insignificant, since laws are made by humans. Punishment prescribed in Section 11(1) is not commensurate with the gravity of the offence, hence being violated with impunity defeating the very object and purpose of the Act, hence the necessity of taking disciplinary action against those officers who fail to discharge their duties to safeguard the statutory rights of animals under the PCA Act.

Unless the owner is convicted, Release of animals not barred

In the case of **Manager, Pinjrapole Deudar and Another Vs. Chakram Moraji Nat and Others**[280] Hon'ble Apex Court observes that unless the owner of the animal in respect of which he is facing prosecution, is deprived of the custody (which can be done only on his conviction under the Act for the second time), no bar can be inferred against him to claim interim custody of the animal.

278. AIR 2010 SC 475

279. (2014) 7 SCC 547

280. (1998) 6 SCC 520

Pinjrapole has no preferential right in interim custody

In the **Pinjrapole Deudar case**[281] it is observed by Hon'ble Apex Court that where the owner is claiming the custody of the animal, Pinjrapole has no preferential right. In deciding whether the interim custody of the animal be given to the owner who is facing prosecution, or to the Pinjrapole, the following factors will be relevant:

- The nature and gravity of the offence alleged against the owner;
- Whether it is the first offence alleged or he has been found guilty of offences under the Act earlier;
- If the owner is facing the first prosecution under the Act, the animal is not liable to be seized, so the owner will have a better claim for the custody of the animal during the prosecution;
- The condition in which the animal was found at the time of inspection and seizure;
- The possibility of the animal being again subjected to cruelty.

Establishment of Pinjrapole is with the laudable object of preventing unnecessary pain or suffering to animals and providing protection to them and birds. But it should also be seen, (a) whether the Pinjrapole is functioning as an independent organization or under the scheme of the Board and is answerable to the Board; and (b) whether the Pinjrapole has good record of taking care of the animals given under its custody.

Prevention of Cruelty Act applies also on Exotic animals

In the case of **Ajanta circus vs. Union of India**[282] Hon'ble Patna High Court observes that section 22 of the cruelty Act applies to all animals including African animals, irrespective of origin.

Release of Camels

In the case of **Dhyan Foundation vs The State of Bihar**[283] Hon'ble Patna High Court has observed that Article 51 A(g)[284] of the Constitution of India and Section 3[285] of the Prevention of Cruelty to Animals Act, 1960 create constitutional and legal duty on everyone to ensure the well being of animals and to prevent infliction upon such animals of unnecessary pain or suffering. The life of the seized camels are in danger due to ailment and victim of weight loss due to non-availability of adequate food etc. The camel are directed to be released on execution of surety

281. Ibid at 281

282. 2009 (2) PLJR 323

283. Decided on 27April, 2017Criminal Writ Jurisdiction Case No.263 of 2017

284. Article 51A(g) It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures

285. Section 3 of the Act provides that it shall be the duty of every person having the care or charge of any animal to take all reasonable measures to ensure the well-being of such animal and to prevent the infliction upon such animal of unnecessary pain or suffering

bond and proper identification of the petitioner with further direction that the petitioner would carry the same straightway to the State of Rajasthan and shall not dispose of the camels without permission of the competent authority under the Rajasthan Act.

Even a stranger may bring proceedings to prevent cruelty to animals

In the case of **Sardar Khan & Anr. vs State Of Bihar**[286] Hon'ble Patna High Court observes that the prevention of Cruelty to Animals Act, 1960 has been enacted to prevent the infliction of unnecessary pain or suffering on animals and Directive Principles of State Policy enshrined in Article 48 of the Constitution says that the State have endeavour to prohibit the slaughter of cows and calves and other milch and draught cattle and therefore, if any animal is put into cruelty and State fails to protect the aforesaid animal, even a stranger to the proceeding being Indian citizen has every right to take the help of legal recourse to prevent the cruelty towards the said animal.

Magistrate has power u/s 451 CRPC to deal with Seized animals

In the case of Naseerulah vs State[287] Hon'ble Madras High Court observes that the police officer has a power to seize animal on suspicion of commission of an offence committed under the Act of 1960. On such seizure, the police officer is required to report to the Magistrate having the jurisdiction. The Court is required to pass an appropriate order with respect to the custody of the animal under the provisions of Section 451 of the CR.P.C

In case of cruelty, animals not to be returned to owner

In the case of **State of U. P. Vs. Mustkin & Ors**[288] Hon'ble Apex Court observes that there were specific allegations in the FIR that the animals were transported for being slaughtered and the animals were tied very tightly to each other. In view of such charges, the animals couldn't be released in favor of the accused. Hon'ble Court directed that the animals be kept in the Goshala and the State Government undertake to take the entire responsibility of the preservation of those animals so long as the matter is under trial.

In the case of **Naseerulah vs State**[289] Hon'ble Madras High Court observes that in one vehicle more than 20 cows or buffaloes were transported and in that process one animal is being attacked by another causing injury to the animals. Cattle are being transported continuously for a period of 48 hours crossing inter-State border without even providing fodder or water. They are mostly taken only for slaughtering in complete violation of the legal provisions. The object of the Prevention of Cruelty to Animals Act, 1960, is only to prevent animals from being put to cruelty. Hon'ble Court confirmed the magistrate order that the petitioner is not entitled for return of the cattle.

286. Decided on 24 December, 2013 in Criminal Miscellaneous. 47517 of 2013

287. Decision dated 14.03.2013 in CRL.R.C.No.777 of 2010

288. 2002 (3) GLH (UJ) 8

289. Decision dated 14.03.2013 In CRL.R.C. No.777 of 2010

In the case of **People for Animals & Anr. vs Md Mohazzim & Anr**[290] Hon'ble Delhi High Court observes that the possibility that some of these birds and animals, may have suffered injuries or afflictions on account of confinement and captivity in such small cages is writ large in the fact that the death of forty-three birds and five rabbits "due to shock" was reported, followed by death of another animal "due to high fever". It does appear that a large number of seized birds and animals included those of foreign origin, e.g., gouldian finch, red lori, cockateel, Australian sun conure etc. Conduct of the accused with absence of any prior verification of the place where he intended to keep them after such release impels that the release of the birds and animals on superdari to the accused amounted to reviving the possibility of them being subjected to continued cruelty. The accused is directed to return all the birds and animals the custody whereof was entrusted to him by handing them over to the Sanjay Gandhi Animal Care Centre, the management whereof shall continue to take their care till further directions are passed by the criminal court upon conclusion of the proceedings.

In the case of **Yusuf @ Isub vs State Of Haryana**[291] Hon'ble Punjab Haryana High Court observes that the camels were being carried in a cruel matter and three camels have died on account of injuries sustained by them during transportation, therefore, it cannot be held at this stage that the camels were purchased for the purpose of agriculture or for pulling of cart, rather the matter in which the camels were found/recovered suggests that the same were being carried for the purpose of slaughtering. Therefore, there is possibility of the camels being slaughtered in case they are released on superdari It is not safe to release the Camels.

In the case of **Goraksha Dal vs State of Punjab & Ors**[292] Hon'ble Punjab and Haryana High Court observes that it is the matter of evidence whether the said accused persons were carrying the animals in question for slaughtering purposes or not but releasing the animals in their favor and direction to produce on each date will only be increasing the agony of speech-less animals. It is directed that the custody of oxen be immediately handed over to the petitioner Society.

All stray dogs not to be killed

In the case of **People for Elimination Of Stray Dogs vs State Of Goa**[293] Hon'ble Bombay High Court has observed that resort can be had to the provisions of sub-section (3) of Section 11 of the Prevention of cruelty to Animals Act 1960 and other relevant law with respect to stray dogs, but section 11(3) of the Act does not contemplate killing of "all" stray dogs in lethal chambers or by such other methods.

290. Decided on 8 August, 2018 CRL.M.C. 2051/2015 and Crl.M.A. 7294/2015

291. Decided on 10 December, 2018 in CRM-M-10513-2016

292. Decided on 11 December, 2008 Crl. Misc. No.12454-M of 2008

293. Decided on 19/12/2008 Writ Petition (PIL) No. 111 of 2005

Without health certificate, infected animals should not be released

In the case of **Sanjay Gandhi Animal Care Centre vs NCT of Delhi**[294] Hon'ble Delhi High Court observes that the health certificate should be obtained in case of infected animals. Clearance of infected animals for the purpose of slaughtering would amount to cruelty which is not only to them but also to humans who would suffer if they consume the infected meat. Same may be released to the superdar only after complying with the guidelines showing health certificate.

Maintenance charges to be paid by the superdar for release of oxen

In the case of **Pappu Ram and Ors. vs State and Anr.**[295] Hon'ble Delhi High Court observes that the liability to pay maintenance charges during the period the oxen remained in the custody of Gaushala lies upon the petitioner. Owners could not get the animals released on superdari due to stay of operation of the said orders. For that, Gaushala can't be blamed to be deprived of its reasonable maintenance charges. There are no allegations if any official of Gaushala was responsible for illegal retention or detention of the animals. No sound reasons exist for waiver of maintenance charges.

CHAPTER VIII

DOCUMENTS - CUSTODY AND DISPOSAL DURING TRIAL AND AFTER TRIAL

The explanation attached to the section 451 CRPC describes that the property includes document and the court is empowered to make suitable order like interim custody or otherwise, with respect to the document which is produced before the Court or which is in its custody, with which any offence appears to have been committed or which appears to have been used for the commission of any offence. Likewise, section 452 CRPC also provides for disposal of such documents after conclusion of trial. Section 30 and Order XIII of the CPC also provides the procedure to deal with the documents. The law enshrines in these provisions are of general nature. Custody and disposal of documents is also governed by Indian Evidence Act, Civil Court Rules, Criminal Court Rules and Indian Stamp Act.

Document

The word document is derived from the Latin *Documentum* which means some thing which instructs or provides information. The word document has been defined in a variety of ways at different places.

The Indian Evidence Act defines document as any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter. The various

294. Decided on 14/01/2015, in CRL.M.C. 5934/2014

295. Decided on 06/08/2015 in CRL.REV.P. 67/2015

illustrations of document are writing, printed, lithographed, photographed words, map, plan, inscription on a metal plate or stone, caricature. It also includes electronic records. All documents including electronic records produced for the inspection of the Court such documents are called documentary evidence[296].

The Information Technology Act provides that the information contained in an electronic record, printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer is also deemed to be a document.[297]

The word Document also find mentioned another place in the Code of Criminal Procedure 1973 where it is referred to include any painting, drawing or photograph, or other visible representation[298].

Indian Penal Code 1860 defines the word document[299] as any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter. It includes A writing expressing the terms of a contract, A cheque upon a banker, A power of attorney, A map or plan, A writing containing directions or instructions, Endorsement on the back of a bill of exchange.

General Clauses Act gives a inclusive connotation to word document[300] which includes any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter.

Document in IT age

The rapid pace of change in technology made the judicial system to make amends to maintain the pace with the changing times. Information Technology Act has been enacted to cope up with the challenges posed by technological advancement. It defines Electronic record[301] as data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer-generated micro fiche. The term Data[302] is defined as a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formal manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer.

296. Section 3 of the Indian Evidence Act
297. Section 65B of the 1872 Act
298. Section 95 (2)(b) of the CRPC
299. Section 29 of the Indian Penal Code 1860
300. Section 3 (18) of the General Clauses Act
301. Section 2(1) (t) of the Information Technology Act 2000
302. Section 2(1) (o) of the InformationTechnology Act 2000

Powers of Court with respect to documents

The court has the power to summon any person to production of documents. The various provisions regarding this contained in Code of Criminal Procedure, Code of Civil Procedure and Indian Evidence Act have been enumerated below -

A. CrPC 1973

The powers of the criminal court to issue summons to produce documents or other things has been contained in Section 91 to 96, 104, 105, 105-B, 105-G, 145, 166-A, 166-B, 230, 233, 242, 243, 244, 254 of the Cr.P.C Section 195 provides for prosecution of certain offences against document and section 340 provides the procedure for such prosecution. Section 291 to section 294 provides the procedure for admitting certain documents.

B. CPC 1908

The power of the court with respect to production of documents contained in section 30, 31, Order V rule 7, Order VII rule 14, Order VIII rule 8-A, Order XI rule 2, Order XI rule 14 to 21, Order XIII, Order XVI rule 6, Order XVI rule 7, Order XVI rule 14, Order XXI rule 41, Order XXI rule 66, Order XXXIV rule3, Order XXXIV rule 5, Order XXXIV rule 8 and Order XLI rule 27 of the Code of Civil Procedure.

Code of Civil Procedure provides that the court may pass orders as may be necessary or reasonable in all matters relating to the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence[303].

Order XIII of the Code specifically deals with the production, marking and return of documents. Sub rule (1) of rule 4 of Order XIII provides the manner in which a document would be admitted.

Order XIII Rule 5 of the CPC provides that in case of an entry, in letter book or shop book or account book or in a public record produced from a public office or by a public officer. After examining the entry and comparing with the copy, the same shall be returned. Besides the documents not admitted in evidence shall not form part of the record and shall be returned[304]. Similar provisions regarding shop book have also been contained in Order VII rule 17 of the CPC.

Any person may get the admitted document back, except the impounded document on certain eventualities but he has to furnish the certified copy or the ordinary copy as the case may be. But no document which become useless or void due to force of decree will be returned[305]. The provisions with respect to document apply to all other material objects[306].

303. Section 30 of the CPC

304. Order XIII Rule 7 CPC

305. Order XIII Rule 9 CPC

306. Order XIII Rule 11 CPC

C. Evidence Act 1872

Section 162 of the Evidence Act provides for production of documents before the court and 165 of the Act prescribes the power of court to put question and order production of documents. The evidence Act approves two types of documents viz. Public document[307] and Private document[308] and it contain meticulous provisions with respect to relevancy and admissibility of various types of documents.

D. Provisions relating to documents in Criminal Court Rules -

Criminal Court rules of Hon'ble High Court of Judicature provides extensive rules for disposal of Property and documents. In this part only the provisions respecting documents have been illustrated. Rule 128 provides that the documents which have not been admitted in evidence should not be made part of the record unless the Court directs otherwise. They should, immediately on the conclusion of the trial, be returned to the person producing them or his mukhtar or pleader after he has signed the receipt for the same. A mukhtar or pleader, when required to do so is bound to take back any document produced by his client which has not been admitted into evidence and to sign the receipt referred to above.

Rules 147 to 151 provide elaborate procedure for preservation and Destruction of Records.

Rule 152 to 154 provides for return of exhibits.

Rule 152 provides that When an entry in a public register, or in private account book or other bulky record, not being itself an entry in respect of which an offence has been committed, or is alleged to have been committed, is produced in evidence, and made an exhibit in the case, and the retention of such register, account book or record would cause inconvenience to the public, or the person producing the same, such register, book or record shall not be retained by the Court but shall be returned to the person by whom it has been produced. Before returning the register, book, or record, the Court shall mark, for the purpose of identifications, such entry or entries as have been exhibited in evidence and shall cause a certified copy of the entry or entries to be filed with the records of the case. The person to whom the register, book, or record is returned, shall be bound to produce the same before the Court when required to do so, and may be required to enter into a bond to that effect.

Rule 153 (a) On the judgment, or order, in any case becoming final, notice shall be given to the person by whom any document, admitted and used in evidence; was brought into Court, or to his pleader, requiring him to take it into his keeping, within six months from the date of the notice, failing which the document will be destroyed, when the record to which it relates is destroyed. The notice must distinctly warn the owner that the document will be kept at his own risk, and that the

307. Section 74 of the Evidence Act

308. Section 75 of the Evidence Act

Court declines all responsibility for its safe custody. A copy of the notice shall be put up in the Court in which the case was tried.

Rule 154 lays down that when returning documents, care must be taken that any document which the Court has impounded is not delivered out of the custody of the Court.

Rule 155 provides that the destruction of records, in accordance with these rules, shall take place at the end of each calendar year, by burning.

Rule 170 - Copies of printed and lithographed maps and plans will not ordinarily be supplied by the Copying Department. Application should be made to the office where the original maps are deposited.

E. Provisions relating to documents in Civil Court Rules

Civil Court Rules of Hon'ble High Court of Judicature at Patna made elaborate arrangement for handling, keeping in custody, return of documents produced before the court.

It provides that the Subordinate Courts should take special care to prevent the unnecessary production of public documents in court. When an officer objects to the production of any documents stating the grounds of such objection it will be the duty of the Court to consider and decide if it should compel the production of such documents or not.[309]

Rule 215 to 221 provides for elaborate scheme of the Classification of Records of Judicial Proceedings.

Rule 222 provides for a table of period for which different document has to be preserved.

Rule 223 to 244 provide detail procedure of different files and forms in which the records and documents are to be maintained.

Note 2 to Rule 230 of the Civil Court rules provides —In the case of Civil Appeals except miscellaneous appeals the certified copies of judgments and decrees filed with the memorandum of appeal should be returned to the appellants on their applying for them after the disposal of the appeals, since the original record is kept with the appellate record in the district record room. In the case of appeals from the decisions of Settlement Officers and civil miscellaneous appeals, these documents should not be returned, but should be retained with the appellate records until the "C" File with which they are placed is due for destruction.

Rule 245 to rule 256-A provides for the manner in which the various documents are to be dealt with. Some of the important provisions are discussed below

Rule 250. When a document of historical or antiquarian interest is in question, the document may be enclosed in a sealed cover or in a locked or sealed box, the necessary particulars being endorsed outside such box or cover. If every other means fails measures should be taken for the safe custody of the document pending instructions from higher authorities.

309. Rule 64 of Bihar Civil Court Rules. [G.L.10/55.]

Rule 250A - In case retention of original Valuable and important document is considered necessary, all measures should be taken by the Court for its safe custody.

Rule 252 - When any public document (not being the record of a suit or of a judicial proceeding) or a document in public custody has been produced in Court in compliance with a summons the Court shall after the document has been inspected or put in evidence, as the case may be, cause it to be returned with the least possible delay to the officer from whose custody it has been produced after the preparation of such copies as the Court may require under Order XIII, Rule 5, clause (2) Civil Procedure Code, unless its detention is considered to be necessary till the delivery of the judgment.

Note — While returning any public document, the Court shall make an endorsement therein near about the exhibit mark and by a separate order in the order-sheet of the case direct that it shall not be destroyed without previous permission of the Court and the Court shall not accord such permission until the trial is concluded, or in case where appeal lies until sufficient time has elapsed for appeal, or, if an appeal is preferred, until the determination thereof. The Court shall forward to the department concerned a copy of the order and before according permission for destruction, shall satisfy itself that no appeal is pending. The term "appeal" includes a second appeal and an appeal to the Supreme Court.

Rule 253. In case any document or book produced at any time in the course of the proceeding appears suspicious or forged or fabricated, it shall be kept in safe custody and shall not be returned to the parties concerned without permission of the Court. The Court shall not accord such permission unless all proceedings connected with such document or book has been completely disposed of.

Rule 254. Where the Court does not make any direction to the contrary unexhibited documents, if not returned earlier, shall, at the conclusion of the trial, be returned to the person producing them or his pleader after he has signed the receipt for the same in the proper column on the list. A pleader, when required to do so, is bound to take back any document produced by his client and to sign the receipt referred to above. [G.L. 3/29.]

Rule 255. (1) A private person, not a party to the suit, producing a document in Court in compliance with a summons, should be required to state in writing the address to which the document is to be returned, if not returned to him personally. If it is desired that the document should be returned to a pleader, a vakalatnama shall be filed along with the document.

Where the document is not tendered or admitted in evidence it shall be returned at once to the person producing it either personally or by registered post.

Where the document is admitted in evidence, a certified copy thereof shall be prepared and placed on the record, if not already there. The original shall then be returned to the person producing it personally or by registered post, or to his pleader unless the genuineness of the

documents is in controversy, in which case the original shall, unless the Court otherwise directs, be returned after the trial is concluded, or, in cases where an appeal lies, after sufficient time has been allowed for appealing, or, if an appeal is preferred, after the determination thereof. The word "appeal" includes a second appeal where a second appeal lies.

In the case of voluminous documents, such as account books or collections of zamindary papers, which cannot conveniently be returned by registered post, the person producing them shall, if they are not returned to him at once, be informed in due course by registered letter that he is at liberty to take them back, and that his reasonable travelling expense will be furnished.

This procedure shall also be adopted where the person producing the document states in writing at the time of production that the document is of value to him and that he will take it back personally.

In cases where the person producing a document has any pleader or mukhtar authorised to take back documents on his behalf the document may be returned under the foregoing Rules to such pleader or mukhtar, unless at the time of production the person producing it states in writing that it should be returned to him personally or by registered post.

Before a document such as is referred to in sub-rule (1) is called for at the instance of a party to the suit, such party shall deposit a sum sufficient to meet such expenses as are likely to be incurred, including the cost of returning the document by registered post, the cost of preparing a certified copy under sub-rule (3) and in cases under sub-rule (4) the travelling expenses both ways of the person producing the document.

In cases under sub-rule (4) the travelling expenses shall be transmitted to the person producing the document along with registered letter therein referred to.

Rule 256 - A period of three months from the date of the decree should ordinarily elapse before the documents exhibited in a case are returned to the person who produced them. The Presiding Officers of outlying Courts should see that exhibits are as far as possible returned before the periodical despatch of the records to the District Record Room.

Rule 256-A - Rule 298 of Chapter IV shall in so far as it is not inconsistent with these rules apply to applications for the return of documents from the Courts.

Rule 298 provides the detail procedure for the return of documents from records in the District Record-Room.

Relating to the Custody and Preservation of Wills

Rule 335. All original Wills presented to the District Judge or District Delegate shall, immediately upon the passing of the order for granting Probate or Letters of Administration be committed to the care of the Head Clerk, or Chief Ministerial Officer of the Judge's or District Delegate's Court, who shall be responsible for their safe custody.

Note. —All Wills, as soon as they are filed in a Court for the purpose of being proved, should be made over for safe custody in the presence of the District Judge or Delegate either to the Head Clerk or to the Sarishtadar of the Court, who should give a receipt for them, and should personally produce them before the Court, on the date of hearing, and, if the Will has to be retained in Court, should take a written receipt for it from the Bench Clerk. The latter officer will be responsible for the custody of the Will so long as it remains in the Court. The rule as to return of unexhibited documents shall apply to unexhibited Wills.

Rule 319 to 334 provide elaborate mechanism for destruction of record and documents.

Impounding of Document

Impounding is the act of seizing and taking legal custody of some documents due to infringement of a law. The Code of Civil Procedure provides that if there is sufficient cause the court may 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 think fit. If the court impounds any document or book, it is kept in the custody of an officer of the court[310]. Section 33 of the Indian Stamp Act says that Court has power to impound an unregistered document to take them as evidence. The occasion to impound the document invariably arise when the document is insufficiently stamped or unregistered though required by law. When an unregistered document is produced before court then at evidence, court may order to impound the document and take the original document in its custody.

Section 104 of the CRPC provides that any Court may, if it thinks fit, impound any document or thing produced before it under this Code. Rule 154 of criminal court rules lays down that when returning documents, care must be taken that any document which the Court has impounded is not delivered out of the custody of the Court.

Decisions of Hon'ble Courts with respect to document and electronic records

Electronic Record

In the case of **Anwar P.V. vs. P.K. Basheer**[311] Hon'ble Apex court observes that the electronic record produced for the inspection of the Court is documentary evidence under Section 3 of the 1872 Act.

Tape records of speeches

In the case of **Tukaram S. Dighole v. Manikrao Shivaji Kokate**[312] Hon'ble Apex Court held that tape records of speeches are document under section 3 of the Evidence Act.

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310. Order XIII rule 8 CPC

311. (2014) 10 SCC 473

312. (2010) 4 SCC 329

Audio Video Cassettes

In the case of **Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdas Mehra & Ors**[313] Hon'ble Apex court decided that audio/video cassettes were document within the purview of Evidence Act.

Compact Disc

In the case of **Shamsher Singh Verma vs. State of Haryana**[314] Hon'ble Apex court laid down that compact disc was document under Section 3 of the 1872 Act.

Contents of Memory Card and Pen Drive

In the case of **P. Gopalkrishnan @ Dileep versus State of Kerala and Anr**[315] Hon'ble Apex Court succinctly discussed the relevant provisions of the Information Technology Act, The Indian Evidence Act, The Code of Criminal Procedure, The General Clauses Act and the Indian Penal Code and laid down that the memory card itself would be a "substance" and hence, the contents of the memory card being electronic record must be regarded as a document.

Court to decide admission or rejection of documents

It has been held in the case of **Baldeo Sahai Vs. Ram Chander & Ors**[316] that the Court has to decide whether the document filed by the parties should be admitted or rejected. If they are admitted and proved then the seal of the Court is put on them giving certain details laid down by law, otherwise the documents are returned to the party who produced them with an endorsement thereon to that effect.

Impounding

In the case of **Sheshrao Bhikaji Kale. Vs Damodar Pandhan**[317] Hon'ble Bombay High Court upheld the direction of impounding of agreement of sale due to insufficient stamp paid.

In the case of **Jayraj Devidas Vs Nilesh Shantilal Tank**[318], Hon'ble Bombay High Court observed that in the matter when any instrument was not duly stamped, the court should proceed to impound the document and issue direction for adjudication of the instrument for the purpose of payment of stamp duty and penalty. Until such process was over, the court couldn't act upon such instrument.

313. (1976) 2 SCC 17
314. (2016) 15 SCC 485
315. 2019 SCC OnLine SC 1532
316. AIR 1931 Lahore 546
317. 2004 (6) Bom.C. R354
318. Decided on 22.08.2014 in Arbitration Appeal 45 of 2013

In the case of **Vinod Kumar Asthana vs. Chief Passport Officer,**[319] Hon'ble Delhi High Court laid down that impounding the passport was not warranted considering that the petitioner had already been called upon to deposit the same with the concerned Court. Further, the permission has already been granted to the petitioner to travel overseas.

LIC Policies and Certificate of Registration are Documents

Hon'ble Patna High Court in the case of **Mohammad quasim Ahmad vs. State**[320] laid down that the LIC policies and Certificate of registration were documents and these had to be released promptly.

Dispute over property and document

In the case of **Keshar Singh vs The State of Bihar**[321] Hon'ble Patna High Court has held that "Sections 451 and 452 of CRPC cannot be made applicable for the disposal of the property as during the trial the accused died and on account of death the proceeding has abated and it will not be deemed that proceeding has concluded in absence of final judgment by the Criminal Court. In that circumstance Section 457 CRPC has a play in this case but the criminal Court will not have a jurisdiction to decide the rival title and ownership claimed by the parties. The Criminal Court will have a jurisdiction only to the extent when there is no serious dispute of title, ownership and possession over the property. It is directed to make Inquiry but when it finds the serious dispute of right, title and possession is involved and while deciding the issue several legal niceties civil are found to be involved, the Court would ask the parties to get their right title decided by Civil Court, till then those properties would remain undercontrol and possession of the Criminal Court. The possession and documents would be handed over to the person as per the judgment of Civil Court.

Court is empowered to order inspection and return of documents

In the case of **State Of Bihar vs Hardwar Pandey**[322] Hon'ble Patna High Court observed that under Section 457 of the Code of Criminal Procedure, the Court would have been justified if it thought fit to direct the return of the documents to the opposite party and, therefore, there could be no difficulty in ordering such an inspection, which, in my view, is justified also to secure the ends of justice. The Court was neither lacking in jurisdiction nor was there any jurisdictional impediment in the way of the Court in passing the impugned orders.

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319. 2019 SCC OnLine Del 8138; Relying the judgment in Manish Kumar Mittal v. Chief Passport Officer 2013 SCC OnLine Del 3007

320. 2009 (3) PLJR 56

321. Decided on 16 December, 2013 in Criminal Miscellaneous No. 25391 of 2013

322. 1978 (26) BLJR 803

CHAPTER IX

PROCEDURE BY POLICE UPON SEIZURE OF PROPERTY

Search and seizure are not a new weapon in the armour of law enforcement agencies. Search may include the search of a place or search of a person or search of the belonging of a person. The searching authority may vary from the Police Officer (different ranks of officer can be prescribed), Controller, Investigating Authority, Inspector, Board, Commission, Registrar of Companies, etc. The object behind investing the police with powers of seizure and production in court of any property have a two-fold effect. Production of the above property may be necessary as evidence of the commission of the crime. Seizure may also have to be necessary, in order to preserve the property, for the purpose of enabling the Court, to pass suitable orders. It is important to know the police power to seize any property.

Provisions regarding power of the police to seize

Power of Police to seize property under CRC

The power of police to seize any property is contained in following sections of the CrPC

i. Section 51 – The police officer making the arrest, may search such person, and place in safe custody all articles, other than necessary wearing-apparel, found upon him and where any article is seized from the arrested person, a receipt showing the articles taken in possession by the police officer shall be given to such person.

ii. Section 52 – The police officer making any arrest may take from the person arrested any offensive weapons which he has about his person, and shall deliver all weapons so taken to the Court.

iii. Section 94 – The police officer may on warrant search any place and take possession of any property or article therein found which he reasonably suspects to be stolen property or objectionable article and to convey such property or article before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose of it in some place of safety. The objectionable articles to which this section applies are—(a) counterfeit coin; (b) pieces of metal made in contravention of the Metal Tokens Act, 1889 (1 of 1889), or brought into India in contravention of any notification for the time being in force under section 11 of the Customs Act, 1962 (52 of 1962); (c) counterfeit currency note; counterfeit stamps; (d) forged documents; (e) false seals; (f) obscene objects referred to in section 292 of the Indian Penal Code (45 of 1860); (g) instruments or materials used for the production of any of the articles mentioned in clauses(a)to (f)

iv. Section 95 - The police officer may seize any newspaper, book or document which contains matter publication whereof is punishable under section 124A or section

153A or section 153B or section 292 or section 293 or section 295A of the Indian Penal Code which the Government declare every issue of such thing being forfeited.

v. Section 100 – During the course of search of place and or person, anything seized from such place or person.

vi. Section 102 – The police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

vii. Section 153 – The police officer may seize any weights, measures or instruments for weighing which are false.

viii. Section 165 enables the police officer investigating into a crime to make a search in accordance with the provisions of section 100 Criminal Procedure Code.

Police power to return seized property

Generally, where a property has been seized by the police, order regarding disposal of the property or delivery of the property so seized is required to be made by the court. If the investigation is still being carried out, the magistrate has the power of disposal of such property or delivery of such property to the person entitled to possession thereof under Section 457 of the C RPC. However, in certain circumstances, the police also have the power to give custody of the property seized to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same. The power of the police officer in this regard is laid down in subsection (3) of Section 102[323] of CRPC This clearly provides that the police officer has the power to give custody of the property to the person concerned on his executing a bond in the following circumstances:

i. Where the property seized is such that it cannot be conveniently transported to the Court or where there is difficulty in securing proper accommodation for the custody of such property, or

ii. Where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation.

323. Subsection (3) of Section 102 CRPC - Every police officer acting under sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same:

Provided that where the property seized under sub-section (1) is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of Sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale."

In view of these legal provisions, if the police officer is of the opinion that the continued retention of seized property is not necessary for the purposes of the investigation, he has the power to return the property on getting a bond executed with undertaking to produce the property before the court as and when required and also to give effect to the further orders of the Court as to the disposal of that property during or subsequent to the court proceedings.

Procedure under Section 457 of the Code of Criminal Procedure 1973

It provides the procedure by police upon seizure of property

457: **Procedure by police upon seizure of property—**(1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation.

{Section 457 of CRPC 1973 corresponds to Section 523 of 1898 CrPC}

When a Magistrate gets the report of seizure of property by police, even if such property is not produced before a criminal court during an inquiry or trial, the Magistrate can order disposal of the property as deem fit, under Section 457 of the CRPC This Section applies when a property is seized by police but not physically produced before the court during trial or inquiry. A report or a mention of the matter in the court is good enough for the court to act upon it. If the person entitled to the property is clearly known to the court, the Magistrate may order delivery of the property to him, under Section 457 (2) of the CRPC

But if no claimant appears and the person entitled to the property is not known, then the Magistrate can detain the property and issue a proclamation allowing six months to raise and establish a claim before him, under Section 458 CRPC If no claim is received within six months from the date of the proclamation, the Magistrate can order that such property shall be at the disposal of the state government. The state government will have the power to sell it as prescribed. If the property belonging to an unknown owner is perishable the Magistrate can order selling it. In short, the disposal of property is a matter of unfettered discretion for the court dealing with it. Section 452 will have to be borne in mind while passing an order both under Section 451 as well as under Section 457[324].

324. Julio @ Francis K. Bugde v. State and Ann, 2007 (3) AIR Bom R 238

An order for disposal or delivery of seized property may be made under Section 457, if the following conditions are satisfied:

(a) Property has been seized by the Police;

(b) Such seizure has been reported to a Magistrate under the provisions of the Code; and

(c) The seized property has not been produced before the Magistrate during the inquiry or trial before him.

Section 457 CrPC empowers a Magistrate to make such order as he thinks fit regarding disposal of the property seized by the police under Section 102 CrPC under suspicion. It applies in cases of properties seized by police which are not linked with complaint of an offence received earlier and therefore, not likely to be produced before Criminal Court for the purpose of inquiry or trial. The expression "is not produced before a Criminal Court during an inquiry or trial" doesn't mean 'may not be produced' or 'will not be produced'. The words 'is not produced' have reference to the point of time when the Magistrate to whom seizure has been reported is called upon to make an order for disposal of such property. The expression 'and such property is not produced before a Criminal Court during an inquiry or trial' in Section 457(1) merely refers to a stage of investigation and provides a condition precedent for exercise of jurisdiction of the Magistrate under this Section.

If the property seized is produced before a Criminal Court during inquiry or trial, the jurisdiction of the Magistrate under this section ceases. This power is limited to selection of one of the two alternatives indicated in Section 457, i. e. (a) delivery of property to the person entitled to the possession thereof; and (b) disposal of it. The court has wide discretion in the matter of disposal of the property where it elects the second of the aforesaid two alternatives. If the person entitled to possession of the seized property is known, then the court has the only choice of delivery of the property to him. The discretion given by these words must be judicially exercised.

Section 457 CRPC authorizes the Court to return the articles to the person claiming to be entitled to possession, whether offence is committed in respect thereof or not. It emphasizes return of the property to the person claiming to be entitled to possession thereof in case property is not for destruction or confiscation. The expression person claiming to be entitled to possession does not necessarily mean owner. Ownership connotes a question of title, whereas possession does not. The court may also direct the delivery of the property to the accused in appropriate cases by virtue of the residual provision "or otherwise". It is now settled that this phrase must be read ejusdem generis[325] to the modes of disposal previously mentioned. It doesn't confer a general power to make any order of disposal which the Court may deem fit.

Where on suspicion of theft property is seized by the police under Section 102 CRPC but on inquiry no offence is found to have been committed, the seized property should be returned to the

325. Ejusdem generis - Where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed

person from whose possession the articles were seized with security within the meaning of Section 457 CRPC A detailed procedure is given under Section 457(2) CRPC which clearly provides that if the person entitled to possession of such seized property is known, the Magistrate may order the articles to be delivered to such known person or persons on such condition as the Magistrate thinks fit and if such person or persons are unknown, only then the Magistrate may detain the seized articles and shall in such case issue a proclamation specifying the articles of which such a property consists requiring any person who may have a claim thereto to appear before him and establish his claim within six months from the date of such proclamation.

A conjoined reading of Sections 457 and 458 CRPC reveal that proclamation should be issued and inquiry about the entitlement of the person can be initiated only if it is found that the identity of person from whose possession the property is seized by the police under Section 102 CRPC is not known. The identity of the person entitled is not disputed if the articles have been seized from the actual physical possession of that person; in that case the Magistrate has no authority in law either to issue proclamation as contemplated under Section 457(2) CRPC or to make an inquiry after expiry of six months. Obvious enough section 458 CRPC will also not apply.

The normal rule is that when property has been seized from a person by the police and no charge-sheet is filed against him, the property should be returned to him, unless he disowns any interest therein. If the person from whom it is seized disowns interest therein, then it is certainly open to a Magistrate to make an inquiry under section 457, Criminal Procedure Code. It is only a normal rule. It has got its own exceptions and it cannot be an inflexible rule that in all cases of seizure the normal rule is that the property should be returned only to the person who was last in possession. It is for the Magistrate to make an inquiry into the question as to whether the person applying for its delivery is entitled to possession. There can't be any rule which doesn't admit any exception. If this is followed as an inflexible rule, persons who unlawfully come into possession of properties, would be encouraged to claim that they should be given the possession of those properties, seized from them merely because of the latches on the part of the police either in the investigation or in launching prosecution.

The person entitled to the possession of the property cannot be equated with actual possession. Nor can they be equated with the expression "the person from whom the property is seized or taken". A person may be in unlawful possession at the time it was seized though he has not committed the offence, and in that circumstance, it cannot be said that he is entitled to possession. It must be a lawful possession. The test, therefore, is not the mere possession of property at the time of seizure, but as to who is entitled to lawful possession. The expression 'entitled to possession' is the sine quo non for the delivery of property under section 457 Criminal Procedure Code".

Relationship of Section 457 with Section 451 and Section 452

Marked difference between sections 451 and 452 is that Section 451 deals with properties

during inquiry or trial, while Section 452 deals with the properties at the conclusion of the trial and also thereafter. Thus Section 451 relates to the pendency of inquiry and trial while Section 452 is relating to post trial stage. A close reading of Section 457 and juxtaposing it with these two sections, show that section 457 may be used in both the stages and gives power to the Court to pass appropriate orders when the properties are not produced before the Court. It will overlap Sections 451 and 452. Section 457 could be added to the said Sections depending upon the stage of the case.

451 CRPC AND S. 457 CRPC

On reading Section 457 in consonance with section 451 it becomes clear that the law not mandates that the property should only be reported and never be produced. Exercise of judicial power can't be left at the mercy and will of the investigating officer. If investigating officer seizes property, such as goods truck or any big animal as the stolen property and merely reports about seizure as the same cannot be produced in the court of Magistrate nor kept in the malkhana, the property cannot be said to be property not produced before the criminal court, during an inquiry or trial. Anything seized, as a result of inquiry/investigation into the complaint must be deemed to have been produced before the criminal court as soon as the investigating officer reports the seizure of such property to the Magistrate. Hon'ble Calcutta High Court in the case of **Ambika Roy vs. The State of West Bengal**[326] observes that "The words "such property is not produced before a Criminal Court during an inquiry of trial" merely refer to the stage of investigation and not the stage of inquiry or trial. If the property is produced in the Criminal Court during an inquiry or trial, S. 451 of the new Code would apply and not S. 457. The factum of seizure has been reported to a Magistrate under the provisions of this Code and that the property has not been produced during an inquiry or trial but at the stage of investigation. The essential ingredients of Section 457 fulfilled and the case comes clearly within the ambit of the said provisions.

Provisions in Bihar Police Act, Bihar Police and RPF Manual

1. Sections 74 to 76 of the Bihar Police Act read with Rule 120 of Bihar Police Manual provides that the suspicious property and unclaimed property has to be dealt with by the concerned authority in the manner prescribed in section 457 of the CR.P.C
2. Chapter 1 rule 37.13 of the RPF Manual also prescribes that the pursuant to the order of the court under section 457 CRPC the property should be delivered to the owner after keeping a sample thereof.

Decisions of Hon'ble Courts touching the issues involved under s. 457 CRPC

Kinds of property liable to be seized by police

In the case of **M. T. Enrica Lexie v. Doramma**[327] Hon'ble Supreme Court observes that

326. 1974 Cri LJ 1002

327. (2012) 6 SCC 760

in course of investigation the police officer can seize any property under Section 102, if such property is alleged to be stolen or is suspected to be stolen or is the object of the crime under investigation or has direct link with the commission of offence for which the police officer is investigating into. A property not suspected of commission of the offence which is being investigated into by the police officer cannot be seized. Under Section 102 of the Code, the police officer can seize such property which is covered by Section 102(1) and no other.

Relationship between section 102 and 457 CRPC

In the case of **Nevada Properties Private Limited v. State of Maharashtra**[328] Hon'ble Apex Court observes that Section 457 applies when a property has been seized by any police officer and is reported to a Magistrate under the provisions of the Code and such property is not produced before a Criminal Court during the course of inquiry or trial. The expression 'not produced before a Criminal Court' used in Section 457 of the Code is significant. Thus, this provision applies to the property seized under Section 102 of the Code, but not produced during the trial or inquiry. In common parlance, the word 'produced' is an expression used to signify actual or physical production which would apply to movable property. Immovable property cannot be 'produced' in a Court. It is held that the expression 'any property' appearing in Section 102 of the Code would not include immovable property.

Police can't seize immovable property, but may seize the documents of title

In the case of **Nevada Properties Private Limited v. State of Maharashtra**[329] Hon'ble Apex Court observes that section 102 postulates seizure of the property. Immovable property cannot, in its strict sense, be seized, though documents of title, etc. relating to immovable property can be seized, taken into custody and produced. Immovable property can be attached and also locked/sealed. Seizure of immovable property in this sense and manner would in law require dispossession of the person in occupation/possession of the immovable property, unless there are no claimants, which would be rare. The police officer has no power to dispossess a person in occupation and take possession of an immovable property in order to seize it. This power could not be inferred and is not implicit in the power of police to effect seizure. Section 102 is not, an enabling provision by which the police officer acts to seize the property to do justice and to hand over the property to a person whom the police officer feels is the rightful and true owner. This is clear from the objective behind Section 102, use of the words in the Section and the scope and ambit of the power conferred on the Criminal Court vide Sections 451 to 459 of the Code. The expression 'circumstances which create suspicion of the commission of any offence' in Section 102 does not refer to a firm opinion or an adjudication/finding by a police officer to ascertain whether or not 'any property' is required to be seized. The word 'suspicion' is a weaker and a broader expression than 'reasonable belief' or 'satisfaction'. The police officer is an investigator

328. 2019 SCC OnLine SC 1247

329. Ibid, at 329

and not an adjudicator or a decision maker. Allowing the police officer to 'seize' immovable property on a mere 'suspicion of the commission of any offence' would mean giving a drastic and extreme power to dispossess etc. to the police officer on a mere suspicion. In no case immovable property seized vide an attachment order is treated as a seizure order by police officer under Section 102 of the Code. Disputes relating to title, possession, etc., of immovable property are civil disputes which have to be decided and adjudicated in Civil Courts. Section 102 of the Code doesn't empower a police officer to seize immovable property, land, plots, residential houses, streets or similar properties. Given the nature of criminal litigation, such seizure of an immovable property by the police officer in the form of an attachment and dispossession would not facilitate investigation to collect evidence/material to be produced during inquiry and trial. It doesn't, however, prohibit the police officer from seizing documents/papers of title relating to immovable property, as it is distinct and different from seizure of immovable property.

It is also observed in **Nevada case**[330] that sub-section (1) of Section 102 empowers a police officer to seize any property which may be alleged or suspected to have been stolen. Theft can take place only of movable property and not of immovable property. The word 'seized' has been used in the sense of taking actual physical custody of the property. Sub-section 3 of Section 102 provides that where it is difficult to conveniently transport the property to the court or there is difficulty in securing proper accommodation for the custody of the property, then the property can be given to any person on his executing a bond. This per se indicates that the property must be capable of production in court and also be capable of being kept inside some accommodation. This obviously cannot be done with immovable property. The power of attachment and forfeiture is given to courts and not to police officer. If a police officer is given the power to seize immovable property it may lead to an absolutely chaotic situation. To give an example, if there is a physical fight between the landlord and the tenant over the rented premises and if the version of the appellant is to be accepted, the police official would be entitled to seize the tenanted property. This would make a mockery of rent laws. If a person forges a will and thereby claims property on the basis of the forged will, then in that case the police officer can't be given the power to seize the entire property, both movable and immovable mentioned in the will. Otherwise, it would lead to an absurd situation which could never have been envisaged by the Legislature. The power of seizure in Section 102 has to be limited to movable property. Phrase 'any property' in Section 102 will only cover moveable property and not immovable property.

Police can't seize immovable property

In the case of **Raparthy Srinivas v. State of Telangana**[331] Hon'ble High Court of Telangana observes that the police officer has no power to seal the immovable property. The concerned Station House Officer is directed to remove the lock and seal of the immovable property.

330. Ibid, at 329, 330

331. 2020 SCC OnLine TS 150

In **Amrit Lal Kumawat v. The State of Rajasthan**[332] Hon'ble Rajasthan High Court observes that in an investigation of case, police have no power to seize disputed immovable property either under Section 102 of the CRPC or pass order for disposal of property under Section 451 of the CR.P.C Section 102 of the Criminal Procedure Code doesn't empower a police officer to seize immovable property like plots of land, residential houses, mountains, rivers streets or similar properties. The reason is that no useful purpose is going to be served by the seizure of the immovable property for the object of investigation. It cannot be inferred that for the purpose of facilitating investigation, inquiry or trial, seizure of immovable property of above kind is permissible.

Section 457 CRPC not applies to property seized under special law

In the case of **Mohammad Yusuf v. Krishna Mohan**[333] It is observed by Hon'ble Calcutta High Court that an inquiry is contemplated where there are conflicting claims. The words "if such person cannot be ascertained" refer to a case where it is known that no amount of inquiry would result in the finding out of the person entitled to the possession. The failure of an inquiry held under Sub- section (2) is dealt with in Section 524. Once an inquiry is held, subsequent orders are governed by Sub-section (1) of Section 524. Consequently, the provision in Sub-section (l) cannot refer to the failure of ascertaining the person entitled to the possession after inquiry. There may be circumstances in which the property was found to suggest that the person who is entitled to its possession would not be ascertained. The property may be such that its possession would be unlawful and nobody would own that he was entitled to its possession. In such a case it can be said that the person entitled to the possession cannot be ascertained. The word 'property' used in S. 457 of the CRPC cannot be that of particular and comprehensive meaning and any properties or goods which are seized under the special enactments such as Customs Act, Gold Control Act etc. will not strictly come within the meaning of property given in S. 457 of the CRPC and as such the Magistrate exercising his powers under S. 457 of the Code will not be authorized to deal with the properties and pass any order in respect of those properties.

Bank Account is property and police can seize or issue a prohibitory order restraining operation

In the case of **State of Maharashtra v. Tapas D. Neogy**[334]. Hon'ble Apex Court observes that factors like burgeoning corruption and protracting trial must be kept in mind in interpreting the provisions of Section 102 of the Criminal Procedure Code. If there can be no order of seizure of the bank account of the accused then the entire money deposited in a bank which is ultimately held in the trial to be the outcome of the illegal gratification, could be withdrawn by the accused and the courts would be powerless to get the said money which has any direct link

332. 1998 Crl. L.J. 3032

333. AIR (25) 1938 cal 17

334. (1999) 7 SCC 685

with the commission of the offence committed by the accused as a public officer. It is held that the bank account of the accused or any of his relations is "property" within the meaning of Section 102 of the Criminal Procedure Code and a police officer in course of investigation can seize or prohibit the operation of the said account if such assets have direct links with the commission of the offence for which the police officer is investigating into.

"Property" not meant in generic sense but with reference to the offence committed

In the case of **R. K. Dalmia v. Delhi Administration**[335] it is observed by Hon'ble Apex Court that whether an offence defined in a particular section of the IPC can be committed in respect of any particular kind of property, will depend not on the interpretation of the word 'property' but on the fact that whether that particular kind of property can be subject to acts covered by that section. In that sense, the word 'property' in a particular section covers only that type of property in respect of which the offence contemplated in that section can be committed.

Money is not immovable property

In the case of **Nevada Properties Private Limited v. State of Maharashtra**[336] Hon'ble Apex Court observes that the money, as per clause (7) of Section 2 of the Sales of Goods Act, 1930, is neither goods nor movable property, albeit Section 22 of the IPC defines the term 'movable property' to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth. The expression 'movable property' has not been specifically defined in the Code. In terms of Section 2(y) of the Code, words and meanings defined in the IPC would equally be applicable to the Code. Money, therefore, would be property for the purposes of the Code. Money is not an immovable property.

Act of freezing account sequel to the crime – Proper

In the case of **Teesta Atul Setalvad v. State of Gujarat**[337] it is observed by Hon'ble Apex Court that the Investigating Officer was in possession of material pointing out to the circumstances that had created suspicion of the commission of an offence, in particular the one under investigation, and therefore exercise of power under Section 102 of the Code would be in law legitimate as it was exercised after following the procedure prescribed in sub-sections (2) and (3) of the same provision.

Power to ascertain entitlement to possession vests in the Magistrate

In the case of **Kasturi Lal Ralia Ram Jain v. State of Uttar Pradesh**[338] Hon'ble Apex court observes that the police officers had to deal with the question of the safe custody of seized

335. AIR 1962 SC 1821

336. Supra at 329, 330, 331

337. (2018) 2 SCC 372

338. AIR 1965 SC 1039

goods. Section 523 provides the procedure in that behalf. It lays down that the seizure by any police officer of property shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or, if such person cannot be ascertained, respecting the custody and production of such property. These are the relevant provisions of the Code in respect of property seized from a person who has been arrested on suspicion that he was carrying stolen property the power to ascertain as to who is the person entitled to possession vests in the Magistrate while dealing with the corresponding Section 523 of 1898 Code.

Discretion must be exercised judicially

In the case of **Ramsagar Yadav vs. Md. Younus**[339] it is held by Hon'ble Patna High Court that assumption by the magistrate that he had no power at all to deal with the matter, shows that the judicial discretion conferred upon him was not exercised. If the Magistrate decided that one or other of the parties was in possession at the time the police seized the property, the proper order to be passed would be to restore that party to possession. If the Magistrate was unable to decide who was in possession, it would be his duty to issue a proclamation under sub-s. (2) of Sec. 523 and proceed in accordance with the provision of that sub-section. Hon'ble Court remanded the case back and directed the magistrate to exercise the power.

Reporting of seizure – Deemed Production

In **Noor Khan vs. Shaikh Jakeer Sk. Akbar**[340] it is held by Hon'ble Bombay High Court that under section 457 CRPC, the magistrate is empowered to pass orders regarding custody of property not involved in any criminal proceeding at any stage from inquiry till trial. Anything seized, as a result of inquiry/investigation into the complaint must be deemed to have been produced before the criminal court as soon as the investigating officer reports the seizure of such property to the Magistrate.

Property seized reported but not produced – Not to be invariably released

In **Ram Prakash Sharma vs State Of Haryana**[341] Hon'ble Apex Court observed that the court had power to dispose of property seized by the police but not yet produced before it under section 457 CRPC, but this did not mean that the property should always be released in favor of the person from it ha d been recovered in cases where the investigation was not over. Each case has its own merit and decision should be taken cautiously after due consideration of the interests of justice and the prospective necessity of the production of the seized articles during trial. If the release of the property seized is going to affect or prejudice the course of justice at the time of the trial, it would be a wise discretion to reject the claim for return.

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339. AIR1940 Pat 32

340. 2003 (2) ALD Cri 65

341. AIR 1978 SC 1282, (1978) 2 SCC 491

Physical custody includes control exercised by Court

In the case of **Smt. Basavva Kom Dyamangouda vs State of Mysore And Anr**[342] Hon'ble Apex Court observed that a production before the Court did not mean physical custody or possession by the Court, but included even control exercised by the Court by passing an order regarding the custody of the articles. Where the Magistrate, after having been informed that the articles have been produced before the Court directs the Sub-Inspector to keep them with him in safe custody, to get them valued and verified by a goldsmith, the articles are undoubtedly produced before the Court and become *custodia legis.* Property seized during inquiry / investigation into complaint of an alleged offence must always be deemed to be property produced before Criminal Court and having become *custodia legis.* Therefore, whether the Magistrate passes an order regarding proper custody of the property under Section 451 of CRPC or Section 457 of CRPC, should be guided by the test, whether the property seized, during inquiry or investigation of a crime, is required to be produced before the criminal court during the course of trial. Physical non production of the property before the criminal court, either during the trial or during earlier stages, will not take away the jurisdiction of the Magistrate to deal with the property in exercise of the powers conferred by Section 451 of the CRPC and subsequently under Section 452 at the conclusion of the trial. Section 457 would be applicable only when the police have seized the property without being in the midst of any inquiry or the investigation into alleged offence. The clause "such property is not produced before the criminal court during an inquiry or trial" for all practical purposes must, therefore, be read as, "such property is not involved and required to be produced before the criminal court during the inquiry or trial." Provisions empowering Magistrate to pass orders regarding proper custody of property seized by police, i.e., Sections 451/452 on one hand and Section 457 on the other side are not overlapping. Sections 451/452 come into play in cases of properties seized by police during the course of inquiry or investigation of an alleged offence and therefore, property becomes *custodia legis* as soon as seized. Section 457 applies in cases of properties seized by police which are not linked with complaint of an offence received earlier and therefore, not likely to be produced before Criminal Court for the purpose of inquiry or trial. The object of the Code seems to be that any property which is in the control of the Court either directly or indirectly should be disposed of by the Court and a just and proper order should be passed by the Court regarding its disposal. In a criminal case, the police always act under the direct control of the Court and has to take orders from it at every stage of an inquiry or trial. In this broad sense, therefore, the Court exercises an overall control on the actions of the police officers in every case where it has taken cognizance.

Court may order for return or payment of the value of lost property

In the case of **Smt. Basavva Kom Dyamangouda vs State Of Mysore And Anr**[343] it is observed by Hon'ble Apex Court that the fact that the articles were stolen from the house of the

342. Supra at 51

343. Ibid at 343, also supra a 51

complainant is sufficient to clothe the Magistrate with the power to pass an order for return of the property. Where the property is stolen, lost or destroyed and there is no prima facie defence made out that the State or its officers had taken due care and caution to protect the property, the Magistrate may, in an appropriate case, where the ends of justice so require, order payment of the value of the property.

Unlawful possession not confers entitlement

In the case of **Purushottamdas v. State,**[344] Hon'ble Allahabad High Court observes that a person entitled to possession is one from whose possession the property was seized and who is not found to have committed any offence such as would render his possession unlawful. Criminal Court under Section 523 of the CRPC is not concerned with the ownership of the property. Possession at the time of seizure must be lawful. Restoration of the property to the person from whom it was seized will not apply if such a possession is found to be unlawful.

Lawful possession confers entitlement

In the case of **K. J. Singh v. C. Tomu Devi**[345] it is observed by Hon'ble High Court that once it is ascertained that a person possession over the seized property is not unlawful, then that person becomes entitled to the possession of the same and it may be restored to the person from whom it was seized.

Jurisdiction to ascertain the entitled person not barred

In the case of **Mohan Singh v. State**[346], Hon'ble Rajasthan High Court observes that the recovery of property from any particular person may be relevant fact and it has some weight in determining the question of entitlement, but this fact alone couldn't be conclusive. The 'person entitled to possession' in the section must not be confused with the expression 'the person from whose possession the property was taken'. Both have different connotations. Even though it is ascertained that the property was recovered from the possession of a certain person, the jurisdiction of the Magistrate to direct an inquiry to ascertain the person entitled to possession thereof is not barred.

Possession of accused may not be unlawful in civil dispute

In the case of **Paidi Subbayya v. Emperor**[347], It was held by Hon'ble Madras High Court that when the complaint was dismissed as one of civil nature and the possession of the property by one of the accused at the time of seizure cannot be said to be unlawful as he also had interest in the property.

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344. AIR 1952 All 470

345. AIR 1968 Manipur 29

346. 1966 CriLJ 233 (Raj)

347. AIR 1939 Mad 905

Court has discretion to restore property even when police filed final report

In the case of **Thimma Reddi v. Rami Reddi**[348], Hon'ble Madras High Court observes that the court has a discretion to pass orders with regard to the disposal of property even when police submitted the report that an offence under Section 411 IPC is not made out in restoring the property to the complainant though the property was recovered from the accused.

Wild Life case – No release in a routine manner

In the case of **State of U. P. & Anr vs Lalloo Singh**[349] Hon'ble Apex Court lays down that provision of insertion of intimation to the Chief Wild Life officer or the officer authorized by him is intended to give concerned official an opportunity of placing relevant materials on record before the Magistrate passes any order relating to release or custody. It is observed that seized property becomes property of State Government when it is used for commission of offence and therefore in appropriate case when material is placed before the Magistrate, prayer for release or custody may be rejected. The seized property must not be released in a routine manner involving wild life cases. When the vehicle is seized by the police authorities in connection with a forest offence and is produced before the Magistrate and no confiscation proceeding is pending then and then only the Magistrate would have jurisdiction to pass any order in exercise of power u/s 457 CR.P.C Intimation of confiscation proceedings by the authorized authority barred the jurisdiction of the Magistrate. It is held that section 457 CRPC is not generally applicable in such cases.

Stranger not allowed to get seized property released under EC Act

In the case of **State of Bihar v. Arvind Kumar**[350]**,** Hon'ble Apex Court observes that any stranger or third party should not be permitted to furnish sufficient security and get the seized goods release in his favour, even while deciding the application under Section 451/457 of the Code of Criminal Procedure, 1973. A person having no title/ownership over the seized material may get the same released on furnishing security and sell it in black market and earn profit several times more than the amount of security furnished by him. Such release would de hors the purpose of the Essential Commodities Act.

No power u/s 457 can be exercised in matters involving EC Act

In the case of the **Administration of Dadra and Nagar Haveli and others Versus C.B. Shah and another**[351] Hon'ble Bombay High Court observes the possession which is referred to in the acts of the seizure is taking legal possession. The criminal courts get jurisdiction not by instituting of proceedings but by report or complaint of some commission of criminal acts. The

348. AIR1941 Mad 416

349. Decided on 20 July 2007 in Criminal Appeal 963 of 2001

350. (2012) 12 SCC 395

351. 1986 SCC OnLine Bom 99 : (1986) 2 Bom CR 624

jurisdiction of criminal courts cannot be invoked either by institution of proceedings or by any reference to certain documents, which caused the Court to take notice of such thing contained therein. Since the property is not seized by the police nor such seizure is reported to the Magistrate. It is also not the seizure under the provisions of the CR.P.C In the absence of any such conditions which require the existence in order that the Magistrate may pass some orders in regard to some property, no application under section 457 of the Code is maintainable. If the property seized is under the control of the Civil Supplies department and in legal possession of the Collector or Department of Civil Supplies. The property is not produced before the Court and recourse to S. 457 of the Code in not possible. Even if it is found that such a seizure is to a certain extent irregular and even if it is shown that it is illegal, this doesn't confer any jurisdiction on the Magistrate under section 457 of the CRPC to deal with it. Ordinarily, criminal Court will not have jurisdiction in respect of the matters which do not directly relate to the commission of offence or intended to be part of the commission of offence. All such inquiries in regard to the orders for disposal of property must be understood to mean the property which is likely to be involved in the offences, or which is discovered by the police in the course of investigation of an offence and reported to the Magistrate, it is only in such case that the criminal Court can get jurisdiction under S. 457 of the CRPC or allied sections given in chapter XXXIV of the Code. Once it is found that the Collector has assumed the jurisdiction under special statute either by following provisions under that statute or by any act under that Statute, the general provisions of the CRPC will not be attracted. When A special statute, vests certain power in absolute terms to deal with a particular subject it alone will have to be given precedence in case of conflict of jurisdiction with similar provisions in another general law. The law contained in the Code of Criminal procedure and the provisions contained in Essential Commodities Act will have to be considered in conjunction and they will have to be reconciled. In case of exercise of jurisdiction in respect of essential commodity under the Essential Commodities Act, 1953, once it is found on record that the Collector has under the said Act assumed jurisdiction, the Magistrate will not have any power to pass any order in regard to the seizure of the essential commodity under the Essential Commodities Act.

Illegality of seizure of EC Act can't be determined under section 457 CRPC

In the case of the **Administration of Dadra and Nagar Haveli and others Versus C.B. Shah and another**[352] Hon'ble Bombay High Court observes that even though the essential commodity is not seized under S. 3 of the act, the question whether such seizure is without authority of law or illegal or void cannot be determined by the Magistrate making an inquiry for passing an order for disposal under S. 457 of the CRPC The jurisdiction of the Magistrate to deal with property in Essential Commodities Act is limited and if such limited jurisdiction is expanded for the purpose of investigation into the factum and illegality of the seizure, the provisions of the Essential Commodities Act can be easily defeated by mere allegation that the police have seized the property and therefore the Magistrate is competent to pass the order in regard to the property.

352. 1986 SCC OnLine Bom 99: (1986) 2 Bom CR 624

Even if there is any other law and even if other law provides for any such inquiry in regard to disposal of property, despite the existence of such provisions in any other law it is ineffective as being contrary to that one found in S. 6 E of the Act. The provisions of that law will not apply and jurisdiction to make orders with regard to the possession of the property seized will vest only in the authorities provided by the Essential Commodities Act and not by ordinary criminal court. In an application under S. 457 of the CRPC it is not open for any person to enlarge the scope of the powers provided by the Statute by inviting the Magistrate to adjudicate on questions which do not fall strictly within his jurisdiction at all.

Revisional authority can't go in question of illegality of seizure under EC Act

In the case of the **Administration of Dadra and Nagar Haveli and others Vs C.B. Shah and another**[353] Hon'ble Bombay High Court observes that Revisional authority while hearing the application against the order of the Magistrate passed under 457 CRPC, has dwelt upon illegality and validity of the seizure under despite having no competence to go into the same in cases involving Essential Commodities Act. The initial requirement of the seizure having not been made by the police officer in this case, the whole superstructure which is built up on that basis must fall down.

Possession is not decisive if it is of thief or a cheat

In the case of **Mahammad Zariff and Anr. v. Sk. Zinaullab**[354] Hon'ble Orissa High Court observed that a mere possession was not decisive, and the possession should not be of a thief or a cheat but of a person who had right to hold it.

Delivery of property to person entitled

In the case of **Prabhat Kumar Das v. Bijoy Prasad Das**[355] Hon'ble Orissa High Court observed that the property must be delivered only to a person who is entitled to the possession thereof. If there is uncertainty over the person then an Inquiry may be done into the matter by giving opportunity to the claimants before passing the order. The scope of such inquiry should be confined to find out the person who is entitled to possession of the property but not the title or ownership thereof. A person may be in unlawful possession, at the time of seizure and in those circumstances, it cannot be said that he is entitled to possession. It must be a lawful possession. The test, therefore, is not the mere possession of the property at the time of seizure, but as to who is entitled to lawful possession. The expression 'entitled to possession' is the sine qua non for the delivery of property under Section 457 CRPC A person may not have title or ownership of the property even then he could still be entitled to possession. The person who claims to take possession of the property must satisfy the Court about his entitlement, for which purpose he is

353. Ibid at 353

354. 1987 (II) OLR 283, 64 (1937) CLT 547

355. (1980) 50 CutLT 415

required to establish that he was in lawful or rightful possession of the property in question. This possession is not of a thief or a cheat but of a person who has right to hold it.

In the case of **M. S. Jaggi v. Subaschandra Mohapatra**[356], it was observed that the person entitled to possession would be one from whose possession the property was seized and such person was found not to have committed any offence so as to render his possession unlawful.

Registered owner – proper person to have custody of vehicle

In the case of Syed **Hafeezulla Pasha v. State of Karnataka**[357]**,** it is observed by Hon'ble Karnataka High Court that normally the registered owner is the proper person for the interim custody of the vehicle and the vehicle should be released in favour of registered owner. The registered owner of vehicle is proper person to have custody as against person with whom he has hire purchase agreement.

In a catena[358] of cases it has been decided that while releasing property under Section 457, CRPC, the attached vehicle should be returned to the registered owner. The custody of vehicle is not to be entrusted to the complainant who claims to have purchased the vehicle.[359] A person in whose name the vehicle stands with the registering authority is entitled to custody of it unless any other person establishes his superior title[360].

Exception to normal rule that interim custody of vehicle could only be of registered owner

In the case of **Kisan Pandurang Kagde v. Baldev Singh Gian Singh**[361] Hon'ble Bombay High Court observed that the complainant/transferee had purchased the vehicle and possession of which was handed over to him. The documents on record showed that prima facie ownership of the motor vehicle and possession thereof had both passed to the complainant/transferee who alleged theft of the vehicle by the transferor. A substantial amount of the consideration had also passed and the accused had intimated to the authorities that he had sold the vehicle and had no objection to transfer of registration. Application for transfer of vehicle in the name of complainant also bore signature of accused. The proper custody would be of the transferee but not the transferor in whose name vehicle stands registered.

In the case of **Prakash Tarachand Sakhre vs Ashok Pundloikrao Wajge And Anr**[362] Hon'ble Bombay High Court observes that i t is not an invariable rule that the vehicle should be

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356. 1977 CriLJ 1902

357. 1987 CriLJ 868

358. Sardar Singh v. Nur Ahmed (1991) 3 Crimes 783 ; Haribhau Dhondiba Chavan v. Balkrishna Bhikoba Ballal, 1987 Mah LJ 340; Smt. Mahamaya Dasi v. Sanat Kumar Law AIR 1968 Cal 564 : (1968 Cri LJ 1538) ; Nandiram v. State of Gujarat (AIR 1967 Guj 80); Neeraj Kumar Agarwal v. State of U.P., 1992 Cri LJ 1247

359. Section Abdul Jabbar v. Khaleel Ahamed 1988 Cri LJ 810

360. Bai Manguv. Bai Vijli AIR 1967 Guj 81

361. 1977 Mh.L.J. 656

362. 2001 CriLJ 3024

released only in favor of the registered owner. Where someone is able to establish superior claim/ title over the vehicle, the custody of the vehicle can be entrusted to him. the change of registration under Section 31 of the Motor Vehicles Act, 1939 is not a condition precedent for transfer of ownership of the vehicle, but that section imposes a condition on both the transferor and transferee to notify transfer, but it does not invalidate transfer as such for non compliance of that section as transfer of ownership is governed by the Sales of Goods Act and takes place from the date of sale and not from the date on which transferee's name is recorded.

In the case of **Ghafoor Bhai Nabbu Bhai Tawar v. Motiram Keshaorao Bongirwar**[363] Hon'ble Bombay High Court upheld the lower court order observing that the non applicant had superior title though the truck still continued to be in the name of applicant in the registration record.

In the case of **Dakhini Prasad Srivastava Versus State of U. P**[364] Hon'ble Allahabad High Court observes that there was no investigation in this case nor any prosecution. Under such circumstances the normal rule is that the property should be delivered back to the person from whose possession it was taken. In the present case there is a very serious dispute about the real ownership of the vehicle. It is a matter which requires to be settled by a Civil Court. In case it is correct that the revisionist has purchased the car, he could have taken delivery of the car from the seller after paying the price and could have applied for registration of his name subsequently. It cannot therefore be said that even in such a case the police can seize the car and deliver it to another person without there being any criminal case or finding of a Criminal Court against revisionist. In every case when the vehicle is required to be registered under Motor Vehicles Act the vehicle not necessarily will be released in favour of the person in whose name the vehicle is registered.

Case involving explosives – Release is subject to forensic examination

In the case of **Ahmed Shah Khan Durrani @ A.S. Mubarak S Vs. State of Maharashtra**[365] Hon'ble Apex Court while appreciating the facts and evidence in the case, observed that the designated court allowed the application under Section 457 of Code of Criminal Procedure, 1973 for release of the tempo but subject to thorough examination by expert for traces of RDX. Though Hon'ble Court not expressed any opinion on this aspect, but didn't disapprove it.

Substance of the petition is material and not its form

In the case of **State Of Bihar vs Hardwar Pandey**[366] Hon'ble Patna High Court observes that the petition filed in the lower court by the opposite party is purported to have been filed under

363. 1978 CriLJ 405, 1977 MahLJ 548

364. 1978 CriLJ 204

365. CRIMINAL APPEAL NO. 1438 OF 2007, decided on 21 March 2013

366. Supra at 323

Section 451 of the Code. Yet it is the substance of the petition and not its form which is the material thing. An order cannot be set aside merely on the ground that the petition has been incorrectly described.

Once identity of person known – release in his favor

In the case of **Keshu Lal vs. State of Rajasthan**[367] Hon'ble Rajasthan High Court observes that though there is some ambiguity under Section 457(2) and under Section 458(1) CRPC to the effect that if no person within such period establishes his claim to such property and if the person in whose possession such property was found is unable to show that it was legally acquired by him, the learned Magistrate by order direct that such property shall be at the disposal of the State Government and may be sold by the Government and the proceeds of such sale shall be dealt with in such manner as may be prescribed. Section 458(1) CRPC will come into play only if the ingredients for issuing proclamation under Section 457(2) CRPC are attracted. It is clear that the provisions of Sections 458(1) and (2) CRPC can be pressed into service only on one condition if the identity of person from whose possession the property seized by the police under Section 102 CRPC is unknown. Once the identity of a person or persons from whose possession property under Section 102 CRPC is seized is known it should be delivered in favour of such person or persons without resorting the procedure prescribed for proclamation under Section 457(2) CRPC in as much as there is a presumption under Section 110 of the Indian Evidence Act that a person who is in actual physical possession of the property is owner of such property unless contrary is shown or established.

Exhaust statutory remedy u/s 457 CRPC but not inherent jurisdiction

In the case of **State of Gujarat v. Shyamlal Mohanlal Choksi**[368] Hon'ble Apex Court observes that the remedy open to the aggrieved is to approach the court under Section 457 CRPC for release of the amount from the prohibitory orders. When direct remedy is available under the Statute i.e., Code of Criminal Procedure, the aggrieved cannot approach the High Court invoking its inherent jurisdiction under Section 482 CR.P.C

Magistrate order is not questionable before a civil court – remedy is appeal

In the case of **Premchand Kar and Anr. Versus the State of West Bengal and Others**[369] it is observed that the Magistrate has the power to pass orders both under section 517 as also under section 523 of the Code to dispose of the property seized in a summary manner and may according to his discretion deliver the property to the person entitled to present possession thereof. If any party is aggrieved by such an order, his remedy lies in the appellate or the revisional courts and the propriety or otherwise of such an order cannot be questioned in any civil court.

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367. 1996 CriLJ 740

368. AIR 1965 SC 1251

369. 1963 Cri LJ 117

If the property seized - but neither produced nor reported to Court

In the case of **G. Venkateswara Reddy V. C. Narasamma**[370] it is observed that the seizure should be reported to the magistrate forthwith by the police under section 457 CRPC. It is only then that the Magistrate can consider the question of the disposal of such property to the person entitled to the possession. This section does not show that the property has to be given to the person, from whom or whose custody it is seized. It gives the discretion to the Magistrate to decide the question about the person "entitled to possession". This expression normally would mean, a lawful or rightful title to hold the property. This section cannot be interpreted to mean that the placing of a report before the Magistrate by the police is a sine quo non for entertaining any application for the disposal of the property. In the case of **Suraj Mohan Vs State Of Gujrat**[371] it is observed that If the fact of the seizure is brought to the notice of the magistrate by any party interested in it, or even by a party, who applies for delivery of such property, it is sufficient to give jurisdiction to the Magistrate to entertain the application and deal with it. In such a situation, the Magistrate himself may direct the police to file a report about the seizure. Even if such a report is not filed in spite of such a notice, it would not stand in the way of the Magistrate disposing of an application for the delivery of such property to the person entitled to the same, who cannot be kept out of its custody merely by the inaction or negligence on the part of the police. The property may be of special importance or necessity to the claimant against whom no offence has been alleged or proved. Insistence on the police report and inaction or negligence on part of the police would make the provision nugatory. The power of Magistrate to call for a report from the police on information given by a party is implicit in the power given to him to deal with such property seized by the police. Without that power the effect of section 457 CRPC would be meaningless and provisions turn nugatory if the police didn't report such seizure.

Registration alone not determining ownership of vehicle in Hire Purchase

In the case of **K. L. Johar and Company v. The Deputy Commercial Tax Officer, Coimbatore III**[372] Hon'ble Apex Court observes that a hire-purchase agreement is distinct from a sale in which the price is to be paid later by installments. In the case of a sale in which the price is to be paid by installments, the property passes as soon as the sale is made, even though the price has not been fully paid and may later be paid in installments. The essence of a sale is that the property is transferred from the seller to the buyer for a price, whether paid at once or paid later in installments. On the other hand, a hire-purchase agreement, as its very name implies, has two aspects. There is first an aspect of bailment of the goods subjected to the hire-purchase agreement, and there is next an element of sale which fructifies when the option to purchase, which is usually a term of hire-purchase agreements, is exercised by the intending purchaser. The fact of

370. 1974 SCC online AP18

371. AIR 1967 Guj 126

372. AIR 1965 SC 1082

registration by itself in one name or another may not be the sole determining factor of the ownership of the vehicle.

Inquiry regarding right to possession and, not right to property

In re **Ratan Das Rangil Das**[373] it has been observed by Hon'ble Bombay High Court that under Section 523 the Magistrate should hold inquiry regarding right to possession and not right to property. Magistrate has to pass an order as soon as he receives a report of seizure from the police. The police have to report the seizure at once and the Magistrate has to pass the order for disposal of the property. Evidently an order has to be passed at once because after the seizure the property is at disposal of the Magistrate who must pass one order or another order. The seizure is reported to the Magistrate in order to obtain his orders. When the Magistrate has to pass the orders at once, he has no opportunity to make any inquiry, and if he cannot make any inquiry, all he can do, if he does not decide to dispose of it in some other manner, is to deliver it to the person from whose possession it was seized. When he has not held an inquiry as to the ownership or title, he cannot deliver it to any other person on the ground of his being entitled to the possession. No property seized from the possession of one person can, barring just exceptions, be delivered to another person by a Magistrate without some inquiry being held.

True owner vs Person entitled to possession - Remedy is Civil Suit

In the case of **Laxmi Chand v. Gopi Kisan Balmukund**[374] it is observed by Hon'ble Bombay High Court that when police seized property from a person who is not shown to have committed any offence in relation to that property, then the Magistrate can only hold that that person is entitled to possession of the property. The person who claims to be the owner has a remedy in a civil Court to recover the property from the person to whom it is restored under Section 528, though the burden would be upon him to prove his title, whereas if the property were restored to the owner, the burden would shift to the other person to prove his title. When the person from whose possession the property was seized himself denies that it was seized from his possession, or his possession would be unlawful or he himself claims that he is not entitled to its possession on account of its being planted upon him or his holding possession over it on behalf of another person, he cannot be said to be the person entitled to its possession.

Not proper to return to owner/ possessor using property for offence

In the case of **Ramasami Aiyar v. Verikateswara Aiyar**[375]**,** it is observed by Hon'ble Madras High Court that if the offence is related to property, the proper order would, be to return it to the owner or person in possession. But this cannot be the proper order where the offence suspected is one committed by the person who is the owner or possessor of the property and who has used it for the commission of the offence.

373. 17 Bom. 748

374. 60 Bom. 183

375. 14 OriL.J. 27 (Mad.)

Possessor by unlawful means vs Rightful owner

In the case of **A. K. A. R. A. Ghettyar v. Ma Saw Hla**[376] it is observed that where the known facts show that the property has been stolen, it would be not be allowed to be retained by a person from whose possession the property is found as against the rightful owner, and force the latter to a civil suit for its recovery if the accused absconds. The law makes a distinction between stolen property and property. Whoever receives or retains in his possession "stolen property" knowing it to be so commits an offence; possession of other property is not an offence. Where "stolen property" is found in possession of another person, there arises the presumption that he knew that it is "stolen property". It is on account of this that property which was stolen or criminally misappropriated or in respect of which criminal breach of trust was committed and is recovered from the possession of a third person, he is not held to be entitled to be restored to it.

Possession at the time of seizure not conclusive to determine entitlement

In the case of **A. S. S. Ahmed Sahib v. Commissioner of Police, Madras**[377] it is observed that when an offence is not made out the property should be delivered to the person from whom it was seized or taken. But it depends upon the circumstances of each case. The actual possession of the property at the time it was seized may be the relevant factor but not conclusive to determine the entitlement of that possession. A person may be in unlawful possession at the time the property was seized though he has not committed the offence and, in those circumstances, it cannot be said that he is entitled to possession.

Exercise of power – only a tentative arrangement

In the case of **Narendra Dejoo Shetty v. Saumyalata Shyama Shetty**[378] Hon'ble Bombay High Court observes that the exercise of power or interim custody vested in the Magistrate under Section 457 of the Code of Criminal Procedure permits the Magistrate to pass an order disposing of said property or delivering the same to the person entitled to possession thereof by way of an interim custody. Unless it was proved in the trial on meeting the charges that there was defalcation of amount at the hands of the accused and the ornaments therein were purchased from the said money siphoned off from the company, exercise of the power is only a tentative arrangement without going to the entitlement or source from which the property is purchased which can be determined during trial.

Ownership of vehicle transferred from date of sale, but not when it recorded in RC book

In the case of **Tarun Kumar Das v. State of West Bengal**[379], it is observed by Hon'ble Calcutta High Court that the transfer of ownership of a vehicle is a matter governed not by the

376. AIR (24) 1937 Rang. 450

377. AIR 1970 Madras 220

378. 2020 SCC OnLine Bom 287

379. 2015 SCC OnLine Cal 1887

provisions of the Motor Vehicles Act but by the provisions of the Sale of Goods Act. Motor Vehicle being a movable, transfer of ownership takes effect from the date of the sale and not from the date on which transferee's name is recorded. As between the transferor and the transferee the sale is complete before the transfer of the Registration Certificate. Immediately the sale is effected with intention to pass title, the registered owner loses his right and the ownership vests with the transferee. The completion of sale of motor vehicle is not dependent on the transfer of its registration certificate. Failure to report to the Registering Authority may involve penalty prescribed by Section 50 or by Section 177 of the Act but such failure to report does not prevent title passing from the transferor to transferee. Non-reporting of the fact of transfer of ownership will not render the transfer inoperative or ineffective. Actual owner can be different from the registered owner and if it is proved that the registered owner has transferred the ownership to a different person, the tortious liability will have to be borne by the transferee despite the non-transfer of the registration and in such cases, the registered owner cannot be made liable.

In the case of **Oriental Fire and General Insurance Co. Ltd. v. Smt. Vimal Rai**[380] Hon'ble Delhi High Court observes that the sale of motor vehicle is governed by the Sale of Goods Act and is complete when the consideration is paid and the vehicle is delivered irrespective of the fact whether the sale has been registered with the Registering Authority or not.

In the case of **Krishan Lal v. State of H. P.**[381] Hon'ble Himachal Pradesh High Court held that where the purchaser was in lawful custody of vehicle in pursuance of an agreement for sale entered into between the purchaser and the owner, the later is not entitled to possession of the vehicle merely because the Registration Certificate is in his name.

Pledgee's possession under valid contract – it is legal possession

In the case of **Budhulal Harnarayan Agarwal v. Sukhman**[382] Hon'ble Nagpur High Court observes that Ownership involves a question of title, whereas possession does not. Where the articles were seized from the custody of the pledgee and it has been found that he did not come into possession of it by illegal means, the articles must be returned to the pledgee. The pledgee's possession being under a contract must be regarded as legal possession and, if the contract is valid, it must be assumed that he would be the person entitled to possession thereof as against the other party to the contract. Section 110 of the Indian Evidence Act carries a presumption that a person who is in actual physical possession of the property is the owner of such property unless contrary is established. The petitioner cannot be permitted to get back possession of the vehicle through this Criminal Proceeding and the remedy, if any, of the grievance floated by him lies elsewhere.

380. AIR 1973 Delhi 115

381. 1994 CriLJ 2539

382. IR (29) 1942 Nagpur 82

Magistrate can't review once passed the order

In the case of **Muneshwar Bux Singh v. State through Raghunadan Prasad**[383] it is observed by Hon'ble Allahabad High Court that there is no power for passing an interim order under section 523. Mere fact security is demanded from the person to whom the property is handed over would not make the order an interim order and once the Magistrate has ordered delivery of the property seized to a person who is entitled to it, that order cannot be reviewed by a Magistrate passing the order. The only remedy open to the aggrieved party is to seek redress from a higher Court.

Properties seized but not reported, Section 457 is not attracted

In the case of **The Superintendent of Customs and Central Excise, Nagercoil v.R. Sundar**[384] it is observed that If the Police Officer keeps in his custody the properties seized and does not report them to the Magistrate, Section 457 is not attracted and the Police Officer will have an arbitrary power of disposal of such properties. Under Section 523(1) of the old CRPC of 1898, it was obligatory on the Police Officer to report the seized property to the Magistrate. This requirement is omitted under present Section 457 of the new Code.

Magistrate can't direct police to seize property

In the case of **P. Manikandan Versus State**[385], represented by the Sub-Inspector of Police, Dindigul Town West Police Station, Dindigul Hon'ble High Court of Madras observes that the key of the shop has not been seized by Investigation Officer and also the same has not been handed over to the Court. When a property 'key' in issue has not been seized by the Police nor recovered, nor produced before the Court, the Trial Court cannot direct the Police to redeem the key/recover/seize the key from the accused.

"Police officer" u/s 457 CRPC– Not to be given restricted meaning

In the case of **Balabhadra Nayak Vs State of Orissa**[386] It is observed by Hon'ble Orissa High Court that there is no other provisions in the CRPC except Section 457 CRPC for passing order for interim release of the vehicle by the criminal Court. In case the words "Police Officer" occurring in Section 457(1) CR.P.C is given a restricted meaning so as to exclude officers of other departments like Excise etc. who are invested with power to investigate into the offence, effect seizure and launch prosecution and to report such seizure to the criminal Court, it would cause injustice to the persons claiming to be entitled to custody of the property. Therefore, the words "Police Officer" in Section 457 CRPC must include in Excise Officer reporting such seizure to a criminal Court in connection with the enquiry or trial of any criminal case. Section 60(3) of the NDPS Act is no bar for interim release of the vehicle as the said provision is only substantive in

383. AIR 1956 Allahabad 199

384. 1993 Cri.L.J 956

385. 2012 SCC OnLine Mad 5031: (2013)1 MWN (Cri) 229

386. (2013) 54 Orissa Criminal Reports 893

nature and speaks of the liability of the vehicle to be confiscated where the owner fails to prove that it was used without his knowledge or connivance or the knowledge and connivance of his agent in charge of the vehicle.

Child of two years is not property

In the case of **Shyama Charan Versus State**[387] it is observed by Hon'ble High Court of Allahabad that section 523 of the Cr PC deals with property seized by police, or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence. The property contemplated by this section seems to consist of material objects and not human being. To have the power of control over another is not equivalent to possessing a right of ownership over others and to treat the other persons less favourably situated as their property. Child of two years therefore can't be deemed to be a property.

CHAPTER X

REVISION CONUNDRUM VIS-A-VIS SECTION 451 AND SECTION 457 CRPC

Section 451 and Section 457 of the CRPC envisage certain disposition of property during pendency of the inquiry or trial. A marked difference between the orders passed under these sections and section 452 CRPC is that in the latter the order for disposition of the property is passed on culmination of the trial. The Code provides the procedure for appeal by any person aggrieved with the order passed under either of the section 452, 453, 456, 458, but it is mute with respect to the orders under section 451 and 457 CR.P.C Due to the fact that the order passed under section 451 and 457 CRPC pertains to the property during continuation of the case, there arise following issues to ponder over; -

(a) Whether the order passed under section 451/457 CRPC by the magistrate is an interlocutory order or falls between somewhere between final order and interlocutory order?

(b) Whether revision lies against the order passed under section 451/457 CRPC or not?

(c) Provisions regarding Revision under the Code of Criminal Procedure

It becomes imperative to understand the powers of revision and its incidents. The procedure and power of revision is prescribed in chapter XXX section 397 to 405 of the Code of Criminal Procedure 1973. These are enumerated below

S. 397 Calling for records to exercise powers of revision.

S. 398 Power to order inquiry

S. 399 Sessions Judge's powers of revision

S. 400 Power of Additional Sessions Judge

387. AIR 1955 All 81 : 1955 CriLJ 261

S. 401 High Court's powers of revision

S. 402 Power of High Court to withdraw or transfer revision cases

S. 403 Option of Court to hear parties

S. 404 Statement by Metropolitan Magistrate of grounds of his decision to be considered by High Court

S. 405 High Court's order to be certified to lower Court

Power of revision Section 397 CrPC

Section 397: Calling for records to exercise powers of revision. —

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself; to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling, for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement that he be released on bail or on his own bond pending the examination of the record.

Explanation.—All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

Section 397(1) of the Code empowers the specified courts to call for the records of inferior criminal court and examine them for the purpose of satisfying themselves as to whether a circumstance, finding or order of such inferior court is legal, correct or proper or whether the proceedings of such inferior courts are regular. The said provision is very widely worded and the obvious object of conferring powers of revision is to give superior criminal courts a supervisory jurisdiction in order to prevent miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precaution or apparent impropriety which may result in hardship injustice or injury to one party or the other.

2. The interdict contained in Section 397(2) of the Code of Criminal Procedure is that the powers of revision shall not be exercised in relation to any interlocutory order. The concept of an interlocutory order qua the revisional jurisdiction of the High Court, therefore, was completely foreign to the earlier Code (1898). Section 397(2) was incorporated in the 1973 Code with the

avowed purpose of cutting out delays and ensuring that the accused persons got a fair trial without much delay and the procedure was not made complicated. Thus, the paramount object in inserting this new provision of sub- s. (2) of s. 397 was to safeguard the interest of the accused.

3. Interlocutory Order

The term "interlocutory order" is a term of well-known legal significance and does not present any serious diffident. It has been used in various statutes but has not been defined either in the Code or elsewhere. In Webster's New World Dictionary "interlocutory" has been defined as an order other than final decision. It may be defined as an order which does not deal with the final rights of the parties, but either - (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or

(2) is made after judgment, and merely directs how the declarations or right already given in the final judgment are to be worked out. An interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.

Decisions of Hon'ble Court relating to interlocutory orders and revision

Interlocutory orders merely regulate the procedure

In the case of **Central Bank of India v. Gokal Chand**[388] Hon'ble Apex Court observed that "every order passed by the Controller, do not include interlocutory orders, which are. merely procedural and do not affect the rights or liabilities of the parties. All these interlocutory orders are steps taken towards the final adjudication and for assisting the parties in the prosecution of their case in the pending proceeding; they regulate the procedure only 'and do not affect any right or liability of the parties."

An order may be final, though appears interlocutory

In the case of **Mohan Lal Magan Lal Thacker v. State of Gujarat**[389] it is observed by Hon'ble Apex Court that the finality of an order could not be judged by co-relating that order with the controversy in the complaint. The fact that the controversy still remained alive was irrelevant. In that case this Court held that even though it was an interlocutory order, the order was a final order.

Interlocutory order used in 397(2) CRPC in restricted sense

In the case of **Amarnath v/s. State of Haryana**[390] it is observed by Hon'ble Apex Court i that the term "interlocutory order" in s. 397(2) of the 1973 Code has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights, or the liabilities of the parties. Any order which substantially affects the, right of the accused, or decides certain rights of the

388. AIR 1967 S.C. 799

389. [1968] 2 SCR 685

390. AIR 1977 SC 2185

parties cannot be said to be an interlocutory order. Orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutoryorder so as to be. outside the purview of the revisional jurisdiction of the High Court.

Certain Orders neither final nor interlocutory – but falls between these two

In the case of **Madhu Limaye vs. State of Maharashtra**[391] it is observed by Hon'ble Apex Court that Such an interpretation and the universal application of the principle that what is not a final order must be an interlocutory order is neither warranted nor justified. It will render almost nugatory the revisional power of the Sessions Court or the High Court conferred on it by section 397(1). On such a 'strict interpretation, only those orders would be revisable which are orders passed on the final determination of the action but are not appealable under Chapter XXIX of the Code. The legislature kept intact the revisional power of the High Court and, at the same time, it put a bar on the exercise of that power in relation to any interlocutory order. In such a situation the real intention of the legislature was not to equate the expression "interlocutory order" as invariably being converse of the words "final order". There may be an order passed during the course of a proceeding which may not be final, but, yet it may not be an interlocutory order pure or simple. Some kinds of order may fall in between the two. By a rule of harmonious construction, it can be said that the bar in sub-section (2) of section 397 is not meant to be attracted to such kinds of intermediate orders. The test is that if an order rejecting the plea of the accused on a point which, when accepted, will conclude the particular proceeding, will surely be not an interlocutory order within the meaning of section 397(2).

Order made against a person not a party to case not interlocutory

In the case of **Parmeshwari Devi v. State and Anr**[392] it is observed by Hon'ble Apex Court that an order made in a criminal proceeding against a person who is not a party to the enquiry or trial and which adversely affected him is not an interlocutory order within the meaning of section 397 (2). It may thus be conclusive with reference to the stage at which it is made, and it may also be conclusive as to a person who is not a party to the enquiry or trial, against whom it is directed.

Interlocutory order must be construed liberally to ensure fair trial

In the case of **V. C. Shukla vs State Through C. B. I .**[393] Hon'ble Apex court observes that the term 'interlocutory order' used in the Code of Criminal Procedure has to be given a very liberal construction in favour of the accused in order to ensure complete fairness of the trial because the bar contained in s. 397(3) of the Code would apply to a variety of cases coming up before the courts not only being offences under the Penal Code but under numerous Acts. If,

391. AIR 1978 SC 47

392. [1977] 2 SCR 160

393. AIR1980 SC 962, reiterated in Rajendra Kumar Sitaram Pande & ors. vs. Uttamand anr.{1999 (3) SCC 134

therefore, the right of revision was to be barred, the provision containing the bar must be confined within the four corners of the spirit and the letter of the law. In other words, the revisional power of the High Court or the Sessions Judge could be attracted if the order was not purely interlocutory but intermediate or quasi final.

The test to decide an order being interlocutory or otherwise

In the case of **K. K. Patel and anr. vs. State of Gujarat and anr.**[394] Hon'ble Apex Court observed that in deciding whether an order challenged is interlocutory or not as for Section 397(2) of the Code, the sole test is not whether such order was passed during the interim stage. The feasible test is whether by upholding the objections raised by a party, it would result in culminating the proceedings, if so, any order passed on such objections would not be merely interlocutory in nature as envisaged in Section 397(2) of the Code. In the present case, if the objections raised by the appellants were upheld by the Court the entire prosecution proceedings would have been terminated. Hence, as per the said standard, the order was revisable.

S. 482 CRPC vis-a-vis 397(2) CRPC

In the case of **R. P. Kapur v. The State of Punjab**[395] Hon'ble Apex Court observes that ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. There may be cases where the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court and High Court may of the view that quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legalevidence adduced in support of the case or evidence adduced clearly or manifestly fails to. prove the charge.

S. 482 not available to defeat the bar under section 397(2) CRPC

In the case of **Amar Nath And Others vs State of Haryana & Others**[396] it is observed

394. {2000 (6) SCC 195}, reiterated in M/S. Bhaskar Industries Ltd vs M/S. Bhiwani Denim & Apparels Ltd Decided on 27 August, 2001 in Criminal Appeal 858 of 2001

395. [1960] 3 SCR. 388

396. Supra at 391

by the Hon'ble Apex Court that where a revision to the High Court against the order of the Subordinate Judge is expressly barred under sub-s. (2) of S. 397 of the 1973 Code, the inherent powers contained in s. 482 would not be available to defeat the bar contained in s. 397(2). It is well settled that the inherent powers of the, Court can ordinarily be exercised when there is no express provision on the subject-matter. Where there is an express provision, barring a particular remedy, the Court cannot resort to the exercise of inherent powers.

Section 397(2) not barred exercise of section 482

Modifying the order passed in **Amarnath case**[397] (Supra paragraph 9), Hon'ble Apex Court observed in the case of **Madhu Limaye vs. The State of Maharashtra**[398] that under the old code 1898 apart from the revisional power section 435, the High Court possessed and possesses the inherent powers to be exercised *ex debito justitiae*[399] to do the real and the substantial 'justice for the administration of which alone Courts exist under section 561A of the old Code. The exercise of the inherent power of the High Court is subject to the principles, that the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party, that it should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice and, that it should not be exercised as against the express bar of law engrafted in any other provision of the Code. On a plain reading of section 482, however, it would follow that nothing in the Code, which would include subsection (2) of section 397 also, "shall be deemed to limit or affect the inherent powers of the High Court". The bar provided in sub-section (2) of section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one of the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justiceinterference by the High Court is absolutely necessary, then nothing contained in section 397(2) can limit or affect the exercise of the inherent power by the High Court. The High Court must exercise the inherent power very sparingly. The bar will not operate to prevent the abuse of the process of the Court and/or to secure, the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers.

In the case of **Raj Kapoor v. Delhi Administration**[400] Hon'ble Apex Court observes that there is no total ban on the exercise of inherent power where abuse of the process of the court or

397. Ibid at 397

398. Supra at 392

399. "Ex debito justitiae." ; of or by reason of an obligation of justice : as a matter of right ; Merriam- webster.com Dictionary, Merriam-Webster,https://www.merriam-webster. com/ dictionary/ex%20debito %20justitiae. Accessed 19 Jun. 2020

400. (AIR 1980 SC 258)

other extra ordinary situation excites the court's jurisdiction. The limitation is self restraint, nothing more. The policy of the law is clear that interlocutory orders, pure and simple, should not be taken up to the High Court resulting in unnecessary litigation and delay. At the other extreme, final orders are clearly capable of being considered in exercise of inherent power, if glaring injustice stares the court in the face. In between is a tertium quid[401], Where it is more than a purely interlocutory order and less than a final disposal. The present case falls under that category where the accused complaints of harassment through the court's process. The answer is obvious that the bar will not operate to prevent the abuse of the process of the court and/or to secure the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers.

In the case of **Krishnan v. Krishnaveni[402]** Hon'ble Apex Court observes that the revision before the High Court under sub-section (1) of Section 397 is prohibited by sub-section (3) thereof, inherent power of the High Court is still available under Section 482 of the Code and as it is paramount power of continuous superintendence of the High Court under Section 483, the High Court is justified in interfering with the order leading to miscarriage of justice and in setting aside the order of the courts below. It remitted the case to the Magistrate for decision on merits after consideration of the evidence.

Hon'ble Special Bench of Hon'ble Patna High Court Judgment concerning Writ jurisdiction, inherent power and revision

In the case of **Surendra Singh vs State of Bihar[403]** Hon'ble Special bench of Hon'ble Patna High Court observes as follows:

(i) Judicial order passed by the criminal courts are amenable to the jurisdiction of the High Court under Article 227 of the Constitution.

(ii) Where appeals or revision applications or applications under Section 482 of the Code are maintainable before this Court for setting aside such order, there is no question of exercise of power under Article 227.

(iii) Where appeals or revision applications or applications under Section 482 of the Code can not be entertained by this Court in setting aside such orders, power under Article 227 can be exercised in exceptional cases.

(iv) Where petitioner has already invoked the revisional jurisdiction of the Sessions Judge under Section 397 of the Code and his second revision application to this Court is barred under Section 397(3), it would indeed require very exceptional circumstances

401. Tertium quid." ; a middle course or an intermediate component ; a third party of ambiguous status; Merriam-Webster.com Dictionary, Merriam-Webster,https://www.merriam-webster.com/dictionary/tertium %20quid. Accessed 19 Jun. 2020

402. (1997) 4 SCC 241

403. 1990 (2) PLJR 693

to warrant interference under Article 227 of the Constitution since the power of the superintendence is not meant to circumvent the statutory bar.

Order u/s 451/457 CRPC - Divergence of Judicial Opinion

There is divergence of views in the judicial decisions whether the order under section 451/457 CRPC is interlocutory or final. Whether revision lies against such order or not. As for the case law on the subject, there is sharp divergence of judicial opinion in this respect one line of decisions holding that an order under Section 451 is purely interlocutory in nature and the other holding that it is a final order or at any rate something like an intermediate order which affects the valuable rights of the parties to hold and keep the property during the pendency of the case. Whether an order is interlocutory or not, cannot be decided by merely looking at the order or merely because the order was passed at the interlocutory stage. Order regarding interim custody of a valuable article like truck decides and touches very important right of the parties. Any party who is denied even interim possession would be substantially and adversely affected by it and would be entitled to invoke revisional jurisdiction of the High Court, because, by such order the Court is affecting and adjudicating important rights of the parties on the particular aspect and such order cannot be said to be an interlocutory order as contemplated by sec. 397(2) of the Code of Criminal Procedure.

Order u/s 451/457 CRPC interlocutory – No revision lies

There are various decisions of Hon'ble High Courts which stipulate that the order under section 451/457 CRPC is interlocutory and no revision lies against it. Some of the decisions are discussed here.

Decision of Hon'ble Madras High Court

In the case of **Radhakrishnan vs State**[404] Hon'ble Madurai Bench observes that the application under Section 451 CRPC is only an interlocutory application and it is not subject to revision under Section 397(2) CR.P.C

Decisions of Hon'ble Kerala High Court

In the case of **Jacob and another, v. Jayabharat Credit & Investment Co Ltd, & others**[405] it is observed that the bar imposed by Section 397(2) cannot get over by invoking Section 482 of the Code. Order refusing interim custody of the vehicle doesn't settle anybody rights finally. Even if interim custody was wrongly denied to a party, he will have to wait till the disposal of the case as it cannot be said that the order has resulted in an abuse of the process of court.

In the case of **V. Parakashan v. K. P. Pankajakshan**[406] it is observed that the maximum

404. Decided on 31/08/2010 in Criminal Original Petition (MD) No.5951of 2010

405. 1983 Cri.Lj 1584

406. 1985 Cri.Lj 951

duration of the arrangement is only till conclusion of the inquiry or trial. The arrangement is only temporary and the main object is to protect or preserve the property pending trial. Even if the person entrusted with interim custody is the owner, his possession or custody during the period of entrustment is only as representative of the Court. The entrustment or custody will not invest him with any preferential right to ownership or even possession. The arrangement once made is not even final till the conclusion of the inquiry or trial The Court is having the right to terminate the entrustment, get back the property from him and entrust it to somebody else whom the Court deems fit in appropriate cases even before the conclusion of the inquiry or trial. So much so, the person entrusted with the property may also be entitled to seek termination of the entrustment and surrender the property even before the conclusion of trial.

In the case of **Yadav Agencies Pvt. Ltd. vs Philomina And Anr**[407] it is observed that an order passed under Section 451 is undoubtedly an interlocutory order. It is actually not a disposal of property, but only an interim arrangement for proper custody pending conclusion of trial or enquiry. Sale or otherwise disposing of property pending trial under Section 451 of the Code will arise only if it is subject to speedy or natural decay or if otherwise, the Court thinks it expedient to do so and that too, if necessary, after recording such evidence required. Normally, though not in all cases, preservation of property pending trial is necessary because it may be required for the purpose of evidence, identification or otherwise during trial. An order under Section 451 of the Code does not settle the title or even right to possession. Refusal of claims to custody under Section 451 does not preclude the person in an enquiry under Section 452 of the Code. It is only an interim arrangement pending enquiry or trial subject to further orders under Section 452 after conclusion of enquiry or trial, if not earlier pending enquiry or trial itself. It is true that in case of rival claims, even though preservation and upkeep are the main considerations, other factors just as right to possession, who is best entitled to possession etc. may be considerations. A person is given custody under Section 451 only as a representative of the Court bound by terms of entrustment to act according to the directions. An order under Section 451 is therefore only an interlocutory order and it is not subject to revision as enjoined by Section 397(2) of the Code.

In the case of **Vasu v. T. Unnikrishnan and Anr**[408] it is observed that the order passed under Section 451 CRPC for disposal and custody of the disputed property is an interlocutory one and cannot be challenged by way of revision under Section 397 of the Code. There may be a case where a person to whom the Magistrate directed the property to be given may be reluctant to continue in custody after some time. It would be open to him to request the court to relieve him of custody for which the Magistrate will have to pass a disposal order afresh. There may be a case where a person who is given custody under Section 451 of the Code is not taking care of the property or is misusing it. That may occasion a fresh order or a modified order being passed by the Magistrate. Therefore, it cannot be said that the order once passed under Section 451 of the Code is a final order. It is necessarily interlocutory in character.

407. 1985 CriLJ 1798

408. 1983 Cr.LJ 1194

In a catena[409] of cases, it is observed by Hon'ble Court that revision against the order under section 451 CRPC is not maintainable.

Decision of Hon'ble Telangana High Court

In the case of **Peddi Jithendra vs The State of Telagana**[410] it is observed that the order passed by the magistrate under Section 451 CRPC for grant of interim custody of the vehicle during pendency of the enquiry or trial is purely interlocutory in nature against which no revision lies under Section 397 (2) of CR.P.C

Decisions of Hon'ble Bombay High Court

In the case of **Ghafoor Bhai Nabbu Bhai Tawar v. Motiram Keshaorao Bongirwar**[411] it is observed that an order may be passed under Section 457 of the Code purely at the stage of investigation or even after the charge-sheet had been filed, but before the property was actually produced before the Court during the trial. In the latter case, any order passed by the Magistrate must necessarily be an interlocutory order subject to the final orders to be passed after the trial has concluded.

In the case of **Haribhau Dhondiba Chavan v. Balkrishna Bhikoba Ballal**[412] it is observed that the order was made after exercising proper judicial discretion and handing over the vehicle to the registered owner. There should be no interference in such order as such order was an interlocutory order.

In the case of **Virendrakumar J. Handa v. Dilawarkhan Alij Khan**[413] it is observed that the order under Section 457 CRPC regarding disposal of property seized is interlocutory one subject to final orders to be passed after conclusion of trial and that such order is not appealable under any express provision and being interlocutory order, the same is not revisable in view of bar under Section 397(2) CR.P.C

In the case of **Liyakat Hussain v. Rajendra**[414] it is observed that the order passed by the Magistrate was an order of interim nature subject to final order and it was interlocutory order which did not decide rights of the parties in any manner. The order passed by the Magistrate did not fall in the category of intermediate order and is covered in the category of interlocutory order and, therefore, not amenable to revisional jurisdiction under Section 397 CR.P.C

In the case of **Prakash Tarachand Sakhre vs Ashok Pundloikrao Wajge And Anr**[415] it

409. Sudip vs State of Kerala Crl. Rev. Pet. No. 1059 of 2014, Munavvar vs State Of Kerala on 6 August, 2015 1235 of 2015, Rathi Devi vs Kerala 16/10/2015 1315 of 2015

410. Decided on 12October, 2018 in Criminal Petition No.10953 of 2018

411. Supra at 364

412. 1987 Mah LJ 340

412. 1991 Mah LJ 1371 : (1992 CriLJ 2476)

414. (1996) 2 Crimes 549

415. Supra at 363

is observed that the order passed by the Magistrate under section 451 or 457 CRPC was interlocutory against which revision was not maintainable.

Decisions of Hon'ble Karnataka High Court

In the case of **U. Kariyappa v. P. Sreekantaiah**[416], it is observed that though the criminal court has discretion to make any order as it thinks fit for the proper custody of such property such a discretion has to be exercised judiciously and not arbitrarily and when the trial court makesany such order regarding the interim custody of the property in exercise of judicial discretion as provided under Section 451 of the Criminal Procedure Code, the revisional court would be very slow to interfere with that order made by the Magistrate in proper exercise of the judicial discretion.

In the case of **H S Manjunatha vs State of Karnataka**[417] it is observed that any order relating to interim custody would be purely an interim order. Hence no revision is maintainable.

Decisions of Hon'ble Allahabad High Court

In the case of **Natha Lal v. State**[418] it is observed that an order under Section 451 of the Code does not decide the right of any person or terminate any proceeding and being an order passed during the pendency of the proceeding for the purpose of preservation and protection of the property till the final determination of proceedings, the order can be treated only as an interlocutory order within the meaning of Section 397(2) of the Code and therefore revision would not lie.

In the case of **Mohammad Aslam Vs. State of UP**[419] it is observed that in view of the bar u/s 52-D of the Indian Forest Act, 1927, revision u/s 397/401 CRPC does not lie against an order passed by Magistrate u/s 451, 457 CRPC rejecting release of vehicle seized under forest offence.

Decision of Hon'ble Delhi High Court

In the case of **Anisa Begum vs Masoom Ali And Ors**[420] it is observed that an order under Section 451 of the Code must be said to be interlocutory in nature. The purpose of such an order obviously is to preserve the property either as evidence or in order to make a proper order after the case is over. The property produced in Court during the course of an inquiry or trial is custodia legis and it remains so even when its custody is entrusted to anyone of the rival claimants or anyone else because he is liable to produce the same as and when directed by the Court. The power to recall entrustment for any reason which the Court may deem fit inheres in the Court in the very

416. 1980 CriLJ 422

417. 10 December, 2015 CRrev 406 of 2015

418. 1976 CriLj 358 (Allahabad)

419. 2013 (80) ACC 895 (All).

420. 1986 CriLJ 503, 30 (1986) DLT 107

nature of the circumstances and the purpose for which the properly is entrusted on Superdari. The duration of such entrustment can at best be until the conclusion of the trial. So, in the eye of law, his possession or custody is only that of Court. It cannot be said to be even unjust, improper or capricious as adversely affecting the rights of the respondent. By no stretch of reasoning, it can be said to be a "matter of moment". There is an obvious fallacy in the reasoning that an order under Section 451 purports to decide finally any of the rights of the parties and as such the aggrieved party has a right to challenge the same in revision. The High Court can interfere with and set aside an order in exercise of its inherent power if it amounts to an abuse of process of the court or if for the purpose of securing ends of justice, it considers its inference absolutely necessary and in that event the bar contained in Section 397(2) cannot limit or affect the exercise of inherent power.

Decision of Hon'ble Patna High Court

In the case of **Ravindra Nath Singh vs. State of Bihar**[421] it is observed that the order under section 451 CRPC is interlocutory and hence no revision lies against it. However, the Hon'ble Court also held that s. 482 CRPC may be resorted in appropriate cases to examine the order. Judgment of Hon'ble Court passed in the case of **Arvind Kumar Singh Case**[422] relied upon in the case.

The other view - Order u/s 451/457 CRPC not interlocutory - revision lies

Decisions of Hon'ble Madras High Court

In the case of **S. V. Chandran vs The State**[423] it is observed that the order passed under Section 451 of CRPC cannot be characterized as an interlocutory order. It depends upon the property seized and properties produced before the Court. Some may lose its value by passage of time; some may perish due to exposure to rain and sun or due to efflux of time and in such event, the Magistrate is empowered to dispose of the properties, pending finalization of the trial. In such circumstances, the order to be passed under Section 451 of CRPC is almost like final orders touching upon valuable right to property of the petitioner. Any decision rendered by the Courts, exercising power under Section 451 of CRPC will affect the rights of the party to have his property returned and, in such circumstances, to turn the petitioner away on the ground that the revision case is not maintainable, will not secure the ends of justice. More so, such order passed under Section 451 is also not appealable. Hence the order passed under Section 451 of CRPC is not interlocutory in nature, but such order determines the constitutional rights of the petitioner for return of properties or for disposing of properties 2. In the case of **Ganesh Murthy vs. State**[424] Agreeing with the decisions of Hon'ble Courts rendered in various cases[425], it is held that the

421. 2002 (1) PLJR 708

422. Arvind Kumar Singh Vs. State of Bihar 1993 BBCJ 436

423. Deceded on 24 October, 2018 Crl. R.C. No. 1217 of 2018

424. Crl. R.C. No. 1369 of 2018 Judgment dated 17/12/2018

425. Praveen Kumar vs. State of Himachal Pradesh (1989) Cri LJ 2537, Bharat Heavy Electricals Ltd. v. State, 1981 Cri LJ 1529 (Andh Pra), (Ishar Singh v. The State of Punjab)1974 Cri LJ 231, M. Abbas v. State of Karnataka, 1980 (2) K.L.J. 259, See Amarnath v. State of Haryana, 1977 Cri LJ 1891

revision is maintainable against the order passed under Section 451 of CRPC as the same is not interlocutory in nature, but such order determines the constitutional rights of the petitioner for return of properties or for disposing of properties.

Decision of Hon'ble High Court of Kerala

In the case of **Pathu v. State of Kerala**[426] it is observed that an interlocutory order is one which is made pending the cause and before a final hearing on the merits. Whether a particular order is interlocutory or not, depends upon the nature of the petition which is disposed of and its connection with the main proceedings and its bearing on the final order in the main proceedings. The meaning to be given to the expression "final order" should be the same in civil and criminal cases. A final order is an order which finally determines the points in dispute and brings the case to an end. It is also observed in this case that the custody of the animals ought not to have entrusted under Section 451 without disposing of the claim of the person who has independent title over the cow and calves. Such person who claims the cow and the calves in his own right and is not interested in the controversy between the litigating parties or the ultimate disposal of the complaint. He has to establish the claim independently of the complaint. The order finally disposed of the case of such independent claimant is not an order falling under Section 397(2) of the CR.P.C The revision is maintainable.

Decision of Hon'ble Andhra Pradesh High Court

In the case of **Bharat Heavy Electrical Ltd. v. State of Andhra Pradesh**[427] it is observed that an order passed under Section 457 CRPC is not. an interlocutory order as it substantially affects the rights of the parties and as such revision is maintainable.

Decisions of Hon'ble Bombay High Court

In the case of **S. Kapur Versus Bhalchandra G. Naik and others**[428] It is, observed that Section 457 speaks of seizure of property by the police and reported to a Magistrate and such property is not produced before any Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of that property or deliveryof such property to a person entitled thereof. In respect of an order made under section 457 of CRPC, no appeal would lie and only a revision would lie.

In the case of **Indrakumar Faredun Irani vs State of Maharashtra**[429] wherein the question of maintainability of revision was not directly in issue, but passing reference was made in paragraph 10 of the judgment in respect of custody of property, holding that the parties cannot directly approach the High Court and invoke the powers of the High Court under section 482 CRPC, but it is only when the Magistrate concerned does not exercise the jurisdiction vested in

426. 1975 Ker LT 696

427. 1981 CriLJ 1529

428. 1986 SCC OnLine Bom 99 : (1986) 2 Bom CR 624

429. 1989 CriLJ 1439

him or exercises it with material irregularity and the Sessions Judge in the revisional powers under section 399 CRPC fails to correct the error that the party can approach the High Court under inherent powers under section 482 CR.P.C

In the case of **Milind vs State of Maharashtra**[430] it is held that the order granting or refusing to return the property when it affects substantial rights of the parties cannot be termed interlocutory.

Decisions of Hon'ble Karnataka High Court

In the case of **M. Abbas v. State of Karnataka**[431], it is observed that the order passed under section 451 CRPC for interim custody of the property would be final between the parties so far as that stage is concerned. Since it concludes who amongst the contending parties would be entitled to the interim custody and is final as between the contending parties and is therefore open to revision.

In the case of **Brijesh Singh And Anr. vs State by All Women Police Station**[432], it is observed that any order passed relating to delivery of the custody of the passport vacillates somewhere between the final and interlocutory orders. Such order can't be said to fall beyond the purview of revision due to the bar of Sub-section (2) of Section 397 of the CRPC Therefore, the revision is maintainable.

Decisions of Hon'ble Allahabad High Court

In the case of **Pradeshia Industrial vs State of Uttar Pradesh**[433] it is observed that the orders on its face, appears to give custody of seized assets in Supurdagi and thus is an interlocutory order in nature. On going deeper into the matter, it appears to have been passed overreaching the jurisdiction under Section 451 CRPC in disobedience of the order of Superior Court. In the circumstances, the delivery of custody, even it may amount an interim custody, is an abuse of the exercise of discretionary powers. The order as such does not amount to an interlocutory order. In the facts and circumstances of the case, it touches the rights of the parties and the question of powers of the Court to direct the handing over custody in violation and over-reaching order of Superior Court. The nature and purport of the order and the findings recorded seeks to give finality of the rights of the parties and hence criminal revision is maintainable.

In the case of **Prdeep Kumar Rastogi vs. State of U. P.**[434] it is observed that revision against an order passed by court u/s 451, 452, 457 CRPC regarding disposal/custody of property is maintainable as the power under these sections is to be exercised judiciously.

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430. 2003 (2) MHLJ 735

431. 1980 (2) Karnataka Law Journal 259

432. 14 December, 2001 Equivalent citations: 2002 CriLJ 1362, ILR 2002 KAR 1427

433. 23April, 2002 Equivalent citations : 200347 SCL126

434. 2008 (62) ACC 62 (All)

Decisions of Hon'ble Gujarat High Court

In the case of **Jashwantsinh Punjabhai Parmar vs Dolatsinh Somabhai Chauhan**[435] It is observed that in a criminal case various types of muddamal or articles are attached, which require disposal prior to the conclusion of the trial. Some articles may be such as would remain in the same condition, which, on the conclusion of the trial, can be produced in the same condition, and if such articles are handed over pending the trial to anybody no serious prejudice can be said to be caused so as to affect the proprietary right. But when an article, like a motor vehicle or a tractor, is handed over to one party, about which a dispute is raised by the other party, and if one party has some inkling that ultimately that vehicle may not remain with him, it can't be said with certaintly that the party will take care of the proper condition of the vehicle or may use it in any way so that ultimately the value and use of that vehicle may be deteriorated or diminished. Secondly, when an article like a motor vehicle is to be handed over to a person who apparently does not seem to be rightfully entitled to it, would deprive the rightful person its use and earning from it ultimately affecting the right of subsistence or income i.e., economic benefit from the use of that particular article. A vehicle is not an article which has to remain idle and to remain in the same condition. So, when handing over of possession of that vehicle even under Section 451 of the Code is to be considered, it is to be considered in such a way that substantial justice is meted out. The order should not be capricious so as to deprive the rightful claimant of that property even for a period of the conduct of the trial. One also cannot say how long such a trial will proceed right upto the last stage i.e., upto the stage of appeal or revision.

Hence order under section 451 of the Code can not be said to be interlocutory. Such order may be interfered with in a revision.

In the case of **Thakkar Mahendra prasad Bapalal v/s. The State of Gujarat**[436] it is observed that merely because an order under sec. 451 is for interim custody, possession and disposal of case property, it cannot be said to be an interlocutory order not revisable by the High Court. Even though the order does not finally terminate the proceeding and in that sense, it may not be final judgment or order, yet it may decide rights and liabilities of the parties concerning a particular aspect. It is an order which decides the substantial and important rights of the parties and, therefore, revision application against such an order is maintainable.

In the case of **State of Gujarat vs Manojkumar Achalaji Khatri**[437] it is observed that on a practical view of sec. 451 of the Code of Criminal Procedure, it cannot be said that order of interim custody is purely interlocutory order. Cases are pending for more than a decade and if during inquiry or trial order for interim custody is passed against a person who is lawfully entitled to claim possession of such case property, his rights can be vitally affected by orders passed

435. (1980) 2 GLR 281

436. 1985 GLH. 61

437. 2001 CriLJ 1223

against him. Hence, in that view of the matter it cannot be said that such order is interlocutory order or interim order which operates during pendency of the inquiry, investigation or trial. Sec. 451 of the Criminal Procedure Code also empowers the Court to pass such orders as is otherwise expedient to do so, including sale of such property or order for otherwise disposal of the property. If a Court passes order for sale of property or otherwise directs disposal of such property then, after such order, the property has to be followed in the hands of the purchaser and consequently also it cannot be said to be an order which is not revisable.

Decision of Hon'ble Himachal Pradesh High Court

In the case of **Praveen Kumar v. State of Himachal Pradesh and Anr,**[438] it is observed that the release of a property pending trial is not an interlocutory order, but a final order between the parties at that stage, and revision against the same is competent. Such an order is final between the parties and the Magistrate cannot till the termination of the proceeding arbitrarily or without proper justification change the same during the course of the proceeding. Such order is subject to the determination by a Civil Court. Therefore, this kind of an order is final between the parties as it has only decided the entitlement to the property in question at that stage. Hence revision against such order is maintainable before the Court of Sessions.

Decisions of Hon'ble Rajsthan High Court

In the case of **Raju v. State of Rajasthan**[439] it is observed that any order, which substantially affects rights of the parties, can not be called an interlocutory order. An order under Section 451/457 CRPC decides a valuable right of the claimants regarding the interim custody of the case property, though temporarily. Therefore, such an order cannot be called to be interlocutory in nature.

In the case of **Mahadev Vs. State of Rajsthan**[440] it is observed that an order entrusting the supurdgi of the case property to either of the claimants, remains in force during the pendency of the proceedings before the Court. That means that it is an order substantially affecting the right to posses the case property during the pendency of the trial of the case. An element of finality, therefore, stands attached to such orders and therefore such orders are revisable under Section 397 Cr. P. C.

Decision of Hon'ble Tripura High Court

In the case of **Radha Prasad Goala v. Manir Mia**[441] it is observed that an order rendered under Section 451 cannot be said to be an interlocutory order. Such an order is final between the contesting parties until final disposal of the trial and, hence is revisable.

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438. 1989 CriLJ 2537

439. (1991) 1 Rajasthan LR 447 : (1992 CriLJ 723)

440. 1997 CriLJ 1614 Raj

441. 1980 Criminal Law Journal, Notes of Cases 6

Decisions of Hon'ble Patna High Court

In the case of **Ram Kishore Thakur vs Shyam Bihari Giri And Anr.**[442] Hon'ble Patna High Court held that the order passed by the trial court for release of the truck in question during or before the conclusion of the trial cannot be said to be interlocutory in nature, as it has decided the right of a party at that stage. Admittedly, the revision was preferred, against the order passed under Section 451, CR.P.C and at that time the trial had not concluded and final form was not submitted. This kind of order affecting the fundamental right of a person to hold a property cannot be termed to be interlocutory in nature It was a final order between the contending parties to enjoy and retain the property, until the trial is over This type of order, therefore, must be taken to be a final order as it has finally determined the right of one party to hold the custody of that property until the trial is concluded. The same issue is required to be determined by a Magistrate and, therefore, there must be some control with regard to the order passed by a Magistrate in relation to a property which is produced before the Court or which in its custodyWhen such a power is entrusted to the Magistrate for disposal of the property until final disposal of the trial, there must be a control to check its wide discretionary power. There may be cases in which property valued at several lacs or vehicle may be released by the Magistrate Pending trial and, therefore, that type of order must be tested in exercise of revisional jurisdiction. There may have been far-reaching consequences out of even the "interim order" of holding the property during the pendency of the trial by a magistrate. In some cases, this interim custody may last for years or even for a decade. In that situation, a person against whose interest the property is allowed to be enjoyed and retained by the other contender, cannot be prevented from filing a revision, otherwise it will affect the fundamental right of a person to hold the property. The person to whom the property or vehicle is released may not have interest. The value and utility of the property shall deteriorate by the time actual owner ultimately get back the property. In that view of the matter, the order for interim release of the property by the Magistrate must be held to be final order and not interlocutory order and, therefore, the revision was maintainable.

In the case of **Lal Mohan Rana vs, The State of Bihar**[443] it is observed that there is no dispute to the fact that the order passed by the Magistrate is not without jurisdiction. It is the petitioner who had invoked the jurisdiction of the Magistrate under Section 451 of the CR.P.C Against the order the petitioner has a remedy under Sections 397 and 401 of the CR.P.C In case, a remedy of revision or application under Section 482 of the CRPC is maintainable for setting aside an order, there would be no question of exercise of power under Article 227 of the Constitution of India.

Hon'ble Patna High Court in a series of cases[444] held that the order passed under Section

442. 1991 (1) BLJR 483

443. Deceded on 19August, 2019 in Criminal Writ Jurisdiction Case No.1146 of 2019

444. (1) M/s Ram Pravesh Rai Estate Pvt. ... vs The State of Bihar decided on 8 May, 2019, Criminal Writ Jurisdiction Case No. 799 of 2019,

451 of the Code of Criminal Procedure is revisable under Sections 397 and 401 of the Code of Criminal Procedure as also the petitioner has statutory remedy under Section 482 of the Code of Criminal Procedure. The petition under Article 226 of the Constitution of India was not entertained however, the petitioner was given the liberty to avail the aforesaid statutory remedy. Revision lies against against order u/s 457, but not against 451 CRPC

In the case of **Joshy v. State**[445] Hon'ble Kerala High Court wherein it is held that revision against the order passed under Section 457 CRPC is maintainable. However, order passed under Section 451 CRPC being an interlocutory order, is not revisable on account of bar under Section 397(2) CR.P.C

Order u/s 451 CRPC – More than interlocutory, though 397(2) barred revision yet s. 482 CrPC may be invoked

In the case of **Shahud-Ul-Haque Versus the State of West Bengal**[446] it is observed that evidently order under section 451 does not determine the entitlement of any of the parties to any seized article. The Magistrate only provides for proper custody of the article having regard to the nature of the property, the person from whom it is seized, the nature of its identifiability, the possibility of its user, acceptibility of an admitted the possession the acceptance be fixed by the claim of ownership etc. The article may be seized from the possession owner, as for example, a motor car or a bus or it may be seized from of a non-owner on identification by the true owner. In all such cases owner should have the first chance of custody subject to conditions to Magistrate. An order under section 451 CRPC is an interlocutory order although its nature may vary in different cases. So far as the intent of section

451 is concerned, there is no doubt that it does not decide the rights of the parties conclusively, but nevertheless its nature is something more than mere interlocutory order in certain cases. It may affect the rights which may be revisable in certain cases, particularly when a true owner is deprived of the possession of the property by an order under section 451. Even though

(2) Vinay Kumar @ Vinay Kumar Yadav vs The State of Bihar And Ors decided on 22 October, 2019; Criminal Writ Jurisdiction Case No. 2642 of 2018,

(3) Sanjay Kumar vs The State of Bihar decided on 17 September, 2019; Criminal Writ Jurisdiction Case No. 1322 of 2019.

(4) Lal Mohan Rana vs The State of Bihar decided on 19 August, 2019, Criminal Writ Jurisdiction Case No. 1146 of 2019,

(5) Devi Lal @ Dev Lal Yadav vs State of Bihar decided on 13 August, 2019 , Criminal Writ Jurisdiction Case No. 1148 of 2019,

(6) Anuj Kumar vs State of Bihar decided on 16 July, 2019, Criminal Writ Jurisdiction Case No.884 of 2019, (7) Md. Salahuddin vs The State of Bihar decided on 24 June, 2019, Criminal Writ Jurisdiction Case No. 869 of 2019,

(8) Harwindar Singh vs The State of Bihar decided on 2 April, 2019; Criminal Writ Jurisdiction Case No.525 of 2019, Manoj Kumar vs The State of Bihar decided on 28 February, 2019. Criminal Writ Jurisdiction Case No.433 of 2019

445. 1986 CriLJ 263

446. Supra at 121

such orders are generally accepted as interlocutory ones attracting the provisions of section 397(2), the jurisdiction of the High Court in exercise of its inherent power is not curtailed. In other words, the High Court can, in spite of the bar under section 397(2), decide the legality of the order under section 482.

Locus Standi Of the Petitioner to File Revision

In the case of **Union of India Through C.R.P.F. 61 B.N. Versus Union of India Through Central Excise Department**[447] it is observed by Hon'ble Patna High Court that the important factor is right of the petitioner to file this revision against the order of the Lower Court. A different authority (Commandant of CRPF 61 BN (through R.P. Purohit), Ajmer) filed a petition for release of the vehicle before the Lower Court. But the revision petition has been filed by another authority, namely, Additional DIGP, CRPF, Patna. Hence the revisionist has no locus to file the revision.

Unanimity that second revision doesn't lie - Bar of 397 (3) Attracted

In the case of **Jagar Singh v. Ranbir Singh**[448] Hon'ble Supreme Court observes that the object of section 397(3) is to prevent a multiple exercise of revisional powers and to secure early finality to orders. Any person aggrieved by an order of an inferior Criminal Court is given the option to approach either the Sessions Court or the High Court and once he exercises the option, he is precluded from invoking the revisional jurisdiction of other authority. That once the Sessions Judge refuses to interfere with the order of the Magistrate no further power of High Court jurisdiction could be invoked as that jurisdiction is invoked to avoid the order of the Magistrate and not of the Sessions Judge and therefore, the bar of sub-section (3) of section 397 is effectively attracted.

In the cases of **Saleem Basha vs The State Rep**[449] and **Sajjad Ahamed vs The State Rep**[450] Hon'ble Madras High Court held that Second revision is not maintainable against the order under section 451 CRPC

In the case of Jeet **Ram & Anr. Versus State of Rajasthan & Anr.**[451] Hon'ble Rajsthan High Court held that the second revision is not maintainable against the order under section 451 / 457 CRPC

Summary of the chapter

Interlocutory order is a creature of law. There is no such methodology to exhaustively enumerate the types of cases which come under the purview of interlocutory orders. Hon'ble

447. 2009 (1) PLJR 194

448. (1979) 1 SCC 560 : AIR 1979 S.C. 381

449. 27 April, 2015 CRL. O.P. No. 10454 of 2015

450. 27 April, 2015 CRL. O.P. No. 10453 of 2015

451. 2005 SCC OnLine Raj 838

Apex Court landmark decision in Madhu Limaye case describes a new class of order which vacillates somewhere between final and interlocutory order. Issues like order under section 451 and 457 CRPC is interlocutory or not, or revision lies against such order or not has not yet reached to the doors of Hon'ble Supreme Court. A definite judgment of Hon'ble Apex Court is awaited.

The judicial opinion of Hon'ble High Courts is starkly divided, sometimes on diametrically opposite poles. Some of the decisions squarely put a ban on revision against such order terming it interlocutory. There are some orders which unequivocally provides that such orders are not interlocutory as it substantially affects the economic rights of the parties, though temporarily. Upto that stage such order conclusively determines the rights of party. Some of the decision says that revision lies against order under section 457 CRPC but not against the order under section 451 CR.P.C It is somewhere held that the order under section 451 CRPC is more than interlocutory, hence this may be scrutinized on the anvil of s. 482 CRPC, even though s. 397(2) put an embargo on the applicability of revision against such order. Obviously, the consensus amongst the decisions of Hon'ble High Courts regarding the nature of the order under section 451 and 457 CRPC is yet to be reached.

So far as the judgments of Hon'ble Patna High is concerned, certainly orders galore on either side of the coin. The matter is yet to be decided by Hon'ble Full bench of Hon'ble Court. Yet the current decisions of Hon'ble High Court, definitely giving a certainty that against the order involving custody of property, statutory remedy of revision is available.

CHAPTER XI

CIVIL ACTION WITH RESPECT TO SEIZED PRIVATE PROPERTY

The dualism of State power – Police and Eminent domain[452]

The State under its police power regulates the use and enjoyment of private property. Though police are only assisting machinery, the police power seems to be synonymous with the power of eminent domain. But the police power is distinct than eminent domain power, in the latter the State can take the property from the owner for public use. Government exercises police power in maintaining law and order situation of the country. It reflects in the police dominance in carrying out day to day activities of the State. Police power is an inherent power of the sovereign authority to provide protection for health, morals, safety, and welfare of the people. Eminent domain power originates out of the constitutional provisions, the police power originates out of legal provisions, which shall not be contrary to constitutional provisions.

Sovereign and Non-Sovereign Function

The English maxim 'the King can do no wrong' regarding the absolute immunity of Crown was never accepted in this country even during the rule of the East India Company. In pre -

independence period, the liability of the State was dependent on the nature of the act and the category of power in which it was placed viz sovereign or non-sovereign power of the State. The first judicial interpretation of State liability during the East India Company was made in John Stuart's case, 1775. It was held for the first time that the Governor Genera in Council had no immunity from Court's jurisdiction in cases involving dismissal of Government servants. In **Moodaly v. The East India Company**[453] the Privy Council expressed the opinion that Common law doctrine of sovereign immunity was not applicable to India. In the case of **Narayan Krishna Laud V Gerard Norman, Collector of Bombay**[454] Hon'ble Bombay High Court observed that that these acts done by the collector in his official capacity were question of fact rather than law. It was observed that the possession of land in question by the plaintiff was sufficient to entitle him to maintain an action for trespass against the collector. In this case also the state official was not found immune. The leading case under Sec. 58 of the Government of India Act 1858 was **Oriental Steam Navigation v. Secretary to the State of India**[455]. It was held in the said case that there was a great and clear distinction between acts done by the public servants in the delegated exercise of sovereign powers and acts done by them in the conduct of other activities. It was also held that East India Company were not sovereign, drew distinction between sovereign acts in respect of which State was not liable and the other category i.e., non sovereign in respect of which the Secretary of the State was made liable.

Liability of the state under Constitution

Article 294 (b) of the Constitution of India provides that the liability of Union Government or State Government may arise out of any contract or otherwise. The word "otherwise" would include various liabilities including tortious liability also. This Article thus constitutes and transfers the liabilities of Government of India and Government of each governing province in the Union of India and corresponding States. Article 300[456] of the Constitution of India provides that State can sue or be sued as juristic personality. In **Kasturi Lal Ralia Ram Jain v. State of U.P**[457] the civil action for recovery of seized property was defeated on account of the court finding that the activity in question involved the exercise of sovereign powers, but in the case of **State of Rajsthan vs. Mrs. Vidyavati**[458] held that the scope of Article 300 is not limited and the expression 'in the like

452. Supra at 18

453. 1775 (1 Brown's Chancery Cases 469)

454. 5 Bom. H.C.R.O.C.J. p.1 (1868)

455. Bombay High Court Reports Vol. V, 1868-69) Appendix I

456. Article 300 reads as under: "The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted."

457. Supra at 339

458. AIR 1962 SC 937

cases' refers back for the determination of such cases to the legal position before the enactment of the Constitution and Article 300 has saved the right of Parliament or legislature of a State to enact such law as it may think fit and proper in this behalf and so long as legislature has not expressed its intention to the contrary, law must be held to be the same which has been continuing from the day of the East India Company. The State should be as much liable for acts committed by its servant within the scope of his employment and wholly dissociated from the exercise of sovereign powers as any other employer. The Fundamental Rights which have been guaranteed and are enforceable by the Supreme Court under Article 32 and High Court, under Article 226 have made the defence of sovereign immunity completely inapplicable vis a vis constitutionally guaranteed right. Even if an employee was doing an unauthorised act but not in a prohibited way, the employer is liable for such acts because such employee was acting within the scope of his employment and in acting did something negligent or wrongful. A master would be liable even for acts which he has not authorized if the same can be connected with the acts so authorized. The state was made liable for breach of fundamental rights by State or its employees based on the principle of strict liability[459].

Civil Action – An Alternative

A civil action in respect of private property, seized or retained by the government is an alternative for a criminal proceeding in terms of the provisions of the Code of Criminal Procedure for the same cause. The difference between the two lies in the form and the forum. A civil action is based on a general notion of right of the property-owner to compensation from anyone who has breached the general duty towards him. The criminal proceedings are an aspect of the court's power to dispose property, which incidentally provides a remedy to the owner of the property but only in those cases where the Inquiry or trial is finally concluded and the property is in the custody of the court. The criminal proceedings also do not confer any title or settle the issue of right over the property. Two courses of action are open for a person whose property is lost or destroyed while in the governmental custody. First, in case the property has come in the custody of the court, he can institute an application for the restoration of property under Section 452 of the Code of Criminal Procedure. Criminal proceedings is obviously a less complicated and speedier way of getting redress subject to the fulfillment of the requirements of a given case. Secondly, in all other cases of loss of property in the governmental custody, a civil action, alleging vicarious liability of the government would still lie and civil action would also be the exclusive course of action where private property interest are harmed in other ways than loss or destruction in the government custody.

Interplay of Laws

Civil action contemplates an interplay of three major laws Code of Civil Procedure 1908, The Indian Limitation Act 1963, The Specific Relief Act 1963 and other relevant laws or regulations depending on the peculiarity of the case.

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459. Nilabati Beherav. State of Orissa, AIR 1993 SC 1960

CIVIL PROCEDURE CODE 1908

1. Section 9 provides that the Courts have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

2. Section 16 Suits to be instituted where subject-matter situate— Subject to the pecuniary or other limitations prescribed by any law, suits—(f) for the recovery of movable property actually under distraint or attachment, shall be instituted in the Court within the local limits of whose jurisdiction the property is situate.

3. Suits for compensation for wrongs to person or movable— Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts[460].

Specific Relief Act 1963

1. Specific relief can be granted for the purpose of enforcing individual civil rights and not for mere purpose of enforcing a penal law[461]. A person may bring the suit for possession of immovable property in accordance with Code of Civil Procedure[462], but such suit can't be filed against government[463]. Whenever any person is dispossessed of movable property without his consent or otherwise than by due process of law, cause shall arise for filing a suit for recovery of possession.

2. Under Section 7 of The Specific Relief Act, 1963 a suit for possession can be filed under any the following conditions:

(a) The property in question must be a specific movable property and not any property.

(b) Person entitled to possess should have a special or temporary right over the said property.

(c) Procedure of the Civil Procedure Code, 1908 shall be followed.

A trustee may sue for the possession of movable property to the beneficial interest in which the person, for whom he is trustee, is entitled.

3. Under section 8 case for possession shall arise, when the person in possession or control is not the owner of the property. But is holding the property as an agent or trustee of the owner. Such person is liable to deliver to person entitled to immediate possession in any of the following cases: —

460. Section 19 of the CPC

461. Section 4 of the Specific Relief Act 1963

462. Section 5 of the Specific Relief Act 1963

463. Section 6(2)(b) of the Specific Relief Act 1963

(a) when he holds the thing claimed as the agent or trustee of the suitor;

(b) when compensation in money would not afford adequate relief for the loss of the thing claimed;

(c) when it would be extremely difficult to ascertain the actual damage caused by its loss;

(d) when the possession of the thing claimed has been wrongfully transferred from the plaintiff.

In these cases, the court shall presume that compensation in money is not adequate relief and it would be extremely difficult to ascertain the actual damage caused by its loss. Unless contrary is proved.

Limitation Act, 1963

The table given below summarizes the period of limitation prescribed by the Act with respect to movable property. where is the table ????

Article	Description of suit		Period of limitation	Time from which period begins to run
ART	68	Suits for specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion.	Three years.	When the person having the right to the possession of the property first learns in whose possession it is.
ART	69	Suit for other specific movable property.	Three years.	When the property wrongfully is taken.
ART	80	Suits for compensation for wrongful seizure of movable property under legal process.	One year	The date of the seizure.
ART	91	Suit for compensation, —(a) for wrongfully taking or detaining any specific movable property lost, or acquired by theft, or dishonest misappropriation, or conversion;	Three years.	When the person having the right to the possession of the property first learns in whose possession it is.
		For compensation, —(b)		

	for wrongfully taking or injuring or wrongfully detaining any other specific movable property	Three years.	When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful.

Decisions of Hon'ble Courts on this issue

Loss of seized property – order for payment of value

In the case of **Smt. Basavva Kom Dyamangouda vs State of Mysore And Anr**[464] Hon'ble Apex Court observes that the seizure of the property by the police amounts to a clear entrustment of the property to a Government servant, the idea is that the property should be restored to the original owner after the necessity to retain it ceases. Where the property is stolen, lost or destroyed and there is no prima facie defence made out that the State or its officers had taken due care and caution to protect the property, the Magistrate may, in an appropriate case, where the ends of justice so require, order payment of the value of the property.

Suit for recovery of property or value maintainable

In the case of **State of Gujarat v. Memon Mahomed Haji Hasam**[465] Hon'ble Apex Court observes that the power to seize and confiscate was dependent upon a customs offence having been committed or a suspicion that such offence had been committed. The order of the Customs Officer was not final as it was subject to an appeal and if the appellate authority found that there was no good ground for the exercise of that power, the property could no longer be retained and had under the act to be returned to the owner. That being the position and the property being liable to be returned there was not only a statutory obligation to return but until the order of confiscation became final an implied obligation to preserve the property intact and for that purpose to take such care of it as a reasonable person in like circumstances is expected to take. Just as a finder of property has to return it when its owner is found and demands it, so the State Government was bound to return the said vehicles once it was found that the seizure and confiscation were not sustainable. There being thus a legal obligation to preserve the property intact and also the obligation to take reasonable care of it so as to enable the Government to return it in the same condition in which it was seized, the position of the State Government until the order became final would be that of a bailee. If that is the correct position once the Revenue Tribunal set aside the order of the Customs Officer and the Government became liable to return the goods the owner had the right either to demand the property seized or its value, if, in the meantime the State Government had precluded itself from returning the property either by its own act or that of its agents or servants. The fact that an order for its disposal was passed by a Magistrate would not in any way interfere with or wipe away the right of the owner to demand the return of the property or

464. Supra at 51, 343, 344

465. Supra at 217

the obligation of the Government to return it. The suit for recovery of the goods or value thereof was maintainable.

Mere issuance of notice u/s 80 CPC from a place – No cause of action arises at that place

In a catena of cases[466] it is decided that merely because Section 80 CPC notice had been issued from a particular place, it can't be said that part of cause of action had arisen within the territorial jurisdiction of that particular place. Though statutory notice Under Section 80 CPC is required to be given, issuance of such notice from a particular place does not form part of the cause of action for the suit itself, as the notice merely paves the way for institution of the suit on the basis of cause of action which had already arisen.

Order of confiscation not a bar to claim title to the goods by real owner

In the case of **C. Subba Rao v. State of Andhra**[467] Hon'ble High Court of Andhra Pradesh observes that the order of confiscation does not prevent a person claiming to be the real owner of the goods from agitating his title to the goods in a Civil Court. Under Section 9 of the Code of Civil Procedure, Courts have jurisdiction to try all suits of civil nature excepting suits the cognizance of which is either expressly or impliedly barred and the general rule of law is that when a legal right and an infringement thereof is disclosed and a cause of action is disclosed, and unless there is bar to the entertainment of a suit, the ordinary Civil Courts are bound to entertain the claim. As far as the order of confiscation is concerned, no principle or provision of law has been brought to my notice so as to contend that the mere presence or existence of the order of confiscation will bar a suit of this nature instituted by the plaintiff.

For suit to recover movable property – Confiscation order need not be set aside

In the case of **Secretary of State v. Lown Karan**[468] Hon'ble Patna High Court observes that an order directing property seized on suspicion of its being stolen to be forfeited, and ordering the sale proceeds thereof to be credited to Government, is illegal and without jurisdiction, as all that section authorizes is that the Government shall be free to sell the property or to hold it as a trustee for the true owner. A suit therefore for the recovery of possession of such properly is maintainable and the fact that such suit is brought more than a year after the order of confiscation is no bar, as it is not necessary to set that order aside.

Real owner may proceed against the possessor

In the case of **Queen-Empress v. Trivhovan Manekchand**[469] it is observed by Hon'ble

466. Bata Shoe Co. Ltd. v. Union of India AIR 1954 Bombay, 129; Union of India v. Firm Balwant Singh Jaswant Singh AIR 1957 Punjab, 27 (FB) ; Azizuddin and Co. by Managing Partner, P.M. Azizuddin v. Union of India (Central Government) owning the South Indian Railway, represented by the General Manager, Tiruchirapalli Junction AIR 1955 Madras, 345; Niranjan Agarwalla v. Union of India AIR 1960 Calcutta, 391; Firm Sitaram Shyamsundar v. Ganpatalal Sharma and Anr AIR 1973 Madhya Pradesh, 233; Union of India as owner of the Eastern Railway Administration v. Kedar Prasad AIR 1970 Patna 212

467. AIR 1958 AP. 403

468. AIR 1920 Pat 182

469. ILR 9 Bom 131

Bombay High Court that the order under section 517 of the Code of Criminal Procedure passed at the conclusion of a trial only concludes immediate right to possession but this does not conclude the right or title of any person to the ownership of the property. The real owner may proceed against the holder of the articles and it can not be said that there is any necessity of having that order set aside.

Judicial order not an act of officer of government for purpose of limitation

In the case of **Jagannath Hazarimal And Ors. vs State Of Bombay**[470] Hon'ble Bombay High Court observes that there is no doubt that the order was passed in exercise of the powers by the appellate Court under Section 517 read with Section 520 of the Code of Criminal Procedure. The order was not passed in any administrative capacity. One side was claiming right to restoration of property and the other side was disputing that right. The decision was given in the litigation and such an order could not be said either to be an act of the officer of the Government or the order of the officer of the Government. The law is therefore well-settled that a judicial order is not an act or order of an officer of the Government.

Suit for recovery of movable property – limitation is three years

In the case of **The State of Madras vs T. Raman And Anr**[471] Hon'ble Madras High Court observes that the suit was filed for recovery of certain movable property taken by defendant from the plaintiff. The suit is not filed on the basis of commission of any tortious act and for damages. Any person who claims to be the owner of the property will be entitled to file a suit for recovery of the same from any body else who may be found to be in possession thereof without the authority of the law or sanction of the law. Such a suit cannot be said to be a suit for compensation for wrongful act committed by any person. The fact that the goods were directed to be confiscated by the Magistrate and they have been taken possession of by the Government and they were subsequently disposed of and the Government are in possession of the sale proceeds is not disputed. Order of the Magistrate directing confiscation of the goods does not decide any question of title to the goods. The order of confiscation passed by the Magistrate was passed without notice to the plaintiff and in his absence hence is not binding on the plaintiff and it is not open to the plaintiff to canvass the correctness of the order in a Civil Court where he seeks to recover possession of the articles. The only Article which will have application to a suit of this nature where the relief prayed for is recovery of specific movable property is Article 49 (Old Act of 1908), under which the period of limitation is three years. Such suit is not barred by any law.

Time begins to run when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful

In the case of **Parshadi Lal Versus Chandan and others**[472] Hon'ble Allahabad High

470. AIR 1963 Bom 83 relying on decisions in Govinda Gala v. Ganu Abaji, 10 Bom LR 749, Bullappa v. Tippangowda and Bhopshetti v. Bhat, (AIR, 1940 Bom 188).

471. (1968) 2 MLJ 586

472. AIR 1935 ALL 915

Court held that It was open to the plaintiff to have brought a suit after his property had been released from attachment for the price of his property if it was not forthcoming as well as for any damages which might have been caused to him by the wrongful attachment. The plaintiff did not claim any damages for the wrongful attachment, but instead claimed his property and its price if the property be not available. Evidently the suit was not for compensation for wrongful seizure of movable property under legal process. On the other hand, it was for the return of the property after it had been released from the wrongful attachment. Article 49 Limitation Act will apply to the present case, which applies to suits for specific movable property or for compensation for wrongfully taking or injuring or wrongfully detaining the same. Time for such suits begins to run from the time when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful. In this case, the possession of the defendant became unlawful after the property was released from attachment. The suit is not time-barred.

Limitation governing suits in respect of movable property

In the case of **Sankar Dastidar vs Shrimati Banjula Dastidar & Anr**[473] Hon'ble Calcutta High Court observes that Articles 68, 69 and 91 of the Limitation Act govern suits in respect of movable property. For specific movable property lost or acquired by theft, or dishonest misappropriation or conversion; knowledge as regards possession of the party shall be the starting point of limitation in terms of Article 68. For any other specific movable property, the time from which the period begins to run would be when the property is wrongfully taken, in terms of Article 69. Article 91 provides for a period of limitation in respect of a suit for compensation for wrongfully taking or injuring or wrongfully detaining any other specific movable property. The time from which the period begins to run would be when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful.

Section 20 CPC not applicable in cases where section 16 CPC applies

In the case of **Smt. Prativa Pattnaik vs State of Orissa And Anr**[474] Hon'ble Orissa High Court observes that if it is held that by search and seizure theproperty is under attachment and prayer is made for recovery of such movable property, there cannot be any doubt that Section 16(f) is applicable. If the suit is required to be filed at the place indicated in Section 16, Section 20 CPC would not be applicable. as Section 20 itself starts with the clause "Subject to the limitations aforesaid", every suit shall be instituted in a Court within the local limits of whose jurisdiction, the cause of action, wholly or in part, arises. Thus, where the matter is governed under earlier provisions including provision Under Section 16 CPC, Section 20 CPC. Would not be applicable.

12. Suits for compensation maintainable for goods seized but lost

In the case of **N. Nagendra Rao and Company vs State of Andhra Pradesh**[475] Hon'ble

473. AIR 200 5 Cal 121

474. 2001 IOLR 601

475. AIR 1994 SC 2663

Apex Court lays down that where the goods confiscated or seized are required to be returned either under orders of the court or because of the provision in the Act, it could not be assumed that the owner had no remedy in case of loss or destruction of the goods and the court was not empowered to pass an order or grant decree for payment of the value of goods. Public policy makes it necessary for the court to exercise the power in private law to compensate the owner where the damage or loss is suffered by the negligence of officers of the state. The suits are maintainable with respect to such cause of action.

State is bound to return the goods or to pay the equivalent price

In the case of **The State of West Bengal vs Chandi Charan Das**[476] Hon'ble Calcutta High Court observed that A quantity of rice was illegally seized by an officer of the State. The State was not a party to the seizure, but the goods were taken charge of by the State. Limitation could not arise so long as the possession of Government was not wrongful. Possession became unlawful or wrongful from the date when there was a refusal on the part of Government to deliver back the paddy to the plaintiff. State has no right to detain the goods of its subject illegally or wrongfully, and if it does so, it is bound under the law to return the goods to the owner or to pay the equivalent price of the goods. No question of limitation arises in such a case until there is an improper or illegal refusal on the part of the State to deliver back the goods.

Suspicion or whisper of knowledge not enough for limitation to start

In the case of **Standard Chartered Bank vs Andhra Bank Financial Services**[477] Hon'ble Apex Court observes that a perusal of Article 91(a) of the Limitation Act shows that it is meant to apply to specific movable property. It further stipulates that the period of limitation shall start running from the date when the person 'first learns' about the conversion of the moveable property. Theprovision of Article 91 (a) of the Limitation Act thus demands two things. First is knowledge on the part of the plaintiff, and second, that the said fact be within his peculiar knowledge. The term "first learns" places a burden of knowledge which is rather specific in nature. Thus, the knowledge must be of the identity of a specific person in whose possession the bonds are and that he acquired the possession of the said bonds under an arrangement, which in law would constitute wrongful conversion. The knowledge of a specific person against whom the suit can be instituted is what is crucial here. A mere suspicion or a whisper of knowledge is not enough for the period of limitation to start running.

Burden to prove knowledge on a particular date lies on plaintiff

In the case of **K. S. Nanji And Company vs Jatashankar Dossa And Others**[478],

476. AIR 1958 Cal 4

477. (2016) 1 SCC 207

478. AIR 1961 SC 1474

Hon'ble Apex Court observes that the article says that a suit for recovery of specific movable property acquired by conversion or for compensation for wrongful taking or detaining of the suit property should be filed within three years from the date when the person having the right to the possession of the property first learns in whose possession it is. A person having the right to the possession of a property wrongfully taken from him by another can file a suit to recover the said specific moveable property or for compensation therefore within three years from the date when he first learns in whose possession it is. Obviously where a person has a right to sue within three years from the date of his coming to know of a certain fact, it is for him to prove that he had the knowledge of the said fact on a particular date, for the said fact would be within his peculiar knowledge.

Protection only for lawful act in pursuance of enactment

In the case of **Jai Lal Versus the Punjab State and another**[479] The then Hon'ble Himachal Bench, Simla of Hon'ble High Court of Delhi observes Article 2 is directed to afford protection to persons acting in pursuance of an enactment, against stale claims and against consequences of committing illegal acts intended to be done under the authority of any law which by reason of some mistake or misapprehension are not justified or are not defendable by its provisions. The protection under Article 2 can, therefore, be claimed only when the act has been performed under colour of statutory duty. If a person acts with the full knowledge that he is not authorized to do so under a particular statute he cannot shelter himself by pretending that the act was done with the intention of carrying out the statute. A rule repugnant to the Act would therefore be a still-born law and it cannot be said that it was in force at the time of commission or omission. In that situation it must follow that the impugned actof the forest authorities were not in pursuance of any enactment in force and consequently Article 2 was not applicable.

Wrongful detention – recovery of goods or value and also damages

In the case of **Dhian Singh Sobha Singh & Another vs the Union of India**[480] Hon'ble Apex Court observes that in a suit for wrongful detention the plaintiff is entitled not merely to the delivery of the goods or their value in the alternative but also to damages for the wrongful detention till the date of the decree. The principle for assessing such damages must be the same as in any other case where the wrongful act of one so injures something belonging to another as to render it unusable or something is taken away so that it can no longer be used, and the number of damages must be ascertained by a reasonable calculation after taking all relevant circumstances into consideration.

479. AIR1967 Del 118

480. AIR1958 SC 274

CHAPTER XII

DISPOSAL OF PROPERTY AFTER CONCLUSION OF TRIAL

On conclusion of trial, the court has to make order for disposal of property depending on the outcome of the case.

Provisions under Section 452 CrPC

Procedure relating to disposal of property is prescribed in Section 452 of the Code of Criminal Procedure:

1. S. 452; Order for disposal of property at conclusion of trial.—(1) When an inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.
2. An order may be made under sub-section (1) for the delivery of any property to any person claiming to be entitled to the possession thereof, without any condition or on condition that he executes a bond, with or without securities, to the satisfaction of the Court, engaging to restore such property to the Court if the order made under sub-section (1) is modified or set aside on appeal or revision.
3. A Court of Session may, instead of itself making an order under sub-section (1), direct the property to be delivered to the Chief Judicial Magistrate, who shall thereupon deal with it in the manner provided in sections 457, 458 and 459.
4. Except where the property is livestock or is subject to speedy and natural decay, or where a bond has been executed in pursuance of sub-section (2), an order made under sub-section (1) shall not be carried out for two months, or when an appeal is presented, until such appeal has been disposed of.
5. In this section, the term "property" includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

{Section 452 of 1973 CRPC corresponds to Section 517 of 1898 CRPC}

1. From bare reading of the heading the provision it is manifest that it is only after conclusion of inquiry or trial that the Section 452 CRPC applies. After an inquiry or trial is concluded it is the duty of the Court to order the disposal of the property regarding which an offence was alleged to

have been committed. This section empowers the Criminal Court to pass final orders regarding Disposal, Destruction, Confiscation or Delivery as it thinks fit. Therefore, property seized must always be deemed to be property produced before Criminal Court and having become *custodia legis.*

2. For the purpose of Section 452 CRPC, Property includes not only such property that has been originally in the possession or under the control of any party, but also includes any property into or for which the same may have been converted or exchanged and anything acquired by such conversion or exchange, whether immediately or otherwise. For example: the money stolen converted into buying car made the latter a subject matter of section 452 CR.P.C For the application of the provisions contained Section 452 CRPC, it is necessary that there must have been an inquiry or trial which must have been concluded and the property in respect of the order is sought to be made must be one (i) which has been produced before the Court; or (ii) which is in its custody, or (iii) regarding which the offence alleged was committed, and (iv) which has been used for commission of the offence.

3. But the livestock or the property subject subject to speedy and natural decay or for which no bond has been executed in pursuance to Section 452(2) CRPC until passing of two months from the completion of trial or until any appeal that may have been filed is disposed of by the appellate court. While passing order under Section 452, the Court should exercise its judicial discretion and give reasons for choosing a particular mode of disposal. It is required to execute a bond with or without sureties to the Court for delivery of any property before conclusion of appeal period or before termination of two months period from the date of conclusion of trial or if the order for disposal of property under Section 452(1) is modified or set aside on appeal or revision. Further, appeal against order under Section 452 can also lie to the appellate court by any person aggrieved by such an order.

4. Section 452 (4) expressly provides that the carrying out of the order of disposal of case property should be stayed until the appeal from it is finally disposed of or until the appeal from the order or conviction or acquittal is disposed of by the appellate Court. Where the title to the stolen property is uncertain or disputed and there is no sufficient evidence to show as to who is the actual owner of it, the Court of Session under Section 452(3) CRPC, may direct the property to be delivered to the Chief Judicial Magistrate who would deal with it in the manner as provided in Sections 457, 458 and 459 of the Code.

5. At the stage of giving *supurdagi* (deliver) under Section 452 CRP.C the proof of ownership is not only a criterion. The Court seizing the properties, has a duty to make arrangement for the proper custody of the same pending conclusion of trial. Acquittal or conviction is one circumstance while right to possess is another circumstance. Both have got independent identity commanding independent sphere. However, in some cases where commission of an occurrence is being doubted, then in that circumstance, it will have some adverse impact, otherwise mere

acquittal of an accused will not give any cogent ground to the accused to ask for return of the property having recovered from him. The Section applies only when a trial or inquiry is concluded. It however does not apply to an inquiry or trial which is abated due to death of the accused.

6. One important difference between section 451 and section 452 is that while the former applies during the pendency of the case, the latter could be invoked only after conclusion of trial. Sections 451 and 452 CRPC attracted in cases of properties seized by police during the course of inquiry or investigation of an alleged offence or produced before it therefore, property becomes *custodia legis*. In the matter of s. 452 CRPC the property includes not only such property that has been originally in the possession or under the control of any party, but also includes any property into or for which the same may have been converted or exchanged and anything acquired by such conversion or exchange, whether immediately or otherwise. Thus, stolen money converted into buying any article would lead the resultant article being property coming under the purview of section 452 CR.P.C which is not with s. 451 CR.P.C In this way the scope of section 452 is much wider than s. 451 CR.P.C

7. Normally, if an accused is acquitted, the court would restore the property to him. But it is not a hard and fast rule. The accused however cannot claim its return as a matter of right. Confiscation of the property is also possible under the section when there is inquiry or trial. On the other hand, if the accused is found guilty the property need not normally be returned to him despite, he is the owner of it.

8. A criminal court cannot decide a question of title to property. But if a person takes property by using violence, the criminal court can order return of it to the person from whom it was taken. When the court orders return of property the affected party should be heard even if no provision is there under Section 452 for issuing a notice. The principle of natural justice must be followed in such cases where substantial rights of parties are involved.

9. An order under Section 452 is not an order determining title or ownership but that of the right to possession, and therefore where serious claims to ownership are put forward, it would be best if the Criminal Courts directs the parties to establish their claim before the Civil Court. The Criminal Court can, however, pass appropriate order of interim nature as it may be appropriate.

Similar Provisions in other Acts

1. Army Act 1950

Section 151 order for disposal of property regarding which offence is committed after conclusion of trial - Disposal may be made by destruction, confiscation, delivery to any person claiming to be entitled to possession thereof, or otherwise, of any property or document produced before the Court or in its custody.

2. The Indian Forest Act

Section 56 also provides procedure for disposal on conclusion of trial for forest offence, of

produce in respect of which it was committed. When the trial of any forest offence is concluded, any forest produce in respect of which such offence has been committed shall, if it is the property of Government or has been confiscated, be taken charge of by a Forest officer, and, in any other case, may be disposed of in such manner as the Court may direct.

Decisions of Hon'ble Court concerning s. 452 CrPC

Disposal under S. 452 - A judicial Function

In the case of **N. Madhavan vs State Of Kerala**[481] Hon'ble Apex court observed that the words "may make such order as it thinks fit", vest the Court with a discretion to dispose of the property in any of the three modes specified in the Section 452. But the exercise of such discretion is inherently a judicial function. The choice of the mode or manner of disposal is not to be made arbitrarily, but judicially in accordance with sound principles founded on reason and justice keeping in view the class and nature of the property and the material before it. One of such well recognized principles is that when after an inquiry or trial the accused is discharged or acquitted, the Court should normally restore the property to the person from whose custody it was taken. Departure from this salutary rule of practice is not to be lightly made, when there is no dispute or doubt the property in question was seized from the custody of such accused and belonged to him.

Acquittal not necessarily entitle the accused to get the property restored

In the case of **Joharilal v. King-Emperor**[482], it is observed that when an accused is given the benefit of doubt and acquitted of theft, it cannot be said that he was necessarily in lawful possession of the property which was the subject-matter of the theft and he is not, therefore, entitled to recover the property under Section 517 CR.P.C

In the case of **Tribhuwan Jha vs State of Bihar And Anr**[483] It is held by Hon'ble Patna High Court that normally an accused on acquittal, will recognize his right to receive back the property which allegedly been recovered from his possession, but this has certain exception, when the finding so recorded under the judgment is found skeptical. In case where right to possess comes under dispute, then parties should be directed to get their claim adjudicated by a Civil Court. It is observed that neither occurrence nor deprivation of property during course thereof, has been questioned, nor there happens to be any kind of adverse finding over recovery of ornaments. The property is allowed to be remained in possession of the informant.

Use of Gun in self defence – Not a property of offence

In the case of **N. Madhavan**[484] Hon'ble Apex Court observed that the gun in question is neither property regarding which any offence appears to have been committed, nor, which has

481. 1979 AIR 1829, (1979) 4 SCC1

482. AIR 1949 Nagpur 17

483. Criminal Appeal (SJ) No.2173 of 2018, 31 January, 2019

484. Supra at 482

been used for the commission of any offence. The acquittal of the accused on the ground that this gun was used in causing the fatal injury to the deceased, only in self defence necessarily involved a finding that the gun was not used in the commission of any offence for which the accused was tried.

When dispute over title, matter be referred to Civil Court

In the case of **Bharat Sanchar Nigam Limited vs Suryanarayanan**[485] Hon'ble Apex Court observed that Entitlement postulates a right. The function which the Court exercises under Section 452 is of a judicial nature. In making that order, the court must have due regard to the entitlement claimed by the person who seeks the possession of the property. A claim of title to the goods which have been seized is a relevant consideration while passing an order under Section 452. Where there are conflicting claims of entitlement to the property, the Magistrate may deal with them or, where it is found that the rival claims need to be resolved only after a trial, refer the conflicting claimants to prove their rights and entitlements before a competent court. Where a claim is made before the court that the property does not belong to the person from whom it was seized, Section 452 does not mandate that its custody should be handed over to the person from whose possession it was seized, overriding the claim of genuine title which is asserted on behalf of a third party. In Case of serious dispute of title, it is appropriate and proper that such a claim be agitated before the competent civil forum.

In the case of **Ram Khalawan Ahir Vs. Tulsi Telini**[486] Hon'ble Calcutta High Court observed that when there was dispute of title, matter should be referred to Civil Court and direction of possession would abide by the result of title suit as conflicting right cannot be decided by Criminal Court andduring that period the property will remain under the custody of criminal court.

No order of confiscation - in case of stolen property

In the case of **Lakahmi Narayan Dutt v. Inspector Ureagan**[487], Hon'ble High Court observed that the object of the section was to enable the magistrate to direct property to be given to some person to whom it appears to belong or to allow it to continue in his possession, the person in whose possession it was found or to make some order of that character. It was not advisable to confiscate the stolen property which had been recovered from the house of the accused upon search.

In the case of **Govindaraja Padayaohi v. Emperor**[488], Hon'ble Madras High Court held that as there was no finding that an offence had been committed or that it appeared from the record that an offence had been committed with respect to the property, the order of confiscation of the stolen property was wrong.

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485. 2019 (1) PLJR 348 (SC)

486. AIR 1924 Calcutta 1040

487. 2 CriLJ 273

488. AIR 1916 Mad 839

Foreign currency never produced , court not empowered to order release

In the case of **Remo Paul Altoe vs Union Of India**[489] Hon'ble Apex Court observed that an order for the disposal of any property under section 452(1) CRPC was necessary where the property remains to be disposed of by the court after the inquiry or trial is over. The foreign currency seized was not produced before the magistrate and was not in the custody or control of the court when the order of confiscation was made. There was thus no necessity for the court to make an order for disposal of any property.

CJM can dispose the goods even after commitment if ordered

In **Kanhaiya Rai vs State of Bihar And Ors**[490] It is held by Hon'ble High Court that where the goods were the subject-matter of trial, the jurisdiction vest in the court which held the trial. The word court referred to in Section 452 will mean the trying court. Section 452 CRPC envisages an order to be passed by the trial court for disposal of the property at the conclusion of the trial. Therefore, the said provision is the appropriate provision to deal with the matter of disposal of the property which is the subject-matter of said trial. Had the seizure list been not produced nor reported to the trying court at all, the Magistrate before whom the seized goods were produced or the seizure was reported could have passed an order of disposal of the seized goods. It is, however, open to the Court of Session instead of dealing with the matter itself, to direct the Chief Judicial Magistrate under Section 452(3) CR.P.C to deal with the matter in the mode and manner provided under Sections 457, 458 and 459 of the Code of Criminal Procedure.

Lapse of time does not deprive court of jurisdiction to pass order for disposal

In the case of **Deopujan Mahto v. Kukur Ahir**[491] It is held by the Hon'ble Patna High Court that merely because the trial has been concluded long before, the jurisdiction of the trying court to deal with the matter is not affected in any way since such an order can be passed even after the disposal of the case. Lapse of time does not deprive court of jurisdiction to pass order on a petition for disposal of the seized goods.

Goods not produced; Not deprived the court to deal with seized goods u/s 452 CrPC

In the case of **Kanhaiya Rai vs State of Bihar And Ors**[492] it is held by Hon'ble Patna High Court that on a report of a seizure to the Court and or production of the seizure list, the Court assumes full control of the seized goods and is conferred with the jurisdiction to deal with the matter of custody and disposal of the goods so seized. Production of Seizure list of the goods was produced before the trying court means the court was not only informed about the seizure of the goods, but the court retained control over the goods, as the seizure list was marked as an exhibit

489. 1977 4 SCC 437

490. 1990 (38) BLJR 855

491. AIR 1940 Patna 198

492. Supra at 491

in the case itself. Therefore, merely because there is no physical production of the goods the court is not deprived of the power to deal with the seized goods under Section 452 of the Code of Criminal Procedure in ordering disposal of the seized goods.

Money returned to accused on acquittal on specific finding of possession

In the case of **Pushkar Singh vs. State of Madhya Bharat & Ors**[493] Hon'ble Apex Court observed that upon the acquittal of the accused and specific finding that money seized from the accused belonged to him. The money must be returned to the accused and not to the complainant.

In the case of **Karuppanan v. Guruswami**[494], Hon'ble Madras High Court observes that the facts of that case clearly disclose that the accused who was acquitted was a bona fide purchaser of bulls alleged to have been the subject-matter of theft. Where the person accused of theft is acquitted and claims as his own the property seized from him, it should be restored to him in the absence of special reasons to the contrary.

In the case of **Lakshmichand v. Gopikishan**[495], Hon'ble Bombay High Court observes that where it is not shown that the person from whom the property was seized, had committed the offence in relation to that property, the Magistrate should hold that the person from whom the property is seized is entitled to possession of that property. It was held that invoking presumption under Section 114 is error in respect of the disposal of the property. Had it been the case, the court should have convicted him.

Property in the custody of receivers missing, inquiry is must

In the case of **Intercontinental Agencies Pvt. Ltd. Vs Amin Chand Khanna**[496] Hon'ble Apex Court observes that no one shall be prejudiced for the acts of the Court. Salutary principle is *actus curiae neminem gravabit'* which clearly says that the act of the Court harms no one. The court couldn't shrug its shoulders when rightful party approached it for the property on the ground that the official receivers disclaimed the property. Detail inquiry should be done to know the whereabouts of the missing property. If the property is not traced out, the aggrieved party should be compensated by the culpable party to pay the value of the vehicles to the appellant.

Statement of the accused or witness can be looked into for disposal of property

In the case of **Khatri v. State of Bihar**[497], it is observed by Hon'ble Apex Court that the protection granted to the accused under Section 162 CRPC is not available in any proceedings other than an inquiry or trial in respect of the offence under investigation and hence the bar created

493. AIR 1953 SC 508

494. AIR 1933 Mad 434

495. AIR 1936 Bom 171

496. 1980 (3) SCC 103

497. (1981) 2 SCC 493

by the section is a limited bar. It has no application in a civil proceeding or in a proceeding under Article 32 or 226 of the Constitution and a statement made before a Police Officer in the course of investigation can be used as evidence in such proceeding, provided it is otherwise relevant under the Evidence Act.

In the case of **Mahesh Kumar v. State of Rajasthan**[498] Hon'ble Apex Court observed that "It is now accepted principle that the confessional part of the statement made by the accused leading to discovery within the meaning of Section 27 of the Evidence Act, 1872 or section 162 of the Code of Criminal Procedure, 1973 can be made use of for the purpose of the disposal of property under Section 452 of the Code". This is now no more res integra from the decisions in a catena of cases[499], that a statement of an accused or a witness can be looked into for the disposal of the property, which takes place at the conclusion of inquiry or trial of the case. Though confession given by the accused to the Investigation Officer during investigation cannot be used to convict him except to the extent covered under Section 27 of the Evidence Act, namely, 'so much information' leading to the 'discovery of a fact', however, for other purposes, such as deciding the owner of the case- property for question of semblance, even for the benefit of the accused, information in confessional statement can be referred to[500].

In the case of **Mst. Bhuti v. Bhanwar Lal**[501] it is observed that the use of statements recorded during investigation is barred during an enquiry or trial relating to the offence under investigation when such statement was made. But an order for disposal of property is passed after the conclusion of an enquiry or trial as the opening words of Section 517 show and so Section 162 cannot be a bar for using those statements in such proceedings where the question of right of possession of the property is only looked into by the Court and not of its ownership.

In the case of **Balkishan vs State of Rajsthan**[502] Hon'ble Rajsthan High Court observes that the statements including those parts which might not have been admissible at the trial of the accused whether under Section 25 of the Evidence Act or Section 162 of the Code of Cr. P. C. were perfectly good material for the purpose of Section 517, Cr. P. C. In other words, the accused himself stated that these monies had been realised by him from the sale of the stolen commodities which undoubtedly belonged to the complainants.

In the case of **Pohlu v. Emperor**[503] it is observed that "the statement made during investigation can be used in proceeding under Sections 517 and 523, Cr. P. C. (now. Sections 452

498. 1991 SCC (Cri) 219

499. Oriental Insurance Co. Ltd. v. State of Karnataka, 1998 Cri LJ 2672 relying on Balkishan v. State of Rajasthan, 1984 Cri LJ 308, Veerabhadrappa v. Govindamma, ILR (1973) Mysore 64 and Thampi Chettiar Arjunan Chettiar v. State, 1985 Cri LJ 1158

500. B. Loganathan v. Inspector of Police 2016 SCC OnLine Mad 1864

501. 1965 Raj LW 291 : 1965 (2) CriLJ 702

502. 1984 CriLJ 308 RAJ

503. AIR 1943 Lahore 312

and 457 of the new Code) and also subsequently for civil suits. it was held that the confessional statement of the accused could be properly used for the purposes of Section 517 to determine (1) whether the property is property regarding which an offence appears to have been committed; and (2) for determining the person to whose custody, it should be delivered."

Gold ornaments melted into gold bars returned to the informant

In the case of **Prakash Vernekar Versus State of Goa & Anr**[504] Hon'ble Bombay High Court observes that a Criminal Court does not decide the title to the property claimed but is required to see as to who is entitled to the possession of the same. The informant had produced sufficient evidence to correlate that the seized articles were from the gold ornaments stolen from her. In the inquiry she had stated that gold in melted form comprises of eight bars which belonged to her as they were melted gold of the remaining gold ornaments which were stolen by the accused from her house and that she was told by the police that the accused had sold the gold ornaments to the jeweler by name Prakash Vernekar who had purchased the same from the accused and it is the police through whom she had come to know about said information. Obviously, the informant would not have known what had transpired after the theft except through the investigations carried out by the police. Prakash Vernekar was no ordinary goldsmith. He was a graduate and a Bank Manager and had the investigating officer done anything to him as belatedly alleged by him, he would have certainly complained about the conduct of the investigation Officer to his superior. His silence for over two years speaks eloquently about the falsity of his claim. Hon'ble Court allowed the melted golds to be retained by the informant.

Converted property may be given to the victim on condition

In the case of **B. Loganathan v. Inspector of Police**[505] Hon'ble Madras High Court observed that "the victim in a property crime will be very much interested in getting back his property. But, once the property is remanded in a criminal case, then it comes to the custody of the Court. That is why, interim custody of the property is used to be given to the eligible persons. In such cases, the Court has to see who has the immediate possession of the property. However, while doing so, if the person who had the possession is not entitled to have it, then he cannot be given the property. Any judicial decision on a particular point of time can't foresee the possibilities of future and it can't provide for every situation. The victim of crime, who is already victimized, should not again be vexed. In property offences, problem arises when the accused converts the case- property into a different form. Sometimes, the accused convert the jewel items into ingots for his convenient sake, easy handling and for easy disposal. But, even in such cases, when the ownership of the case properties could be traced to the de facto complainant, he can be given the custody of the same prescribing certain reasonable conditions. The information in the confessional statement recorded from the accused throws much light on the aspect of the ownership of the

504. 2007 CriLJ 4649 : (2007) 5 AIR Bom R 580

505. 2016 SCC OnLine Mad 1864

case property, namely, ingots. They show that these ingots were made out of the jewels, stated to have been robbed from the victim of the crime. The properties were allowed to be returned to the victim/complainant on conditions."

Order for disposal of property – Not necessarily in Judgment

In the case of **Raja Ram and Ors. vs Awadh Ram And Ors**[506] it has been held that "the order for disposal of property should not necessarily be incorporated in the judgment itself but it can be made within a reasonable time even thereafter. It must be decided as to from whom the property was seized or to whom it belonged prima facie. In actions for wrongful detention the measure of damages can only be the value of the goods as at the date of the verdict or judgment. The tort is complete the moment the goods are wrongfully converted by the defendant and no question can arise in those cases of any continuing wrong. In a case of wrongful detention, however, the cause of action may certainly arise the moment there is a refusal by the defendant to re-deliver the goods on demand made by the plaintiff in that behalf. But even though the cause of action thus arises on a refusal to re-deliver the said goods to the plaintiff the wrongful detention of the goods is a continuing wrong and the wrongful detention continues right up to the time when the defendant re- delivers the goods either of his own volition or under compulsion of a decree of the Court. There is moreover this distinction between actions for wrongful conversion and those for wrongful detention that in the former the plaintiff abandons his title to the goods and claims damages from the defendant on the basis that the goods have been wrongfully converted by the defendant either to his own use or have been wrongfully dealt with by him. In the latter case, however, the plaintiff asserts his title to the goods all the time and sues the defendant for specific delivery of the chattel or for re-delivery of the goods bailed to him on the basis that he has a title in those goods. The claim for the re- delivery of the goods by the defendant to him is based on his title in those goods not only at the time when the action is filed but right up to the period when the same are re-delivered by the defendant to him. The wrongful detention thus being a tort which continues all the time until the re-delivery of the goods by the defendant to the plaintiff, the only verdict or judgment which the Court can give in actions for wrongful detention is that the defendant does deliver to the plaintiff the goods thus wrongfully detained by him or pay in the alternative the value thereof which can only be ascertained as on the date of the verdict or judgment in favour of the plaintiff.

Rickshaw used for carrying stolen articles – can't be confiscated/destroyed

In the case of **Balamal Matlomal Versus State of Gujarat**[507], Hon'ble Gujrat High Court observes that merely the fact that the accused was going away in that rickshaw and in that were put the stolen articles. The auto rickshaw does not necessarily become an article which can be said to have been used in the commission of an offence of theft. It was not an instrument with which that theft was committed, that it could be destroyed or confiscated. The theft was already

506. 1990 CriLJ 1663

507. AIR 1970 SC 26

committed, and the mere fact that the stolen property was placed in a rickshaw whereby he was going away, cannot be called an instrument used in commission of offence.

Boats can't be confiscated for carrying stolen articles

In the case of **Jarip Gazi v. Emperor**[508] it is observed that a man may use a lathi or other instrument for committing an offence. No doubt such a weapon can be dealt with under the section in question, but if the interpretation put by the Magistrate upon the Section were sound, one-might conceive a case in which the house used by thieves or counterfeiters of coin for carrying on their unlawful trade would be liable to confiscation. Such an interpretation has never been given to this section. Apart from the question of law we think that the confiscation of the boats which apparently were hired by the petitioners would be very unjust to the owners.

Offence committed with respect to hides, not cart – Released

In re **Abdul Azeez**[509] it is observed that the offence being only in respect of the hides there was no justification for passing an order, in respect of the cart confiscating it. The only order that ought to have been passed was an order directing the return of the same to the accused from whose possession it was seized.

No order of confiscation in every case irrespective of circumstances

In the case of **Suleman Issa v. State of Bombay**[510]**,** it is observed that the powers of the Court, under Section 517 of the Cr PC no doubt extend to confiscation of property in the custody of the Court, but it is not every case in which the Court must necessarily pass an order of confiscation irrespective of the circumstances of the case. It is possible to conceive of cases where the subject matter of the offence may be property which under the law relating to the offence is liable to be confiscated as a punishment on conviction. The section contains a general provision for disposal of the property in the circumstances mentioned in the latter part of the Section. Confiscation is not the only mode of disposal of property and is singularly inappropriate in a case where the accused is prosecuted for an offence punishable with the maximum sentence of 3 months and a fine of Rs. 100/- .

Claim of third party must be heard before passing order

In the case of **Mohammad Yusuf v. Jivraj Premjibhal**[511] it is observed that when no claim or right to possession was made by a third party, the Court cannot be required to take any notice of any such supposed claim. But if the claim is made by any third party before the Court even during the pendency of the trial, that claimant has a right to be heard about his claim at the end of the trial and before passing any orders under Section 517(1) of the Code.

508. (1904) 8 Cal WN 887

509. AIR 1944 Mad 59

510. 56 Bom LR 1180 : (AIR 1954 SC 312)

511. ILR (1963) Guj 1002

Order concludes only right to possession, but not ownership

In the case of **Queen-Empress vs Tribhovan Manekchand And Ors**[512] Hon'ble Bombay High Court observes that "Confession is admissible for other purposes as an admission against the person who made it. Where there has been a trial and an order by the trying Court under Section 517 of the Criminal Procedure Code that concludes the immediate right to possession. Where, as in this case, an order has to be made under Section 523, the Magistrate may in the enquiry proceed on such evidence as is available, and make an order for handing property to the person he thinks entitled, this does not conclude the right of any person. The real owner may proceed against the holder of the articles or for damages as for a conversion.

Refusal to the complainant Delivery of the money seized – Harsh

In the case of **Dhanraj Baldeokishan vs The State**[513] it is observed that these entire statements including those parts which might not have been admissible at the trial of the accused whether under Section 25 of the Evidence Act or Section 162 of the Code of Criminal Procedure were perfectly good material for the purpose of Section 517 Cr. P. C. In other words, It is true that the accused stated in his statement under Section 342 Cr. P. C. that these monies belonged to his brother. But it: is remarkable that this brother has not come forward to claim these monies for all this length of time. In these circumstances, confiscating the monies and refusing their payment to the complainants, when according to the accused himself (and which version there is no reason to doubt) they were realised from the alleged stolen commodities, was unnecessarily harsh and should be set aside.

In case of acquittal, property should be restored to the person from whom is seized

In the case of **Kedar Biswas v. Mathura Nath Mitra**[514] it is observed by Hon'ble Court that after the accused was acquitted of theft or burglary, the proper order to make was to direct that the property found in the possession of the accused should be restored to him and that, if the complainant so liked, he could go to the Civil Court and file a suit and secure an injunction.

In the case of **Sattar Ali v. Afzal Mahomed**[515] it is observed by Hon'ble Court that "the elephant having been taken from the present petitioner's possession, on the failure of the case against him it should have gone back to the present petitioner from whom it had been taken".

In re **Devidin Durga Prasad**[516] it is observed by Hon'ble Court that the Magistrate had passed that order under section 523 of the Code of Criminal Procedure, but, the property in that case having been produced before the Court in an inquiry, the only section applicable was section 517 of the Code and that under section 517 the Magistrate had jurisdiction only in case he found

512. (1885) ILR 9 Bom 131

513. AIR 1965 Raj 238, 1965 CriLJ 805

514. [(1913) 18 Cal. W.N. 959.]

515. [(1926) ILR 54 Cal. 283.]

516. [(1897) ILR 22 Bom. 844.]

that it was property "regarding which any offence appears to have been committed or which has been used for the commission of an offence". As that was a case of discharge, (the case was sent back to the Magistrate to be disposed of in accordance with law with an observation that if he found that the case came within, section 517, then he could make such order as he thought fit; on the other hand, if the case was not governed by section 517 of the Code, then the only legal order to pass was to restore the previous possession.

In re **Ratanlal Rangildas**[517] it was held that, if no offence is found in respect of the properties produced before a Court in the course of an enquiry or a trial, then the only order, which should be made, was that the properties must be given back to the possession from which they came.

CHAPTER XIII

FORFEITURE JURISPRUDENCE AND DISPOSAL OF PROPERTY

The increasing tendency of procuring property by illegal means to have an extravagant life style of such unscrupulous persons has a negative impact on the common psyche of the general people. Where a person is in possession or control over assets which directly or indirectly constitute the proceeds of crime, he has no property rights in those assets and no valid title to the[518]. No person has a right to hold property which is the product of a crime. Non-conviction-based asset forfeiture model also known as Civil Forfeiture[519] Legislation gained currency in various countries.

Evolution of Forfeiture Jurisprudence

Maintenance of social order has always been a function of all societies from times immemorial. It is important to understand the concept of forfeiture of property in bygone era in different societies and legal system.

Confiscation of Property in Ancient India

In ancient Indian society, the code of conduct, which regulated the societal affairs and individual life, came to be known as Dharma or law[520]. Violation of Dharma or law entails

517. [(1892) ILR 17 Bom. 748.]

518. Hon'ble Irish High Court in Gilligan v. Criminal Assets Bureau, Galvin, Lanigan & Revenue Commissioners, (1994-97) 5 Irish Tax Reports 424

519. Civil forfeiture represents a move from a crime and punishment model of justice to a preventive model of justice. It seeks to take illegally obtained property out of the possession of organized crime figures so as to prevent them, first, from using it as working capital for future crimes and, secondly, from flaunting it in such a way as they become role models for others to follow into a lifestyle of acquisitive crime. Civil recovery is therefore not aimed at punishing behavior but at removing the trophies of past criminal behavior and the means to commit future criminal behavior.

520. Evolution of criminal justice system in ancient India, Dr. Rahul Tripathi , International Journal of Multidisciplinary Research and Development www.allsubjectjournal.com Volume 5; Issue 1; January 2018; Page No. 153.

punishments in myriad forms. Manu emphasized the importance and utility of punishment in following words

Punishment rules all creatures,

It again preserves them all where all others sleep.

Punishment keeps awake the learned know punishment as Dharma identifying one with the other

In various modes of punishments prescribed, confiscation of property was also prevalent in ancient India[521]. In those times, the entire private property of an offender would be confiscated, unlike present day criminal law where only confiscate the property used in the commission of the crime. In ancient India, there were various kinds of crimes that warranted confiscation of property. Foremost amongst those were, the crime was for an official, who accepted money from suitors, with poor intentions. An official, who is supposed to administer public affairs, but is also corrupted by wealth and has disrupted the business of another could have property taken. Perjury, i.e., the act of giving false evidence, was considered a serious offence and punishment was prescribed for it. The entire wealth of a person, who cited false witnesses out of greed, would be confiscated by the King, and in addition he would be externed. Any person who fails to render assistance according to his ability in the prevention of crime would be banished with his goods and chattel.

Confiscation of property under Islam

In Islamic jurisprudence references of confiscation of property found during the reins of Imam Ali, when properties unlawfully acquired were confiscated and unjust appointments and dismissals were canceled. Imam Ali declared: "By Allah! If I had known of this sort of public wealth, even if it was spent in paying the dower of the women or for purchasing slave girls, I would have confiscated it too[522]".

Confiscation of property under Christianity

Asset forfeiture[523] has an ancient history. Its roots may be traced back to biblical justifications as a form of punishment. The roots of forfeiture of tainted property may be traced back to Biblical notions of punishment, where a provision in the Old Testament stipulates that an ox that gores and kills a person must be stoned irrespective of its owner's negligence, and its flesh shall not be eaten[524]. One of the verses[525] says and whosoever will not obey the law of thy God, and the law of the king, let judgment be executed speedily upon him, whether it be unto death, or

521. Lahiri,Tarapada. Crime and Punishment in Ancient India p.169

522. Vide: Peak of Eloquence, ISP, 198

523. The word "forfeiture" is derived from two Latin words, namely foris, which means "outside", and facere, which means "to do"; It is defined as as "the taking of property derived from a crime

524. Exodus 21:38

525. Ezra 7:26

to banishment, or to confiscation of goods, or to imprisonment. Confiscation is mentioned in the Bible as a quasi-criminal sanction against disobedience to lawful orders[526]. Punitive confiscation presupposes some guilt or blameworthiness on the part of the owner. Expropriation of such property was a quasi-legislative power which authorized the legal rule that a lost chattel is to be returned to the claimant although he cannot formally prove his ownership, provided he satisfies the finder as to his bona fide by means of tokens (distinctive marks, simanim[527]).

Indian Law on forfeiture / attachment

Attachment, forfeiture and confiscation related provisions are found in various Indian laws. Some of which are reproduced below

1. **Code of Civil Procedure 1908**

It provides for attachment and sale of property for the purpose of compelling attendance of a witness[528], in case of disobedience of injunction[529] and to enforce performance of duties of receiver[530]. It also provides for attachment and sale of judgment debtor property in execution[531]. Section 60 provides the description of property liable to attachment and sale in execution of decree and what property not liable to be attached. Order XXI Rules 41 to 59 prescribe the various procedure for attachment in execution of a decree. Order XXI rule 64 to 92 provides the procedure for sale in execution of a decree.

2. **Code of Criminal Procedure 1973**

The Code of Criminal procedure laid down certain provisions which are generally followed in forfeiture and attachment. Sections 83 to 86 provide the procedure for attachment of the property of a proclaimed person and disposition of such property.

Section 83 of the CRPC provides that the court may order for attachment of any movable or immovable property, or both, belonging to the proclaimed person. In case the property attached is a debt or other movable property, the attachment may be made by seizure, or by appointment of a receiver[532] of by an order prohibiting the delivery[533]. In case of attachment of immovable property paying land revenue the same shall be attached through the collector and in case of other immovable property the same may be attached by taking possession, or by the appointment of

526. Ezra 10:8 and that whoever would not come within three days, according to the counsel of the leaders and the elders, all his possessions should be forfeited and he himself excluded from the assembly of the exiles

527. Simanim–means signs or indicators–that are meant to point the way to improved circumstances

528. Section 30of the CPC

529. Section 94(c) of the CPC

530. Section 94(d)of the CPC

531. Section 51 and order XXXVIII of the CPC

532. Order XL of the CPC

533. Sub-section 3of Section 83CRPC

a receiver[534]; or by prohibiting payment of rent or delivery[535]. If the property attached consists of live-stock or is of a perishable nature, the Court may order immediate sale thereof[536].

Section 84 provides that if any claim or objection is preferred within six months from the date of such attachment, by any person other than the proclaimed person, on the ground that the claimant or objector has an interest in such property, and that such interest is not liable to attachment, the claim or objection shall be inquired into, and may be allowed or disallowed in whole or in part. In the event of death of the claimant or objector, same may be continued by his legal representative. Any person whose claim or objection has been disallowed in whole or in part may, within a period of one year from the date of such order, institute a suit to establish the right which he claims in respect of the property in dispute. The order shall be conclusive subject to the result of such suit.

Section 85 provides that on appearance of the proclaimed the Court shall release the property from attachment. If he doesn't appear the property shall be at the disposal of the State Government. It couldn't be sold for a period of six months from date of attachment or disposal of claim or objection. But if the property is subject to speedy and natural decay or the Court considers that the sale would be for the benefit of the owner it may be sold. If the person appears within two years and proves that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property, or, if the same has been sold, the net proceeds of the sale, or, if part only thereof has been sold, the net proceeds of the sale and the residue of the property, shall, after satisfying therefrom all costs incurred in consequence of the attachment, be delivered to him.

Section 86 provides that an appeal from order rejecting application for restoration of attached property by any person aggrieved by any refusal to deliver property or the proceeds of the sale.

Section 95, Section 105-C, Section 105-E, Section 105-F, Section 105-G, Section 105-H, Section 105-I of the CrPC prescribe procedure of forfeiture of property in certain circumstances. Section 141 and 146 provide the power of executive magistrate to attach property in certain circumstances. Section 437-A (2), 446, 446A and 447 provide procedure regarding forfeiture of bail bonds.

Section 421 of the CRPC provides for attachment and sale of movable property in realization of fine.

The other relevant provision in this regard is Rule 77 of Chapter XI of Criminal Court Rules which provides that If in any case a claim is made to the property attached under Section 421 (1)

534. Ibid

535. Sub section 4 of Section 83 CRPC

536. Sub section 5 of Section 83 CRPC

(a)], Code of Criminal Procedure, the ownership of such property must be determined by the Magistrate who issued the warrant, or his successor in office or the Magistrate in charge of the accounts.

Appendix IV Rules Relating To Fines of Criminal Court Rules Note- provides for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of warrant, namely:—If the police officer attaches any movable property and If no person claims the property attached, the Police Officer can sell it within the time specified in the warrant without any previous reference to the Magistrate. It also provides that if any person makes any claim in respect of the property attached, then the ownership of such property shall be determined by the Magistrate who issued the warrant, or his successor in office or the Magistrate in charge of the accounts.

3. Indian Penal Code 1860

Section 53 of the IPC provides forfeiture of property as one mode of punishment. Section 126[537] and 127[538] of the IPC provides forfeiture of any property used or intended to be used in committing such depredation, or acquired by such depredation and received as such, inter alia other punishment like imprisonment and fine. Section 206[539] and 207[540] of the IPC made the fraudulent claim to property to prevent it from seizure as forfeited punishable. Section 217[541] and 218[542] of the IPC made disobedience and framing incorrect record by public servant to prevent seizure of property as forfeited. Sub section (2) of Section 263-A provides that any stamp, die, plate, instrument or materials in the possession of any person for making any fictitious stamp may be seized and, if seized shall be forfeited.

4. Criminal Law Amendment Ordinance 1944

This ordinance of 1944 prescribes a special procedure of attachment of property acquired by schedule offences and its disposal. This ordinance was promulgated during Second World War vide the powers conferred under section 72 of the Government of India Act. Later on, it was assented to by the President of India vide Adaptation of Laws Act 1950. This ordinance has permanent enforcement.

The ordinance provides detail procedure for attachment[543] of the money or other property procured by means of the offence mentioned in second schedule and also ad interim attachment[544]

537. Committing depredation on territories of Power at peace with the Government of India

538. Receiving property taken by war or depredation mentioned in sections 125 and 126

539. Fraudulent removal or concealment of property to prevent its seizure as forfeited or in execution

540. Fraudulent claim to property to prevent its seizure as forfeited or in execution

541. Public servant disobeying direction of law with intent to save person from punishment or property from forfeiture.

542. Public servant framing incorrect record or writing with intent to save person from punishment or property from forfeiture.

543. Section 3 Criminal Law Amendment Ordinance 1944

544. Section 4, Adinterim attachment; Criminal Law Amendment Ordinance 1944

if there exists prima facie grounds for commission of such offence. It provides for making the order of ad interim attachment absolute or releases the property[545] but certain limitations on release have been prescribed[546]. The ordinance provides stringent measures like Attachment of property of mala fide transferees[547]. It provides that the execution of orders of attachment shall be done in the manner of attachment of property in execution of decree as prescribed in the Code of Civil Procedure, 1908[548]. The ordinance provides that the District judge may allow for security if sufficient, in lieu of attachment[549]. Provisions for maintenance of the person affected and his family, business, appointment of receiver for the purpose can also be made[550]. The ordinance also provides for administration of attached property where Court ordering attachment has ceased to exercise jurisdiction of India[551] and Duration of attachment[552], procedure for appeal[553] and Evaluation of the amount of money procured by the accused on conviction[554].

Section 13 of the ordinance provides for disposal of attached property upon termination of criminal proceedings for any scheduled offence on furnishing the copy of the judgment of the trial court, appellate or revisional court or, in case no cognizance taken, or Acquittal.

District Judge shall withdraw any orders of attachment of property made in connection with the offence, or where security has been given in lieu of such attachment, order such security to be returned. Where the final judgment or order of the Criminal Courts is one of conviction, the District Judge shall order that from the property of the convicted person attached under this Ordinance or out of the security given in lieu of such attachment, there shall be forfeited to Government such amount or value as is found in the final judgment or order of the Criminal Courts, together with the costs of attachment

Where the final judgment or order of the Criminal Courts has imposed or upheld a sentence of fine on the said person, the District Judge may order that the said fine shall be recovered from the residue of the said attached property or of the security given in lieu of attachment. In case the amount forfeited exceed the value of the property attached and where the property of any transferee attached, the District Judge shall order that the balance of the amount ordered to be forfeited, with the costs of attachment of the transferee's property shall be forfeited to Government

545. Sub-sections (1), (2), (3) of Section5; Criminal Law Amendment Ordinance 1944

546. Sub-Section (3)(a) and 3(b) of Section 5; Criminal Law Amendment Ordinance 1944

547. Section 6; Criminal Law Amendment Ordinance 1944

548. Section 7 Criminal Law Amendment Ordinance 1944; Section 36 to 74 and Order XXI rule 1 to rule 106 of the Code of Civil Procedure 1908 provide meticulous procedure for execution of decree

549. Section 8; Criminal Law Amendment Ordinance 1944

550. Section 9; Criminal Law Amendment Ordinance 1944

551. Section 9–A; Criminal Law Amendment Ordinance 1944

552. Section 11; Criminal Law Amendment Ordinance 1944

553. Section 11; Criminal Law Amendment Ordinance 1944

554. Section 12; Criminal Law Amendment Ordinance 1944

from the attached property of the transferee or out of the security given in lieu of such attachment; and the District Judge may order that any fine or any portion thereof not recovered of the transferee or out of security given in lieu of such attachment.

Order of attachment with respect to the property remains after attachment shall be withdrawn or the remainder of the security returned. The forfeited amount shall be credited to the Government after deducting the costs of attachment. If there are more than one authority who suffered loss, the amount shall be distributed in proportion to the loss sustained by each.

Enabling provision in Other Laws relating to Ordinance 1944

5. Section 5(6) of Prevention of Corruption Act 1988

6. Section 85(5) of Bihar Prohibition and Excise Act, 2016

It provides that A special Judge, while trying an offence punishable under the respective Act, shall exercise all the powers and functions to be exercised by a District Judge under the Criminal Law Amendment Ordinance, 1944.

7. Bihar Special Court Act 2009

In Bihar, in the year 2009 Bihar Special Court Act was enacted to provide for the constitution of special courts for the speedy trial of certain class of offences under Prevention of Corruption Act, 1988 and for confiscation of the properties involved in those offences in the State of Bihar. It was enacted to prosecute the public servants in Bihar who have accumulated vast property, disproportionate to their known sources of income by resorting to corrupt means and confiscate their ill-gotten assets. Section 26 of the Act says that notwithstanding anything in the Prevention of Corruption Act, 1988 and the Criminal Law Amendment Ordinance, 1944 or any other law for the time being in force, the provisions of this Act shall prevail in case of any inconsistency. Thus, the special Act doesn't bar application of both above-mentioned laws, but provides that in case of inconsistency, the provisions contain in special Act shall prevail upon them.

The Special Act prescribes the procedure for Confiscation of property[555], Notice for confiscation[556], Confiscation of property in certain cases[557], Transfer To be null and void[558] and Power to take possession[559].

Section 19 provides for Refund of Confiscated money or property— Where an order of confiscation made under section 15 is modified or annulled by the High Court in appeal or where the person affected is acquitted by the Special Court, the money or property or both shall be returned to the person affected and in case it is not possible for any reason to return the property,

555. Section 13 of Bihar Special Court Act 2009

556. Section 14 of Bihar Special Court Act 2009

557. Section 15 of Bihar Special Court Act 2009

558. Section 16 of Bihar Special Court Act 2009

559. Section 18 of Bihar Special Court Act 2009

such person shall be paid the price thereof including the money so confiscated with the interest at the rate of five percent per annum thereon calculated from the date of confiscation.

8. Indian Wild Life Protection Act 1972

Wildlife Amendment Act of 2002 inserts a new Chapter VI(A) in the existing Wildlife Protection Act 1972. This chapter states that if any person or any group of persons or any trust acquired any property from illegal hunting or prohibited trade of wild animals under this Act the property would be forfeited by the State Government by the authorised officer. Such forfeiture of the property by the State Government can be done by the procedure established by law and by taking necessary steps such as investigation, search or survey of any property, place, people or documents. If it was found that only a part of property was acquired illegally, such a person would be given a chance and will be asked to pay the fine which is equivalent to the market value of the property. Certain forfeiture related provisions are enumerated in the table below

Section 58C	Prohibition of holding illegally acquired property.
Section 58E	Identifying illegally acquired property.
Section 58F	Seizure or freezing of illegally acquired property.
Section 58G	Management of properties seized or forfeited
Section 58H	Notice of forfeiture of property.
Section 58-I	Forfeiture of property in certain cases.
Section 58K	Fine in lieu of forfeiture.
Section 58L	Procedure in relation to certain trust properties.
Section 58M	Certain transfer to be null and void.
Section 58-O	Appeals.
Section 58Q	Bar of Jurisdiction.
Section 58U.	Power to take possession

9. Indian Forest (Bihar Amendment) Act

Section 52 provides for Seizure and its procedure for the property liable for confiscation under the Act.

10. Bihar Prohibition and Excise Act 2016

Section 56 enumerates the thing liable to confiscation. Section 58 provides the confiscation procedure by collector, Section 61[560], Section 62[561] and Section 72[562] also provides for confiscation of certain other things.

560. S.61- Confiscated articles to vest with the Collector

561. S.62- Premises liable to be sealed and confiscation

562. S. 72 - Powers in relation to absconding person and confiscation of movable or immovable property

11. Narcotic Drugs and Psychotropic Substances Act 1985

Chapter VA was inserted by Section 19 of Amendment Act 2 of 1989. This chapter provides a separate procedure of forfeiture of property derived from, or used in illicit traffic. Some of the important provisions are enumerated in the table below

Section 68C	Prohibition of holding illegally acquired property
Section 68E	Identifying illegally acquired property
Section 68F	Seizure or freezing of illegally acquired property
Section 68G	Management of properties seized or forfeited
Section 68H	Notice of forfeiture of property
Section 68-1	Forfeiture of property in certain cases
Section 68L	Procedure in relation to certain trust properties
Section 68M	Certain transfers to be null and void
Section 68Q	Bar of jurisdiction - No order passed or declaration made regarding forfeiture shall be appealable except as provided therein and no civil court shall have jurisdiction in these matters.
Section 68 U	Power to take possession of property declared to be forfeited
Section 68 Z	Release of property in cases of acquittal, detention set aside and others.

12. Fugitive Economic Offender Act 2018

This Act is the most recent enactment which provides the procedure to deal with the fugitive property

On declaration of an individual as a fugitive economic offender, the special court may order that following properties stand confiscated to the Central Government—(a) the proceeds of crime in India or abroad, whether or not such property is owned by the fugitive economic offender; and (b) any other property or benami property in India or abroad, owned by the fugitive economic offender[563].

Identification of the properties in India or abroad that constitute proceeds of crime which are to be confiscated and in case such properties cannot be identified, quantify the value of the proceeds of crime[564].Such property may be exempted in which any other person has an interest acquired bona fide and without knowledge of the fact that the property was proceeds of crime[565].

All the rights and title in the confiscated property shall, from the date of the confiscation order, vest in the Central Government, free from all encumbrances[566].

563. Section12 of the Fugitive Economic Offenders Act

564. Sub Section 3 of Section 12 of the Fugitive Economic Offender Act

565. Sub Section 4 of Section 12 of the Fugitive Economic Offender Act

566. Sub Section 8 of Section 12 of the Fugitive Economic Offender Act

Where on the conclusion of the proceedings, the Special Court finds that the individual is not a fugitive economic offender, the Special Court shall order release of property or record attached or seized under this Act to the person entitled to receive it[567].

Where an order releasing the property has been made by the Special Court, the Director or any other officer authorised by him in this behalf may withhold the release of any such property or record for a period of ninety days from the date of receipt of such order, if he is of the opinion that such property is relevant for the appeal proceedings under this Act[568].

13. Customs Act 1962

Chapter XIV of the Act provides a detail procedure for confiscation of the goods. Some of the relevant provisions are enumerated below

Section 113	Confiscation of goods attempted to be improperly exported, etc.
Section 115	Confiscation of conveyances.
Section 118	Confiscation of packages and their contents.
Section 119	Confiscation of goods used for concealing smuggled goods.
Section 120	Confiscation of smuggled change in form, etc. goods notwithstanding any
Section 121	Confiscation of sale-proceeds of smuggled goods.
Section 122	Adjudication of confiscations and penalties.
Section 122A	Adjudication Procedure.
Section 124	Issue of show cause notice before confiscation of goods, etc.
Section 125	Option to pay fine in lieu of confiscation.
Section 126	On confiscation, property to vest in Central Government.

14. Prevention of Money Laundering Act

The Money-Laundering is not only the wealth earned through illegal means, the same would also include legal income that is concealed from public authorities: To evade payment of Taxes (Income Tax, Excise Duty, Sales Tax, Stamp Duty, etc); To evade payment of other statutory contributions; To evade compliance with the provisions of Industrial laws such as the Industrial Dispute Act 1947, Minimum Wages Act 1948, Payment of Bonus Act 1936, Factories Act 1948, and Contract Labour (Regulation and Abolition) Act 1970; and / or to evade compliance with other laws and administrative procedures. The endeavour of the Legislature is to cover not only the wealth earned through Illegal means, but also to bring Illegal Income under the purview of PMLA, which includes even Legal Income that is concealed from public authorities.

567. Sub Section 9 of Section 12 of the Fugitive Economic Offender Act

568. Sub Section 10 of Section12 of the Fugitive Economic Offender Act

Due to aforementioned reasons the Act includes a wide range of laws in India under its ambit. It includes offence under IPC[569], NDPS Act[570], Explosive Substances Act (Offence under section 3, 4, 5), Unlawful Activities Prevention Act[571], Arms Act (offence under section 25, 26, 27, 28, 29, 30), Wild Life Protection Act[572], Immoral Traffic Prevention Act (Offence under section 5, 6, 8, 9), Prevention of Corruption Act (Offence under section 7, 7A, 8, 11, 12, 13, 14), Explosive Act (Offence under section 9B, 9C), Antiquities and Arts Treasures Act (Offence under section 25/3, 28), SEBI Act (Offence under section 12A/24, 24), Customs Act (Offence under section 132, 135), Bonded Labor system Abolition Act (Offence under section 16, 18, 20), Child Labour Prohibition and Regulation Act (Offence under section 14), Transplantation of human organs Act (Offence under section 18, 19, 20), Juvenile Justice Care and Protection of Children Act 2000 (Offence under section 23, 24, 25, 26), Emigration Act (Offence under section 24), Passport Act (Offence under section 12), Foreigners Act (Offence under section 14, 14B, 14C), Copyright Act (Offence under section 63, 63A, 63B, 68A, Trade Marks Act 1999(offence under section 103, 104, 105, 107, 120), Information Technology Act (offence under section 72, 75), Biological Diversity Act (offence under section 55/6 , Protection of plant varieties and farmers rights Act (offence under section 70/68, 71/68, 72/68, 73/68), Environment Protection Act (offence under section 15/7, 15/8), Water prevention and control of pollution Act (offence under section 41(2), 43 0, Air prevention and control of pollution Act (offence under section 37), The suppression of unlawful acts against safety of maritime navigation and fixed platforms on continental shelf Act (Offence under section 3), The Companies Act (Offence under section 447) and Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act (Offence under section 15). Now any evasion of the state levies and dues will also tantamount to Money-Laundering and attract this Act. Some of the important provisions are enumerated in the table given below

Section 5	Attachment of property involved in money-laundering.
Section 9	Vesting of property in Central Government.
Section 10	Management of properties confiscated.
Section 16	Power of survey.
Section 17	Search and seizure.
Section 18	Search of persons.
Section 20	Retention of property.
Section 21	Retention of records.

569. IPC Offence under section 120B, 121, 121A, 255, 257, 258, 259, 260, 302, 304, 307, 308, 327, 329, 364A, Offence against Property under Chapter XVII of the Act

570. NDPS Act - Offence under section 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 A, 27 A, 29

571. UAPA - - Offence under section 10/3, 11/3, 13/3, 16/15, 16A, 17, 18, 18A, 18B, 19, 20, 21, 38, 39, 40

572. Wild Life Protection Act - Offence under section 51/9, 51/17A, 51/39, 51/44, 51/48, 51/49B

Section 41	Civil court not to have jurisdiction.
Section 58A	Special Court to release the property.
Section 58B	Letter of request of a contracting State or authority for confiscation or release the property.
Section 60	Attachment, seizure and confiscation, etc., of property in a contracting State or India.
Section 67	Bar of suits in civil courts.
Section72	Continuation insolvency of proceedings in the event of death.

Besides the above-mentioned laws there are various other enactment which provide for confiscation of the seized property and also forfeiture of the property of the accused on conviction[573].

Forfeiture and Seizure

The word `forfeit' is defined in Concise Oxford English Dictionary `lose or be deprived of (property or a right or privilege) as a penalty for wrongdoing'. Forfeiture' and `seizure' have different meaning and connotation in law.

`Forfeiture' is defined as the divestiture of specific property without compensation in consequence of some default or act forbidden by law[574]. In the case of **R. S. Joshi etc. v. Ajit Mills Ltd & Anr**[575] Hon'ble Apex Court observes that the word forfeiture bears the same meaning of a penalty for breach of a prohibitory direction. In the case of Chairman of the **Bankura Municipality v. Lalji Raja & sons**[576] it is observed by Hon'ble Apex Court that unless the loss or deprivation of the goods is by way of a penalty or punishment for a crime, offence or breach of engagement, it would not come within the definition of forfeiture.

Seizure' is generally understood to mean a forcible taking possession. In law, seizure is the taking possession of property by an officer under legal process. Seizure of property under legal process is a temporary measure. It is temporary interference with the right to hold the property. Seizure under legal process is usually followed by confiscation or forfeiture or disposal in accordance with the provisions under which seizure has been made or the property is returned to the person from whom it has been seized or to the lawful claimant to such property.

Some important judgment of Hon'ble Courts touching the subject

Forfeiture is not penalty but a mode of recovery of embezzled money

573. Some of those laws have been enumerated in Appendix – II and III of the paper

574. The Law Lexicon' by P. Ramanatha Aiyer [2nd edition (Reprint 2000)],

575. AIR 1977 SC 2279

576. AIR 1953 SC 248

In the case of **Biswanath Bhattacharya v Union of India**[577] Hon'ble Apex court observes that the 1944 Ordinance provided for the attachment of the money or other property which is believed to have been procured by means of one of the Scheduled Offences by the offender. Such attached property is required to be disposed off as provided under Section 13 of the said Ordinance. Under Section 12 of the Ordinance, the criminal court trying a Scheduled Offence is obliged to ascertain the amount or value of the property procured by the accused by means of the offence. Under Section 13(3), it is provided that so much of the attached property referred to earlier equivalent to the value ascertained by the criminal court under Section 12 is required to be forfeited to the State. The forfeiture contemplated in the Ordinance was not a penalty within the meaning of Article 20 but it is only a speedier mode of recovery of the money embezzled by the accused. It is also observed that if a person acquires property by illegal means, then the deprivation of such person of the enjoyment of such ill gotten property is justified. Such a deprivation is not inconsistent with the requirement of Articles 300-A and 14 of the Constitution which prevent the State from arbitrarily depriving a subject of his property.

Confiscation and Forfeiture – difference

In the case of **Baleshwar Ray**[578] Hon'ble Patna High Court observes that "confiscation" and "forfeiture" are not similar and synonymous terms. "Confiscation" envisages a civil liability, whereas, an order of forfeiture of food grains or vehicle is preceded by a judgment of conviction. Etymologically speaking, confiscation means appropriation to the use of State which is adjudged forfeited. Though, confiscation also amounts to appropriation of private property to public Treasury, but it is not by way of penalty. This can be said on the basis of the two different provisions which have been made under the Act, viz., (i) for confiscation for which an Executive Authority, the Collector, has been authorized, and (ii) forfeiture of the property in question along with conviction and sentence for the offender by the competent Court of law. The statement of the object of the EC Act makes the distinction between the two terms, viz., confiscation and forfeiture rather obvious. For achieving the object for which the Legislation has been enacted, provision of confiscation has been made. A separate provision has been carved out for criminal prosecution (Section 7 of the E. C. Act). The power of confiscation is independent of the launching of prosecution with regard to contravention of any order in terms of Section 3 of the Act. Thus, by no analogy or logic can "confiscation" be said to be punishment or penalty, even though, the net result of the confiscation is the deprivation of the said property from the hands of the owner/person from whom it has been seized and appropriation of the same tothe State/Public Treasury. If this is so, then vesting the power of confiscation in an Executive Authority, viz., the Collector, cannot be said to be in derogation of the provisions contained in Section 3 sub-Clause (4)[579] of the CRPC

577. (2014) 4 SCC 392

578. Supra at 152, 154, 156, 157, 159

579. Section 3 sub-Clause (4) of the CRPC reads as follows:- 3. Construction of references.-(4) where, under any law, other than this Code, the functions exercisable by a Magistrate relate to matters- (a) which involve the appreciation or shifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or

Though, while proceeding with confiscation, some amount of shifting of evidence or appropriation thereof is inherent, but the proceedings do not end in any punishment or penalty or detention in custody. In that event, such power of confiscation can be exercised by Executive Authority and the construction of reference in Section 3 of the CRPC, with respect to such powers being exercised only by a Judicial Officer, does not apply.

No proceedings under the ordinance against a dead person

In the case of **U. Subhadramma v. State of A.P.**[580] Hon'ble Apex court observes that Section 3 requires the Government to make an application to the District Judge within the local limits of whose jurisdiction the said person ordinarily resides or carries on business, which clearly indicates existence of such a person. It excludes the possibility of proceedings against a dead person. Section 13 requires the Government to inform the District Judge about the status of the criminal proceedings. It is also observed that that the section is silent as to the effect of abatement of prosecution. Concept of abatement of a trial could be subsumed in the section where the final judgment and order of the criminal court is one of acquittal. In this context, the presumption of innocence of an accused till he is convicted must be borne in mind and there is no reason to consider this presumption to have vaporized upon the death of an accused. It is incomprehensible that such an application could have been made in regard to a dead person who obviously cannot be said to be ordinarily resident or carrying on business anywhere. There is no legal provision which enables continuance of prosecution upon death of the accused. A null and void conviction can't be used as a basis for making an attachment of the property of a dead person.

Attachment to remain in force until withdrawn

In the case of **Sonamati Devi v The State**[581] Hon'ble High Court of Patna observes that even when the final judgment or order of the criminal Court is one of acquittal, there will be no termination of the attachment, unless pursuant to Section 13 the District Judge passes orders in that behalf. When the order of acquittal is final, the District Judge shall withdraw any orders of attachment of property made in connection with the offence. Unless and until the DistrictJudge passes orders withdrawing the order of attachment, the attachment as provided in Section 10 will continue in force.

Petition Under CRPC Not Maintainable in Matters Involving 1944 Ordinance

In the case of **A. Sambaih Nayak vs. State of Telangana**[582] Hon'ble High Court of

detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; (b) which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive

580. (2016) 7 SCC 797

581. 1958 CriLJ 1217

582. Decided on 05/01/2016, Cr. Petition 15912 of 2016

Telangana observes that permitting the petition to sell the property, under attachment by executing a sale deed before disposing of the main case, will frustrate the very purpose of the attachment. Only when a person could establish that the property under attachment has been acquired by him by lawful means, that such attachment may be withdrawn. The ordinance also provides for appeal by aggrieved person or party. Filing of the criminal petition under Section 482 CRPC is nothing but circumventing the procedure contemplated under the provisions of the Ordinance, which is not permissible under law.

Attachment continues till termination of criminal proceedings

In the case of **K. G. Natesan vs State**[583] Hon'ble Madras High Court observed that it cannot be contended that the attachment order passed by the Court becomes nugatory or gets invalidated merely on the premise that no specific orders were passed. The plea of raising ad-interim attachment on the ground that the said attachment lapses by efflux of time cannot be countenanced in view of Section 10(b) of the Criminal Law (Amendment) Ordinance, 1944. The attachment order will continue till the termination of the criminal proceedings.

Provisions of Chapter VII- A CrPC not applicable in local offence

In the case of **State of MP vs. Balram Mihani**[584], it is observed by Hon'ble Apex Court that there are specific other Central laws wherein the properties earned out of trading of Narcotic Drugs and Psychotropic Substances or the offences relating to smuggling or financial offences relating to foreign exchange are liable to be attached, seized and forfeited. Chapter VII-A is one such measure to introduce stringent measures for attachment and forfeiture of the properties earned by the offences, by way of reciprocal arrangement in the contracting countries. However, if we accept the State's contention that the provisions of Chapter VII-A are for all and sundry offences in India, it would be illogical. If such a construction as claimed by the petitioner is given then it would mean that even for the offences which are local in nature and committed within the State, still the property connected with those offences shall be forfeitured to the Central Government. That would obviously be an absurd result 8. Procedure of CRPC to be followed when no proceedings under the ordinance; Where claimants are, S. 458 CRPC not applicable

In the case of **S T Goudar vs State by Police Inspector**[585] it is observed by Hon'ble Court that in the absence of any specific provisions in special law, the provisions of the Code of Criminal Procedure 1973 have to be followed for the purpose of procedure. There is no dispute that property was seized from the deceased accused. There is no question of confiscation because the said properties have neither been attached nor any application has been filed for the purpose of confiscation. No rival claim is made in the case. Hence the court has to adopt the procedure in case of acquittal for disposal of the properties to such person who are entitled to it.

583. Crl. M.P. No. 1467 of 2013 decided on 25August, 2014

584. Decided on 1 February, 2010; CRIMINAL APPEAL Nos. 891-893 of 2007

585. CRP no 982 of 2015 decided on 23August, 2019

Inquiry should be made only to ascertain as to whether the applicants are the only legal representatives of the deceased accused or not. The properties seized during investigation after abatement of the case, have to be released in favour of the applicants/claimants in accordance with law. Relying on the Hon'ble Apex Court judgment in **U. Subhadramma case**[586] it is observed that no proceedings can be held against a dead person about acquisition of property by deceased when once the case is abated, since there is a presumption of innocence of the accused till, he is convicted. Since the claimants put forward the claim, section 458 CRPC is not applicable.

Criminal Prosecution vs Confiscation proceedings

In the case of **State of Madhya Pradesh vs. Kallo Bai**[587] Hon'ble Apex court lays down that the criminal prosecution is distinct from confiscation proceedings. The two proceedings are different and parallel, each having a distinct purpose. The object of confiscation proceeding is to enable speedy and effective adjudication with regard to confiscation of the produce and the means used for committing the offence while the object of the prosecution is to punish the offender. The scheme of the Act prescribes an independent procedure for confiscation. The intention of prescribing separate proceedings is to provide a deterrent mechanism and to stop further misuse of the vehicle.

In the case of the **State of Madhya Pradesh v. Uday Singh**[588] Hon'ble Apex Court observes that the Criminal prosecution is distinct from confiscation proceedings. The two proceedings are different and parallel, each having a distinct purpose. The object of confiscation proceeding is to enable speedy and effective adjudication with regard to confiscation of the produce and the means used for committing the offence while the object of the prosecution is to punish the offender. The scheme of the *Adhiniyam* prescribes an independent procedure for confiscation. The intention of prescribing separate proceedings is to provide a deterrent mechanism and to stop further misuse of the vehicle.

CHAPTER XIV

RESTORATION OF POSSESSION OF IMMOVABLE PROPERTY

Usually, the criminal court has nothing to do with the immovable property. As declaration of title, possession and interest in any immovable property is considered the exclusive domain of the Civil Court. But section 456 CRPC carves an exception to this and provides for restoration of possession of immovable property.

Provisions under section 456 CRPC

Section 456 - Power to restore possession of immovable property.—(1) When a person is

586. Supra at 582

587. 2017 (14) SCC 502

588. AIR 2019 SC 1597

convicted of an offence attended by criminal force or show of force or by criminal intimidation, and it appears to the Court that, by such force or show of force or intimidation, any person has been dispossessed of any immovable property, the Court may, if it thinks fit, order that possession of the same be restored to that person after evicting by force, if necessary, any other person who may be in possession of the property: Provided that no such order shall be made by the Court more than one month after the date of the conviction.

(2) Where the Court trying the offence has not made an order under sub-section (1), the Court of appeal, confirmation or revision may, if it thinks fit, make such order while disposing of the appeal, reference or revision, as the case may be.

(3) Where an order has been made under sub-section (1), the provisions of section

454 shall apply in relation thereto as they apply in relation to an order under section 453.

(4) No order made under this section shall prejudice any right or interest to or in such immovable property which any person may be able to establish in a civil suit.

Section 456 CRPC corresponds to Section 522 of the 1898 CR.P.C The court can issue orders for restoration of immovable property seized by intimidation or physical force. The powers under the Section 456 can be exercised only when a person is convicted for an offence of criminal intimidation and any person has been dispossessed of any immovable property due to that physical force. Force[589], Criminal Force[590] and Criminal Intimidation[591]. The use of criminal force or intimidation need not be an ingredient in the original offence being proceeded with. But it should be there in the unlawful seizure of the property by the offender.

The purpose of this Section is to avoid any person from gaining wrongful possession of land or other immovable property by his unlawful use of force. If dispossession of immovable property

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589. 591 S. 349 of the Indian Penal Code - A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling: Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described.

    (First) — By his own bodily power.

    (Secondly) —By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person.

    (Thirdly) — By inducing any animal to move, to change its motion, or to cease to move.

590. Section 350 Criminal force—Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other

591. Section 503 Criminal intimidation.—Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legallybound todo, or to omitto do any actwhich that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation

is not by force or intimidation, this Section cannot be used for its restoration. Such an order of restoration can be issued by the court only on conviction in an offence. The use of criminal force must be either against the person or the property. Such an order of restoration should in no way infringe any legitimate right of a person in regard to the ownership of that property. The section casts a limitation of one month for passing any such order by a convicting court. It also provides that if the convicting court has not passed such order, the revisional or appellate court also may pass such order. It provides that s. 454 CRPC relating to appeal will be applicable in the same manner as it applies with respect to s. 453 CR.P.C The extent and scope of the provision is only to restore the possession of a person entitled to. The criminal court has no power to decide the intricate matter of title involved in the immovable property.

Restoration of possession over immovable property also find mention in sub section 6(a) to section 145 of the CRPC – It provides that if an executive magistrate decides that one of the parties was, or should be treated as being, in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction, may restore to possession the party forcibly and wrongfully dispossessed. In the case of **Lake Palace Hotels Private Limited vs. State of Rajasthan**[592], Hon'ble High Court observes that the Magistrate (Executive) has the authority to pass all incidental orders when he drops the proceedings under sub-sec. (5) of sec. 145, there can be hardly any objection in principle to his passing such an order subsequent to the order by which he drops the proceedings within a reasonable time of his having done so. In other words, the Magistrate can restore the party possession from whom possession was taken at the time of attachment provided there is clear material on the record to show that. Where, however, there is no such material, the Magistrate must rest content with the passing of an order removing the attachment and leave the parties to seek their remedy in a proper court of law.

Important Judgments of Hon'ble Courts on this subject

No limitation on appellate or revision court to pass order U/s 456(2) CrPC

In the case of **Fida Hussain v. Sarfaraz Hussain**[593] Hon'ble Patna High Court laid down that there was nothing in s. 522(3) to limit the jurisdiction of an appellate Court to the passing of an order within one month either of the original conviction or the appellate order and that it was left tn the discretion of the appellate or revisional Court, not to exercise its power under this section in cases where there has been undue or excessive delay in moving the Court for its use: in other words the appellate or revisional Court will use its discretion in exercising power within reasonable time.

592. 1987 CriLJ 518 Rajsthan

593. AIR 1933 Patna 617

In the case of **Savlaram Sadoba Navle v. Dhyaneshwar Vishnu Chinke**[594] Hon'ble Bombay High Court held that even though magistrate dismissed the application for an order for possession filed a month after conviction, the High Court could make an order for possession in proper case exercising its revisional jurisdiction.

In the case of **Nihal Singh v. Emperor**[595] Hon'ble Allahabad High Court held that there was no limitation of one month from the date of conviction for passing the order. If the magistrate passed an order for restoration of possession of the immovable property more than one month after the conviction under s. 447 IPC, the High Court could set aside the order in revision and itself pass an order for the restoration of possession.

In the case of **H. P Gupta vs Manohar Lal And Ors**[596] Hon'ble Apex Court observes that Section 456 (2) CRPC applies to a case where a conviction has been recorded by the trial Court and the trial Court has through mistake or inadvertence omitted to make an order for restoration of possession of immovable property to the complainant or has refused to pass such order either because the offence was not attended by criminal force or show of force or by criminal intimidation or because the application in that behalf was made after expiry of 30 days and an appeal or revision either against the conviction or the order refusing restoration has been preferred; in such a case sub section (2) provides that the appellate Court or the revisional Court while disposing of such appeal or revision may make an order restoring possession of the immovable property to the complainant. There is no limitation on the powers of the appellate Court or revisional Court as the words "while disposing of the appeal, reference or revision" mean in continuation of the disposal of the appeal, reference or revision. The appellate or revisional Court acting under s.456(2) will have jurisdiction or power to pass the order for restoration of possession at any time but it has to be exercised with discretion within reasonable time of the disposal of the appeal, reference or revision. Hon'ble Apex Court concurred with the view taken by Hon'ble Patna High Court in the case of **Fida Hussain Vs. Sarfaraz Hussain** *(Supra)*.

Limitation applies only when Trial Court not passed such order

In the case of **Mahesh Dubey vs. Shivbodh Dubey**[597] Hon'ble Supreme Court observes that Sub-Section 2 of Section 456 CR.P.C provides that if the Court trying the offence has not made an order of restoration, the Court of appeal, confirmation or revision can also make such an order while disposing of the proceedings pending before it. No limitation has been provided for the higher courts to make such order. When appeal against conviction was filed, the order of the trial court directing restoration of the possession was not given effect to and petition for handing over possession was filed after dismissal of the appeal of the accused persons. Since the trial court had already passed the order while convicting the accused for restoration of the possession. The

594. AIR 1942 Bom 148

595. AIR 1939 Allahabad 662

596. AIR 1979 SC 443

597. Decided on 12 February 2019 In Criminal Appeal No. 1104 of 2011

limitation of 30 days would not apply. It would apply only if the Trial Court had not passed any order in respect of the case property while convicting the accused.

Serious dispute of title not to be adjudicated by Criminal Court

In **Re Masgi Bitchanna**[598] Hon'ble Court observes that where serious dispute of right, title and ownership over the property exists, the Criminal Court will not adjudicate the ownership and title of the property seized as jurisdiction lies within the domain of Civil Court and the Criminal Court would abide by the result of the decision of the Civil Court and till then the property will remain under the custody of Criminal Court. The parties may be asked to approach the Civil Court and get the dispute settled as the Criminal Court cannot go into these disputes and decide. Such a decision would only be subject to the decision of the Civil Court till the dispute is decided. Any party may get necessary directions of the Civil Court if the property has to be preserved.

No order of restoration of possession in pendency of Trial

In the case of **Abdul Wahab vs. State of Bihar**[599] Hon'ble Patna High court observed that section 456 didn't contain any enabling provision to make any order of restoration when trial is pending. The section contemplates that ifthe accused is convicted of an offence attended by criminal force or show of force or by criminal intimidation, and it appears to the Court that, by such force or show of force or intimidation, any person has been dispossessed of any immovable property, the Court may, if it thinks fit, order that possession of the same be restored to that person after evicting by force, if necessary, any other person who may be in possession of the property. But not otherwise.

Writ Jurisdiction of Hon'ble High Court – Restoration of possession

In the case of **Anju Devi Vs. Commissioner of Police & Ors**[600] it is observed by Hon'ble Delhi High Court that though direction to deliver possession while exercising extraordinary jurisdiction under Article 226 of the Constitution is made exceptionally. The availability of other efficacious remedy cannot always be used as a weapon of defense to deny relief to the aggrieved person. There is no bar in exercise of that power and its exercise depend upon the facts and circumstances of each case. Where a helpless lady has been thrown out as a result of collusion and connivance of the police. It is the duty of the court to come to the aid of such oppressed person. It is necessary to innovate and forge novel tools when atrocities are committed by those who are required to enforce the rule of law. The alleged offender cannot be permitted to take advantage of delay in justice delivery system. Existence of criminal and civil cases have their own merits and the instant order will not prejudice parties in those proceedings but the lady can't be denied the relief of putting back into possession. A relief deserves to be given in exercise of jurisdiction under Article 226 cannot be placed in a rigid mould. But it is to be moulded as the facts and circumstances of the case and cause of justice may demand.

598. AIR1969 AP 54

599. Decided on 16/04/1979 in connection with Criminal Revision 1234 of 1977

600. 1994 (2) CRIME 691

Hon'ble Delhi High Court observed in the case of **Vijay Khanna & Anr. vs Union Of India & Ors**[601] that where the possession of one of the party over the disputed house was itself unlawful, the persons deriving their claim from such person can't have more rights than what their transferor had. They being bona fide purchase for valuable consideration can't be a ground of resistance to hand over the possession to the entitled person. Though power to restore possession of immovable property under Section 456 Cr.P.C can be resorted to by the Court only after recording the finding of guilt against the accused but in the peculiar circumstances of the case the Hon'ble Court order for restoration of status quo ante with the direction to police to put back the dispossessed into possession.

Order passed beyond one month may be validated by Sessions Court

In the case of **Basanta Kumar Maity v. Kenaram Maity**[602] Hon'ble Calcutta High Court observed that the Sessions Judge had the power to pass an order under s. 522 (1898 code, corresponding to s. 456 CRPC 1973) even after one month of conviction. There was nothing in the code which prevented the sessions court from validating the order of the Magistrate passed beyond one month of the conviction. Even the High Court as a revision court had the power to make such an order.

Order to vacate the premises and also fine – Appealable order

In the case of **Smt Kanwal Sood vs. Nawal Kishore**[603] Hon'ble Apex court observes that every trespass does not amount to criminal trespass within the meaning of section 141 of the Indian Penal Code. In order to satisfy the conditions of section 441 it must be established that the appellant entered in possession over the premises with intent to commit an offence. The appellant may be fondly thinking that she had a right to occupy the premises even after the death of Shri R. C. Sood. If a suit for eviction is filed in Civil Court, she might be in a position to vindicate her right and justify her possession. This is essentially a civil matter which could be properly adjudicated upon by a competent Civil Court. To initiate criminal proceedings in the circumstances appears to be only an abuse of the process of the Court. Since the magistrate not only awarded the fine but also directed the appellant to vacate the premises within two months from the date of the order. This part of the order presumably was passed under section 456 of the Criminal Procedure Code, and this made the order appealable.

Mere show of criminal force is not sufficient

In the case of **Mahesh Sahu v. Emperor**[604] it is observed by Hon'ble Patna High Court that the trespass, if any, committed was in the bona fide assertion of the petitioner's claim or right. The order under Section 522 of the CRPC directing that the house in question be restored to the

601. 1999 CriLJ 1275 Hon'ble Delhi High Court

602. AIR 1953 Cal. 393

603. AIR 1983 SC 159

604. AIR 1919 Pat 26 : 1919 CriLJ 270 at page 274

possession of the Mussamat, was also bad in as much as mere conviction under S. 448, IPC would not justify an order under Section 522 of the Cr PC unless it was found that the offence was attended by criminal force as is expressly mentioned in the latter section. Mere show of criminal force is not sufficient.

Force may be used against the complainant or against his men

In the case of **Rajbanshi Thakur Versus Chandey Jha and others**[605] it is observed that if at the time of forcible entry, the act of the accused is attended with criminal force or show of criminal force, the provisions of Section 522 of the CRPC would be attracted. The force may be not only in regard to the complainant, who may be absent at the time, but it may be against the complainant or his men or it may be directed against a neighbour who protests against the conduct of the accused. When petitioner went back to recover property and forcibly prevented from doing so, even then the provisions of Section 522 of the Cr PC, would be attracted to the case.

In the case of **Bameshwar Singh v. Emperor**[606] Hon'ble Patna High Court observed that the criminal force may be either against the complainant or against his party, and, if there is such criminal force or show of criminal force, then the trying Magistrate would be justified in taking action under S. 522 of the Code and direct possession to be restored to the person dispossessed. On the other proposition, where a criminal trespasser enters upon property and prevents the rightful possessor from coming into possession of it, dispossession is said to have taken place, and, if the trespasser was guilty of some force or intimidation when he prevented the other party from entering upon the property, a Magistrate would be justified in taking action under Section 522 of the Cr PC.

Force must be applied to human body and not to inanimate object

In the case of **Narain Singh v. Parma Lal**[607] it has been held that the criminal force contemplated by Section 522 of the Cr PC must refer to force applied to a human body and not to any inanimate object.

In the case of **Mahalir v. Rex**[608] it is observed that use of criminal force or show of force, or criminal intimidation must all be with reference to a person and not with reference to property. Use of criminal force means actual use thereof; criminal intimidation connotes a threat of use of force to another person. Show of force, therefore, must be something different from these two. It may fall short of the use of force or of a threat to use force. Where the accused or his accomplices having entered upon the land do not quit the land when the true owner protests against such unauthorized entry and are ready to fight, the offence can be said to have been attended to by 'show of force'. Show of force may consist in the physical presence of the accused, his servants or

605. 1950 SCC OnLine Pat 113 : AIR 1951 Pat 307

606. 4 Pat. 488 : (AIR(12) 1925 Pat. 689 : 27 CriLJ 137)

607. AIR (27) 1940 Lah. 460 : (42 CriLJ 160).

608. AIR (36) 1949 All. 228 : (60 CriLJ 338).

companions in such a way that the true owner is put to the fear that if he tried to regain possession by force he will be met by force. In such a case the dispossession of the true owner is not complete till he appears on the scene, protests and has to go away. The case is covered by S. 522 and an order for restoration of possession can be passed by the Court.

CHAPTER XV

PAYMENT TO INNOCENT PURCHASER

The provisions regarding payment to innocent purchaser has been enshrined in section 453 of the Code of Criminal Procedure. It is reproduced as follows:

Section 453 ; Payment to innocent purchaser of money found on accused.—When any person is convicted of any offence which includes, or amounts to, theft or receiving stolen property, and it is proved that any other person bought the stolen property from him without knowing or having reason to believe that the same was stolen, and that any money has on his arrest been taken out of the possession of the convicted person, the Court may, on the application of such purchaser and on the restitution of the stolen property to the person entitled to the possession thereof, order that out of such money a sum not exceeding the price paid by such purchaser be delivered to him.

Circumstances under which court may order under this provision

The court may order under this section for payment of money to the innocent purchaser on existence of following circumstances

1. Conviction of an accused for theft or receiving stolen property
2. Another person bought the stolen property without knowledge
3. Money has been seized on arrest from the convicted person
4. Application by such purchaser
5. Restitution of stolen property to the person entitled.

But the court can't order payment of money exceeding the price paid by such purchaser. The payment of money has to be made from the money seized from the possession of the accused on his arrest. This section came into operation only after conclusion of trial and not during pendency of the trial. If no money is found on accused, the court cannot order accused who is convicted or the owner to make payment of purchase money to the innocent purchaser. The innocent purchaser may approach civil court for such claim by filing a suit against the convict.

Section 357(1)(d) and Section 453 CRPC

This section has a bit affinity with section 357 (1) (d) of the CR.P.C Section 357(1) (d)provides for payment of compensation. It says that when a court impose s a sentence of fine the

Court may, when passing judgment, order the whole or any part of the fine recovered to be applied. Provision (d) to Sub Section (1) of Section 357 CRPC says that when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, incompensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto. Though the provisions contained in section 357(1)(d) and the section 453 CRPC are not framed on the same line, but the spirit of both the sections is same, that is , to amend the loss suffered by bona fide purchaser due to the restitution of the property to the person entitled. The major difference between these two provisions is that while in the case of section 357(1)(d) the payment is made out of the fine imposed on the accused, under section 453 CRPC , the payment is made out of the money seized from the accused. The powers conferred under section 357(1)(d) are thus wider in ambit than that of section 453 CR.P.C

Judgment in Vilmont v. Bentlev[609]

The right of an innocent purchaser of property stolen or obtained by fraud was discussed in above mentioned case. In this case a person (A) obtained goods by false pretenses from other person (B) and pledged those goods with third person(C). D purchased those things from C in ordinary course of business. When A on discovering the fraud committed by B, indicted him and he was convicted for obtaining the goods by false pretenses. A then claimed that the goods be restored to him, while D claimed to be entitled to possession on the ground of his being an innocent purchaser for value. The Court of Appeal held that A was entitled to be restored to his possession.

Theft not affect title of owner and bona fide purchaser had no title

Section 453 contemplates that such property, on conviction of the offender must be restored to the rightful owner and not to the third person even though he might have received it in his possession bona fide. There is a reason for this and it is that dishonest possession of the third person being an offence the Court cannot very well restore "stolen property" to the person from whose possession it was seized. If he did not previously know that it was "stolen property", after the conviction of the thief he should know that it was stolen property. Theft did not affect the title of the owner and did not transfer it to the thief. A bona fide purchaser from the thief got no better title. As the possession of the third person would be an offence, he cannot be said to be the person entitled to its possession and only the rightful owner can be held to be the person entitled to its possession.

609. (1887) 18 Q.B.D. 322

CHAPTER XVI

PROCEDURE WHEN NO CLAIMANT APPEARS WITHIN SIX MONTHS

Section 458 of the Code provides a procedure where no claimant of property appears within six months from issue of proclamation under section 457(2) CR.P.C

Provision under s. 458 CrPC

It reads thus;

S. 458 (1) If no person within such period establishes his claim to such property, and if the person in whose possession such property was found is unable to show that it was legally acquired by him, the Magistrate may by order direct that such property shall be at the disposal of the State Government and may be sold by that Government and the proceeds of such sale shall be dealt within such manner as may be prescribed.

(2) An appeal shall lie against any such order to the Court to which appeals ordinarily lie from convictions by the Magistrate.

Section 458 CRPC is a subsequent or supplemental proceeding of s. 457 CRPC in the sense that when the person entitled to possession couldn't be ascertained or the person from whose possession the property seized couldn't have been able to prove that his acquisition of the property was legal.

Sub section (2) of section 457 CRPC provides that if the person entitled is known, he may be given delivery of the property, but if such person couldn't be ascertained, then the property should be kept in court custody. Further it provides for issuance of proclamation with a purpose to know any claimant to establish his claim with six months.

If no person within six months could be able to establish his claim to such property kept by the magistrate in his custody, or if the person in whose possession such property was initially found couldn't be able to show that it was legally acquired by him, in that eventuality the magistrate may order that the property belongs to the Government, which could be sold by the Government and the sale proceeds be appropriated.

Order passed under section 458 CRPC is appealable and a person aggrieved with the magistrate may appeal against the same before a court of appeal where appeal against convictions ordinarily lies.

Section 460 of the CRPC provides that If any Magistrate not empowered by law to sell property under section 458 or section 459, erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

Civil court has no jurisdiction to return the property, without setting aside auction u/s 458

In the case of **Rahul Sondhi Versus Amritsar Sugar Mills Co. Ltd., Amritsar and others**[610] Hon'ble Allahabad High Court observes that orders for sale of the property seized during criminal proceedings (Gun) are referable to section 458 CR.P.C Section 458(2) provides for an appeal against an order of the Magistrate directing sale of the property. Since the order for sale was made prior to the order of holding seizure illegal, the aggrieved party should have got the order of sale passed under section 458 CR.P.C set aside and then only any direction for the return of the gun could be given effect to. The auction so effected cannot be re- opened or set aside on a suit filed for return of the gun. Unless the auction proceedings under section 458 are set aside, no Civil Court has jurisdiction to direct return of the property sold under section 458 CR.P.C

CHAPTER XVII

POWER TO SELL PERISHABLE PROPERTY

Perishable Property is the property which is ephemeral and short lived. They are subject to speedy decay. Agricultural produce, live stocks, fruits, nuts, forest produce, vegetable products, processed foods are some of the examples of the perishable property. These have a very small shelf life and hence urgent attention is needed to dispose of the property with a twin objective that the precious resources should not be came into desuetude and also that it may be liquidated in form of money to avoid loss.

Provisions under section 459 CRPC

Section 459 of the CRPC provides generally for sell of perishable property.

Section 459. Power to sell perishable property.—If the person entitled to the possession of such property is unknown or absent and the property is subject to speedy and natural decay, or if the Magistrate to whom its seizure is reported is of opinion that its sale would be for the benefit of the owner, or that the value of such property is less than five hundred rupees, the Magistrate may at any time direct it to be sold; and the provisions of sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale .

The section provides that if the person who is entitled to the possession of the perishable property is not ascertained or he is absent. Then the magistrate may order for sale of the property for the benefit of the owner. He may also pass such an order when the value of property is less than five hundred rupees. The provisions of section 457 and 458 will apply.

It means that the magistrate may order that the property is at the disposal of the government and direct the government to sell it and deal with the sale proceeds in the manner prescribed. When any property is liable to be damaged then the court not taking enough precautionary measure for production of it and its safe custody as required by law is an erroneous exercise of

610. 2010 CriLJ 2278

judicial discretion. Magistrate has ample competency to dispose of any perishable property by sale.

Similar provisions at other place in CrPC

Section 83 (5) of the CRPC provides that If the property ordered to be attached consists of live-stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

Section 85 (2) If the proclaimed person does not appear within the time specified in the proclamation, the property under the attachment shall be at the disposal of the State Government; but it shall not be sold until the expiration of six months from the date of the attachment and until any claim preferred or objection made under section 84 has been disposed of under that section, unless it is subject to speedy and natural decay, or the Court considers that the sale would be for the benefit of the owner; in either of which cases the Court may cause it to be sold whenever it thinks fit.

Proviso to Section 102 CRPC provides that where the property seized by police is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale.

Section 145 (8) of the CRPC provides that If the Executive Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale-proceeds thereof, as he thinks fit.

Similar provisions in other laws

Bihar Prohibition and Excise Act 2016

Section 57 provides for sale or destruction of articles before confiscation If the article in question is liable to speedy and natural decay.

Essential Commodities Act 1955

Sub section (2) of Section 6 A of provides that where the Collector is of the opinion that the essential commodity is subject to speedy and natural decay, he may order it to be sold.

Indian Forest Act 1927

Section 58 provides the procedure that the Magistrate may direct the sale of any property seized under section 52 and subject to speedy and natural decay, and may deal with the proceeds as he would have dealt with such property if it had not been sold.

Narcotic Drugs and Psychotropic Substances Act 1985

Second proviso of sub-section (2) of section 63 provides that the court may dispose of or sell the article if the article ts 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.

Code of Civil Procedure 1908

Section 75 (f) of CPC provides that the court may issue commission to conduct 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.

Proviso to Order XXI rule 43 CPC provides that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

Order XXXIX rule 6 of the CPC provides the power to order interim sale

The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any movable property being the subject-matter of such suit or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once.

Bihar Police Manual

Rule 121 (d) When, in the case of intestate property under the control of police rapidly deteriorates or perishes, the police assume the responsibility of selling it in anticipation of orders, or when the Court directs that the property shall be sold on the spot.

Rule 307 (h) of Bihar Police Manual provides that orders shall be taken to convert perishable unclaimed property into cash at the earliest date the law allows.

RPF Crime Manual

Chapter 1, Rule 32.4 and Rule 37.12 provides that If the recovered property is a perishable item, like grapes, pomegranate, apple, mango, vegetables, fish, etc, then it must be auctioned, after having obtained permission from the concerned Railway Court by giving an application in writing for its quick disposal.

Order passed by magistrate not empowered – not vitiate the proceedings

Section 460 of the CRPC provides that If any Magistrate not empowered by law to sell property under section 458 or section 459, erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

Agricultural produce sold in interest of both sides

In the case of **Satnam Agro Industries v. State of Punjab**[611] Hon'ble Apex Court directed that the paddy or the rice lying in the court custody should be put topublic auction in the interest of both the sides. Hon'ble Court also directed that the sale proceeds received from such auction should be initially paid to one of the parties on the condition of furnishing of bank guarantee for the said amount.

Rainy season, auction for agricultural products held proper

In the case of **Neeraj Goyal vs State of Rajsthan**[612], Hon'ble Rajasthan High Court observed that due to rainy reason there is all possibility of decaying of the agricultural products and upheld the trial court order of auction of agricultural products.

CHAPTER XVIII

RIGHT TO APPEAL

Right to appeal is a creation of statute. It is a statutory right given to an aggrieved to get his grievance with the order of the lower forum agitated at some higher forum.

Provisions of appeal under section 454 CrPC

Section 454 provides for Appeal against orders under section 452 or section 453.

S. 454 - Appeal against orders under section 452 or section 453.—(1) Any person aggrieved by an order made by a Court under section 452 or section 453, may appeal against it to the Court to which appeals ordinarily lie from convictions by the former Court.

On such appeal, the Appellate Court may direct the order to be stayed pending disposal of the appeal, or may modify, alter or annul the order and make any further orders that may be just.

The powers referred to in sub-section (2) may also be exercised by a Court of appeal, confirmation or revision while dealing with the case in which the order referred to in sub-section (1) was made.

Provision of Appeal at other places in Chapter XXXIV CrPC

In addition to section 454 which provides for appeal against the order under section 452 and 453 CRPC, Sub section (3) of section 456 and sub section (2) of section 458 of the CRPC also provides for the appeal against the order in the respective sections. Section 86 of the CRPC also provides that any aggrieved person may appeal against the refusal to deliver property or the proceeds of the sale of any property which was subject of attachment.

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611. (2008) 15 SCC 784

612. Decided on 10 October, 2012 in Criminal Misc. Petition No. 2326/2012

Provisions of Appeal against order affecting property in other Laws

Fugitive Economic Offenders Act 2018

Section 17 of the Act provides for appeal against every order and judgment of the special court, except interlocutory orders.

Copyright Act 1957

Section 71 provides for appeal against order of the magistrate with respect to the seizure of infringing copies by police[613] and, Court order of delivering infringing copies to the owner[614].

Trademarks Act 1999

Section 111(2) provides that when a forfeiture is directed on a conviction and an appeal lies against the conviction, an appeal shall lie against the forfeiturealso. Section 111(3) provides that when a forfeiture is directed on acquittal and the goods or things to which the direction relates are of value exceeding fifty rupees, an appeal against the forfeiture may be preferred, within thirty days from the date of the direction, to the court to which in appealable cases appeals lie from sentences of the court which directed the forfeiture.

Essential Commodities Act 1955

Section 6-C provides for appeal against confiscation.

Forest Act 1927

Section 59 provides for appeal against the order of confiscation and disposal orders of the property made under sections 55, 56 and 57.

Bihar Prohibition and Excise Act 2016

Section 92 of the Act provides that the final order passed by Excise officer, collector and excise commissioner are appealable.

Bihar Special Court Act 2009

Section 17 of the Act provides for appeal against the order of the authorized officer passed under chapter III relating to confiscation.

Cable Television Networks (Regulation) Act, 1995

Section 15 provides for appeal against order of confiscation of equipment.

Cigarettes And Other Tobacco Products (Prohibition Of Advertisement And Regulation Of Trade And Commerce, Production, Supply And Distribution) Act, 2003

Section 19 provides for appeal against adjudging the confiscation.

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613. Section 64 of Copyright Act

614. Section 66 of Copyright Act

Appeal by aggrieved persons

Section 454 of the CRPC confers independent right of appeal by an aggrieved person against orders on disposal of property under Section 452 or 453 CR.P.C The aggrieved person need not be the aggrieved one relating to the final judgment but an aggrieved one in the interim issue of disposal of property. An appeal under Section 454 CRPC in regard to disposal of property is quite different from an appeal on the final order of the trial proceedings. Both the appeals need to be heard by the same court so as to avoid conflict in judgments. The order of the appellate court for disposal of the property under 452 or 453 CRPC, does not affect the finality of the order of acquittal or conviction in the original case. Disposal of property is a subsidiary matter. The Sections 451 and 454 confer full discretion on the court for disposal of property. The Section 454 does not mention about a notice to the parties but the aggrieved ones need to be heard so as to ensure natural justice. The Section 454 (2) gives wide powers to the appellate court to make any further order, such as setting aside the original order or restitution of property, which is just and proper.

Some judgment of Hon'ble Court regarding Appeal

Criminal appellate court has jurisdiction to modify order u/ s 452 or 453 CrPC

In the case of **Bhikaji vs The State of Maharashtra And Ors**[615] it is observed that conjoint reading of sections 452, 453 and 454 gives a clear understanding that the claim to the property advanced in a criminal case can be decided by the trial court, appellate court or the revisional court and also in an appeal provided under section 454. The legislature has not laid down that if an appeal is not preferred under section 454(1), the order passed by the trial Court in respect of the disposal of the property shall not be varied in appeal, revision or confirmation proceedings. It has been specifically provided that these courts can exercise the powers to vary the order in respect of the disposal of the property. When a judgment in a criminal case is passed, such a third party not being either complainant or accused is normally not present in the Court or aware of the decision, no notice to such a person is provided by the statute. If he gets the knowledge of the rejection of his claim by any source or, in case, he is an accused or complainant in the criminal case, does not wish to challenge the order of conviction or acquittal, as the case may be, then he may file an appeal in respect of the rejection of his claim to the property only under section 454(1) . But when no separate appeal has been filed under section 454(1), the powers of the appellate or the revisional Court to deal with the order of the disposal of the property are saved by sub-section (3) of section 454. Hence, the appellate and the revisional Court has power to vary or annul any order of the disposal of the property passed by the trial Court while dealing with the order of conviction or acquittal.

615. 1994 (2) Bom CR 518

Appeal under section 454 CrPC is in addition to normal appeal

In the case of **Bhikaji**[616] it is observed that remedy of appeal provided under section 454(1) to any person aggrieved is in addition to the normal remedy of appeal which is available to the complainant, State or the accused against the order of conviction or acquittal. The remedy under section 454(1) can't be read in exclusion with the remedy of appeal or revision against an order in respect of the criminal offence. The function entrusted to the Criminal Courts to pass orders in respect of the disposal of the property which are subject matter of the Criminal Cases is a sort of supplementary proceedings and the same forum is entrusted with both the jobs. The order passed by the trial court in respect of the criminal offence can be varied or annulled by the appellate or revisional Court. Similarly, the order passed in respect of the disposal of the property also can be varied or annulled by that Court. It is not necessary that there should be a separate grievance made by the claimant or he should file a separate proceeding. A person who is not either the complainant or an accused can also claim the property.

Principles of natural justice to be followed

In the case of **State Bank of India vs Rajendra Kumar Singh & Ors**[617] Hon'ble Apex Court observes that though the statute does not expressly require a notice to be issued or a hearing to be given to the parties adversely affected. Yet before making an order of return of property, the parties adversely affected must be heard. When the appellate or revisional Court wants to vary the order of disposal of the property passed under section 453 or 454 of the Code of Criminal Procedure, 1973, it can do so after hearing all the parties affected by the proposed order. A third party claimant to the property would in such case entitled to a notice. Though this is not provided by any specific provision in the statute, it will have to be read in Chapter XXXIV of the Code of Criminal Procedure, 1973 since the basic rule of natural justice would require the Courts to comply with the said requirement. If the property is directed to be delivered to a third party or complainant in a case instituted on Police report, he will have to be issued notice, if the appellate or the revisional Court wants to vary that order and direct the return of the property to some other person.

Blanket stay by the appellate court would not subserve justice

In the case of **Shaban Thanawala vs The State Of Maharashtra**[618] Hon'ble Apex Court observes that a blanket stay under this section on release of the money would not subserve the interests of justice as the aggrieved is an octogenarian and also the beneficiary in the will. Hon'ble Court allows the corpus to be utilized for meeting medical or other urgent necessities.

Court of Appeal

In the case of **Walchand Jasraj v. Hari Anant**[619]. It is observed by Hon'ble Court that

616. Ibid

617. AIR 1969 SC 401

618. Decided on 6 December, 2019, in CRIMINAL APPEAL No 1856 of 2019, SLP (Crl) No 2585 of 2019)

619. AIR 1932 Bom 534(E)

what section 520 means is that any Court, which has powers of appeal, confirmation, reference or revision in respect of the trial Court, that being the Court subordinate thereto referred to in the section, can make any substantive order it thinks fit in respect of property dealt with by the trial Court under Ss. 517, 518 or 519. If an application is made to the Sessions Court as the Court having powers of revision in respect of the trial court in regard to orders relating to property made under Ss. 517, 518 or 519, then, the Sessions Court can itself make a proper order and need not refer the matter to the High Court.

CHAPTER XIX

DESTRUCTION OF PROPERTY

Destruction of the property is one of the modes of disposal prescribed in the Code of Criminal Procedure. Section 452 CRPC specifically enumerates destruction as one mode of disposal of property after conclusion of Trial.

Provisions under Section 455 CRPC

Section 455 of the code of criminal procedure enshrines the provision for destruction of certain matters on conviction under certain offence.

S. 455. Destruction of libelous and other matter. —

(1) On a conviction under section 292, section 293, section 501 or section 502 of the Indian Penal Code (45 of 1860), the Court may order the destruction of all the copies of the thing in respect of which the conviction was had, and which are in the custody of the Court or remain in the possession or power of the person convicted.

(2) The Court may, in like manner, on a conviction under section 272, section 273, section 274 or section 275 of the Indian Penal Code (45 of 1860), order the food, drink, drug or medical preparation in respect of which the conviction was had, to be destroyed.

Similar provisions in other Acts

In addition to the provisions contained in the 455 CRPC there are various other legislation which also provides for destruction of articles in certain circumstances. Some of those legislations are enumerated below

Code of Criminal Procedure 1973

Section 133 (f) and, Section 133 (vi) of the CRPC, empowers the executive magistrate to make absolute or, conditional, order that any dangerous animal should be destroyed, confined or otherwise disposed of,

Food Safety Act

Section 38(4) provides that where any article of food seized is of perishable nature and the

Food Safety Officer is satisfied that such article of food is so deteriorated that it is unfit for human consumption, the Food Safety Officer may, after giving notice in writing to the food business operator, cause the same to be destroyed.

Young Persons Harmful Publications Act 1956

Section 6 mandates destruction of harmful Publications.

Narcotic and Psychotropic Substances Act and Rules

Section 48 of the Act and Rule 11 of the NDPS Rules 1985 provides for destruction of standing opium crops.

Section 52 A of the prescribes the procedure for disposal of seized NDPS materials.

Rule 45A of the NDPS Rules provides for destruction of drugs,

Prevention of food adulteration Act 1953

Section 10 (4(A)) and section 11(5)(ii) authorize for destruction of adulterated foods or drinks.

Public gaming Act 1867

Section 8 and 13 provides for destruction of gaming instruments, seized from a gaming house and, found in public street.

Prevention of Cruelty to Animals Act and Rules

Section 11 (3) (b) of the provides for destruction of stray dogs.

Section 13 of the Act and Rule 9 (I) of Prevention of cruelty to Animal Rules provide for destruction of animals and euthanization on the order of the court subject to the certificate issued by veterinary doctor.

Section 35(2) also provides for destruction of incurable animals.

The Bihar Prohibition and Excise Act, 2016

Proviso to Section 57 of provides that where anything is liable to speedy and natural decay, or is of trifling value or which can be put to misuse, the Collector or the officer concerned, may, order such thing to be destroyed, if in its or his opinion such order is expedient in the circumstances of the case.

Section 58 (4) provides that the collector may order for destruction of the confiscated spurious liquor.

Copyright Act

Section 67 provides for disposal of infringing copies or plates for making infringing copies.

Trademarks Act

Section 111(4) provides that the court may order for destruction of forfeited articles after conviction.

Section 135 of the Act provides that the court may grant the relief, inter alia other reliefs, of delivery up of the marks and labels for destruction and erasure.

Bihar Prevention of Beggary Act 1951

Section 9 (a) of provides for destruction of obscene pictures or literature, tobacco snuff, opium, any drug or liquor or perishables of the value of five rupees or less.

Section 9 (c) provides for destruction by burning of clothing, rags, bedding and other articles of persons found to be suffering from any infectious or contagious disease.

Bihar Preservation and Improvement of Animal Rules 1960

Rule 12 provides for destruction of infected animals.

Bihar Juvenile Justice (Care and Protection of Children) Rules 2017

Rule 68(3) of the provides for destruction of certain seized articles which have been found on search of the institution.

Articles which may be destroyed

Such thing which contains obscene, lascivious, prurient material tending to deprave and corrupt in any form which could be read, seen or heard is liable to be destructed. It except only such thing which is published for public good, scientific, literary, art, learning and religious purposes or engraving and sculpture in ancient monument, temple or car used for conveyance of idols.[620] The law contained in Young persons harmful publications Act is supplementary to the law provided in the Cr.P.C

Adulteration of food, drink, drugs and sale thereof is punishable under the Indian Penal Code[621]. Relevant provisions of Prevention of food Adulteration Act, Bihar Prohibition and Excise Act, Drugs and Cosmetics Act are also applicable in the peculiar circumstances of the case.

In the case of **Veerabhadra Vs. State**[622] Hon'ble Madras High Court has observed that the Court may order the food, drink drug or medical preparation in respect of which the conviction was had, to be destroyed.

Printing or engraving matter known to be defamatory and Sale of printed or engraved substance containing defamatory matter are also punishable[623] and such materials are liable to be destructed on the order of the court.

Libelous Matter

The word libel has not been defined in the Indian law. In common parlance libel is a

620. Section 292 and 293 of the IPC

621. Section 272, 273, 274 and 275 of the IPC

622. AIR1940 Mad. 953

623. Section 501 and 502 of the IPC

publication of false and defamatory statement in some permanent form leading to injure the reputation of another person without lawful justification or excuse. Libel is a defamation[624] in a fixed form. Libel is actionable per se without the proof of actual injury. Law presumes that the person who is defamed by libel suffers injury. In the case of **Balram vs. S. S. Lala**[625] Hon'ble Rajsthan High Court accepted theplaintiff contention that on account of publication of imputation of fraudulent business in the newspaper by defendant, the plaintiff suffered injury. Libelous materials may contain in the book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object.

Section 455 of the CRPC provides generally for destruction of libelous and other materials. Destruction of obscene materials, defamatory documents, adulterated food etc of which a conviction was held, comes under this Section. If some pages of a book are defamatory those pages alone need to be destroyed but not the entire book. One of the essential requirements of the section is that such order of destruction of the relevant materials can only be ordered when the trial culminates in conviction of the accused. If there is no conviction, no such order could be passed by the court. While in other legislation as numerated above the destruction may be ordered either during the litigation or even post litigation. Destruction of property in some of the special laws doesn't depend on the outcome of the trial and they may be ordered in accordance with the requirement and circumstances of the particular case.

CHAPTER XX

CONCLUSION

Human life is not possible without property. It has economic, socio-political, sometimes religious and legal implications. The restrictions on the the property are usually governed by legislative provisions and regulations. Interference with private property rights of an individual by state authorities often have dire consequences. It sometimes also results in forfeiture procedures when the property was used in violation of a law or for illegal purposes. On the one hand, the seizure of property by the state authorities gave rise to the constitutional question of the search and seizure process, citizen right to property and privacy as well as the confiscation and forfeiture. On the other hand, it also poses questions of interim custody, retention, release, restoration and disposal of seized property during pendency of the proceedings or after conclusion of the case.

There is a trichotomy[626] in the sense that where property has been seized by the police, but not produced before the court, the power to dispose it of is covered by section 457. Where property has been seized and/or otherwise produced before the court, the manner to dispose of such property is governed by sec. 451. If the question of disposal arises after the inquiry or trial in

624. As per Black's Law Dictionary, defamation means the offence of injuring a person's character, fame, or reputation by false and malicious statements. The term seems to be comprehensive of both libel and slander

625. AIR1975 Raj 11

626. Supra at 342, Ram Prakash Sharma

any criminal court is concluded, the disposal of the property involved in the case is governed by sec. 452. One important difference between section 451 and section 452 is that while the former applies during the pendency of the case, the latter could be invoked only after conclusion of trial. It must also be noted that property includes not only such property that has been originally in the possession or under the control of any party, but also includes any property into or for which the same may have been converted or exchanged and anything acquired by such conversion or exchange. Sections 451 and 452 CRPC attracted in cases of properties seized by police during the course of inquiry or investigation of an alleged offence and therefore, property becomes *custodia legis* as soon as seized. On the other hand, Section 457 CRPC applies in cases of properties seized by police which are not linked with complaint of an offence received earlier and therefore, not likely to be produced before Criminal Court for the purpose of inquiry or trial. For the application of the provisions contained Section 452 CRPC, it is necessary that there must have been an inquiry or trial which must have been concluded and the property in respect of the order is sought to be made must be one (i) which has been produced before the Court; or (ii) which is in its custody, or (iii) regarding which the offence alleged was committed, and (iv) which has been used for commission of the offence.

When the property has any evidentiary value, it is to be kept intact and to ensure its production during the course of evidence for the purpose of marking as a material object the condition of non alienation is imposed. However, when the property has no evidentiary value and only the value of the property is to be properly secured for passing of final order under Section 452, CRPC, the necessity of keeping such properties intact by imposing onerous conditions, prohibiting its alienation or transfer would not be necessary in law. With the advanced technology, it is not necessary that the original of the property inevitably has to be preserved for the purpose of evidence in the changed context of times. The reception of secondary evidence is permitted in law. The rightful, owners, who have lost the property by an act of crime even after detection and recovery are continued to be prevented from beneficial possession and enjoyment of the same by the archaic conditions imposed as a regular routine despite the changed context of scientific developments. After all the Court while passing a judicial order of interim custody is guided by the investigation material and other prima facie material, which support the claim and title of the person to whom interim custody is given. Having once given the interim custody to the person who is supposed to be the owner of the property, depriving him to effectively use and exercise the lawful ownership rights would be unlawful.

Before passing any order with respect to any property or document the court must bear in mind the legislative mandate enshrined in various laws governing the particular circumstance of each individual case and the conflicting interest of all the rival sides. Such order must be passed in the best interest of all. If there is any special legislation which regulates the exercise of power or any embargo on such exercise, that law must be taken into account before passing the order.

APPENDIX - I

PROVISIONS RELATING TO SEARCH, SEIZURE, ATTACHMENT, CONFISCATION, FORFEITURE, DISPOSAL OF PROPERTY IN CODE OF CRIMINAL PROCEDURE

Arrest and, seizure of stolen property etc	
Section 41 (d)	When police may arrest without warrant any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing;
Search and seizure	
Section 47	Search of place entered by person sought to be arrested
Section 52	Power to seize offensive weapons.
Attachment of property	
Section 83	Attachment of property of person absconding
Section 84	Claims and objections to attachment.
Section 85	Release, sale and restoration of attached property
Section 86	Appeal
Search warrant and procedure for search and seizure	
Section 93	When search-warrant may be issued by Court to search for a document or the thing for which summons issued under section 91 or section 92(1) of CRPC
Section 94	Search of place suspected to contain stolen property, forged documents, etc. on being authorized by court to enter, search, seize and report about the articles
Section 95	Power of Government to declare certain publications forfeited and power of court to issue search-warrants for the same.

Section 99	This provision enables all search-warrants issued under section 93, section 94, section 95 or section 97 be in accordance with provisions of sections 38, 70, 72, 74, 77, 78 and 79
Section 100	The detail procedure of search and seizure and Persons in charge of closed place to allow search
Section 101	Procedure to be followed if the things found in search beyond jurisdiction of another court
Section 102	Procedure and power to seize the property by police
Section 103	Magistrate may direct search in his presence
Section 104	Power to impound document, etc., produced.

Reciprocal Arrangements For Search, Attachment And Forfeiture Of Property

Section 105 D	Identifying unlawfully acquired property
Section 105 E	Seizure or attachment of property
Section 105 F	Management of properties seized or forfeited under this Chapter
Section 105 H	Forfeiture of property in certain cases

Consequence of disobedience of the order of Executive Magistrate to remove nuisance

Section 141(2)	Procedure on order being made absolute and consequences of disobedience – if act of removal of nuisance as made absolute under section 136 and 138 of the code, is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other movable property of such person within or without such Magistrate's local jurisdiction, and if such other property is without such jurisdiction, the order shall authorise its attachment and sale when endorsed by the Magistrate within whose local jurisdiction the property to be attached is found.

Executive Magistrate power to restore to possession the party forcibly and wrongfully dispossessed

Section 145(6)(a)	If the Magistrate decides that one of the parties was, or should under the proviso to sub- section (4) be treated as being, in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction; and when he proceeds under the proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.

Executive Magistrate power to order for custody or disposal of crop etc

Section 145(8)	If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale-proceeds thereof, as he thinks fit.
Section 146	Executive Magistrate power to attach subject of dispute and to appoint receiver. Receiver has the powers and duties as prescribed in rule XL of the Code of Civil Procedure

Seizure of weights and measures by the police officer

Section 153	Inspection and seizure of weights and measures by the police officer

Procedure for search by police officer making investigation

Section 165	Search by police officer making an investigation for anything necessary for the purposes of an investigation. The provisions of this code as to search-warrants and the general provisions as to searches contained in section 100 shall, so far as may be, apply to a search made under this section. Copies of any record be sent to the nearest Magistrate empowered to take cognizance of the offence, and the owner or occupier of the place searched shall, on application, be furnished, free of cost, with a copy of the same by the Magistrate.
Section 166	When officer in charge of police station may require another to issue

	search-warrant. Such officer, on being so required, shall proceed according to the provisions of section 165, and shall forward the thing found, if any, to the officer at whose request the search was made. It must be reported to the nearest magistrate along with the copies of the record and list of the things prepared.
Section 170 (2)	The police officer shall send to such Magistrate any weapon or other article along with other things when he forwards an accused person to a Magistrate when evidence is sufficient.

Procedure to realise fine

Section 421	Warrant for levy of fine. —The Court passing the sentence of fine may take action for the recovery of the fine either by issuing a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender; or by issuing a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter.
Section 422	Effect of such warrant. — Such warrant may be executed within the local jurisdiction of such Court, and it shall authorise the attachment and sale of any such property outside such jurisdiction, when it is endorsed by the District Magistrate within whose local jurisdiction such property is found

Procedure on forfeiture of bail bond

Section 446	On forfeiture of bail bond, If sufficient cause is not shown and the penalty is not paid, the Court may recover the same as if such penalty were a fine imposed by it under this Code.

Disposal of property

Section 451	Order for custody and disposal of property pending trial in certain cases
Section 452	Order for disposal of property at conclusion of trial
Section 453	Payment to innocent purchaser of money found on accused
Section 454	Appeal against orders under section 452 or section 453
Section 455	Destruction of libelous and other matter

Section 456	Power to restore possession of immovable property
Section 457	Procedure by police upon seizure of property
Section 458	Procedure where no claimant appears within six months
Section 459	Power to sell perishable property

Effect of Irregularity in issuing search warrant and disposal of property

Section 460	If any Magistrate not empowered by law to (a) issue a search-warrant under section 94 (i) or, (I) to sell property under section 458 or section 459, erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.
Section 461	If any Magistrate, not being empowered by law in this behalf,(a) attaches and sells property under section 83; or(b) issues a search-warrant for a document, parcel or other things in the custody of a postal or telegraph authority; his proceedings shall be void.

Forms in the second schedule to the Code of Criminal Procedure, which is being used for forfeiture or attachment of the property

FORM6	Section83
FORM10	Section93
FORM11	Section94
FORM47	Section446
FORM50	Section446
FORM53	Section446
FORM55	Section446

APPENDIX - II

PROVISIONS OF SEARCH, SEIZURE, ATTACHMENT, DESTRUCTION ETC. UNDER OTHER INDIAN CENTRAL LAWS

1	Air (Prevention And Control Of Pollution) Act, 1981	Section 24	Power of entry and inspection and seizure
2	Antiquities And Art Treasures Act, 1972	Section 23	Powers of enter and search any place; and seizeure
3	Ancient Monuments Preservation Act 1904	Section 17	Power of search and confiscation
4	Cable Television Networks Regulation Act 1995	Section 11	Power to seize
		Section 12	Confiscation
		Section 14	Procedure of confiscation and return of seized articles
5	Anti Hijacking Act 2016	Section 18	Procedure for seizure, attachment, revocation of seizure and attachment
		Section 19	Confiscation and forfeiture of property
6	Arms Act 1959	Section 19	Power to seize arms and ammunition on refusal to produce license
		Section 20	Seizure of arms and ammunition Under suspicious circumstances
		Section 21	Deposit of arms, etc., on possession ceasing to be lawful and receive back anything so deposited or to dispose it by sale to any person except those things confiscated
		Section 22	Search and seizure by magistrate
		Section 23	Search of vessels, vehicles for arms, etc.

		Section 24	Seizure and detention under orders of the Central Government
		Section 24-A	Prohibition as to possession of notified arms in disturbed areas, etc. Sub Section (1)(d)(i) provides for search of anything Sub Section (1)(d)(ii) provides for seizure of arms
		Section 24 B	Prohibition as to carrying of notified arms in or through public places in disturbed areas, etc Sub Section (1)(c)(i) provides for search of anything Sub Section (1)(c)(ii) provides for seizure of arms
		Section 32	Power to confiscate
		Section 37	Arrest and searches.
7	Army Act 1950	Section 150	Order for custody and disposal of property pending trial
		Section 151	Order for disposal of property regarding which offence is committed after conclusion of trial
8	Benami Transactions Prohibition Act 1988	Section 5	Any property, which is subject matter of benami transaction, shall be liable to be confiscated by the Central Government.
		Section 24 -29	Chapter IV - Attachment , Adjudication And Confiscation
9	Cattle Trespass Act 1871	Section 8	To register seizures
		Section 10	Cattle damaging land may be seized and the police to aid such seizures

		Section 11	Cattle damaging public roads, canals and embankment may be seized
		Section 14	If the cattle is not claimed, the same may be sold by public auction
		Section 15	Delivery to owner disputing legality of seizure, but making deposit
		Section 16	If the owner doesn't deposit, the cattle may be sold by public auction
		Section 22	Compensation for illegal seizure or detention and release of cattle
10	Chit Funds Act, 1982	Section 68	Attachment before judgment and other interlocutory orders
		Section 82	Power to enter and search any place and to seize any documents. All searches shall be made in accordance with the provisions of the Code of Criminal Procedure, 1973.
11	Cigarettes And Other Tobacco Products(Prohibition Of advertisement And Regulation Of Trade And Commerce, Production, Supply And Distribution) Act, 2003	Section 12	Power of entry and search.
		Section 13	Power to seize
		Section 14	Confiscation of package
		Section 15	Power to give option to pay costs in lieu of confiscation
		Section 18	Giving opportunity to the owner of seized packages
		Section 23	Forfeiture of advertisement and advertisement material on conviction
12	Cinematograph Act 1952	Section 7A	Power of search and seizure
13	Commissions of Inquiry Act 1952	Section 5(3)	Power to enter, seize or take extracts or copies

14	Commission of Sati (Prevention) Act 1987	Section 8	Power to seize properties acquired for glorification of the commission of Sati
15	Conservation of foreign exchange and prevention of smuggling activities Act 1974	Section 7	Application of provisions of sections 82, 83, 84 and 85 of the CRPC
16	Copyright Act, 1957	Section 55	Where copyright in any work has been infringed, the owner of the copyright shall be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right.
		Section 58	All infringing copies of any work in which copyright subsists, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of possession thereof or in respect of the conversion thereof.
		Section 64	Power of police to seize infringing copies
		Section 66	Disposal of infringing copies or plates for purpose of making infringing copies
17	Customs Act	Section 100	Power to search suspected persons entering or leaving India, etc.
		Section 101	Power to search suspected persons in certain other cases.
		Section 102	Persons to be searched may require to be taken before gazetted officer of customs or magistrate.

Section 103	Power to screen or X-ray bodies of suspected persons for detecting secreted goods
Section 105	Power to search premises.
Section 106	Power to stop and search conveyances.
Section 106A	Power to inspect
Section 110	Seizure of goods, documents and things.
Section 110(2)	Where no notice in respect of seized goods is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized.
Section 110 A	Provisional release of goods, documents and things seized pending adjudication.
Section 111	Confiscation of improperly imported goods, etc
Section 113	Confiscation of goods attempted to be improperly exported, etc
Section 115	Confiscation of conveyances.
Section 118	Confiscation of packages and their contents
Section 119	Confiscation of goods used for concealing smuggled goods
Section 120	Confiscation of smuggled goods not with standing any change in form, etc
Section 121	Confiscation of sale-proceeds of smuggled goods

18	Criminal Law Amendment Act, 1908	Section 17A	Power to notify and take possession of places used for the purposes of an unlawful association
		Section 17B	Movable property found in a notified place
		Section 17E	Power to forfeit funds of an unlawful association
19	Criminal Law Amendment Ordinance 1944	Sections 3 to Section 14	Provisions for attachment and disposal of property
20	Criminal Law Amendment Act 1961	Section 3(4)	Power of search, detain person, vessel, article etc.
		Section 4	Power to declare certain publications forfeited and to issue search warrants for the same
21	Dangerous Machines Regulation Act 1983	Section 26 or injury	Examination of machine causing death
		Section 27	Inspection of records, etc.
		Section 28	Power to enter and search
		Section 29	Power of seizure.
		Section 30	Search and seizure to be made in accordance with the Code of Criminal Procedure, 1973
22	Dramatic Performances Act 1876	Section 8	Power to issue warrant to arrest and seize articles
23	Drugs and Cosmetics Act 1940	Section 14	Confiscation of consignment of drugs with which offence committed
		Section 22 Section 33G read with Section 33 H	Powers of Inspectors to inspect any premises, search any person enter and search any place

		Section 31	Confiscation
24	Drugs And Magic Remedies (Objectionable Advertisements) Act 1954	Section 8	Power to enter and search any place and seizure
		Section 10 A	Forfeiture of document on conviction
25	Drugs Control Act 1950	Section 16	Power to search any place and take possession of any stock of drugs
26	Electricity Act 2003	Section 135(2)	Power to enter, inspect, break open and search any place or premises, search, seize and remove all such devices, instruments, wires examine or seize any books of account or documents.
27	Emigration Act 1983	Section 35	Power to search, detain, seizure, arrest
28	Environment Protection Act 1986	Section 10	Power to enter, search and seizure
29	Essential Commodities Act 1955	Section 6 A	Confiscation of essential commodity and return in certain circumstances
		Section 7(1)(b) Section 7(1)(c)	Forfeiture of any property, any package, covering or receptacle, animal, vehicle, vessel or other conveyance.
30	Explosives Act 1884	Section 7	Power to enter, inspect and examine any place, aircraft, carriage or vessel and to search for explosives , to seize, detain and remove any explosive.
		Section 10	Forfeiture
31	Food Safety and Standards Act 2006	Section 38(b)	Power to seize article of food
		Section 41	Power to search any place, seize any article of food or adulterant,

32	Foreign Exchange Management Act 1999	Section 37	Powers to search and seizure etc. The Director of Enforcement and other officers of Enforcement shall exercise the like powers which are conferred on income-tax authorities under the Income-tax Act, 1961and shall exercise such powers, subject to such limitations laid down under that Act.
		Section 37 A	Special provisions of search and seize assets held outside India
33	Smugglers And Foreign Exchange Manipulators (Forfeiture Of Property) Act, 1976	Section 7	Forfeiture of property in certain cases
34	Forest Act 1927	Section 52	Seizure of property liable to confiscation
		Section 53	Power to release property seized under section 52.
		Section 55	All timber or forest-produce and all tools, boats, carts and cattle used in committing any forest offence liable to confiscation.
		Section 56	Disposal on conclusion of trial for forest-offence, of produce in respect of which it was committed.
		Section 57	Magistrate power to order confiscation of property in case of offender not traced and power to make over to the person entitled.
		Section 58	Procedure as to perishable property seized under section 52.by Magistrate

		Section 59	Appeal
		Section 60	Property when to vest in Government
		Section 61	Saving of power to release in certain cases
		Section 81	Failure to perform service may lead to confiscation of such share
35	Forward Contracts Regulation Act 1952	Section 21 A	Power of court to order forfeiture of property.—Any court trying an offence punishable under section 20 or section 21 may, if it thinks fit and in addition to any sentence which it may impose for such offence, direct that any money, goods or other property in respect of which the offence has been committed, shall be forfeited to the Central Government.
		Section 22 A	Power to search and seize books of account or other documents Police, when authorized may enter upon and search any place where books of account tor other documents relating to forward contracts or options in goods entered into contravention of the provisions of this Act, and seize any such book or document. The provisions of the Code of Criminal Procedure shall apply to any search or seizure.
36	Fugitive Economic Offenders Act, 2018	Section 5	Attachment of property.
		Section 8	Search and seizure.
		Section 9	Search of persons.

		Sub section (2) to (10) of Section 12	Confiscation procedure
		Section 13	Supplementary procedure for confiscation
		Section 15	Management of properties confiscated under this Act
37	Indecent representation of Women Prohibition Act 1986	Section 5	Powers to enter and search
38	Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992	Section 12	Power to enter and search
		Section 13	Power to seize infant milk substitutes, etc., or containers thereof.
		Section 14	Confiscation.
39	Information Technology Act 2000	Section 29	Power to access computer system to search
		Section 76	Confiscation
		Section 80	Power to enter any public place and search and arrest
40	Insolvency and Bankruptcy Code, 2016	Section 218	Power of Investigating authority to search, inspect and seize
41	Legal Metrology Act 2009	Section 15	Power of inspection, seizure, etc.-
		Section 16	Forfeiture
42	Motor Vehicles Act 1988	Section 206	Power of police officer to impound document

		Section 207	Power to detain vehicles used without certificate of registration permit, etc
		Section 213(5)	Power to enter, inspect and search and seize or take copies of any registers or documents
43	Narcotic Drugs and Psychotropic Substances, Act, 1985	Section 42	Power of entry, search, seizure and arrest without warrant or authorisation.
		Section 43	Power of seizure and arrest in public place
		Section 44	Power of entry, search, seizure and arrest in offences relating to coca plant, opium poppy and cannabis plant
		Section 45	Procedure was seizure of goods liable to confiscation not practicable.
		Section 48	Power of attachment of crop illegally cultivated
		Section 49	Power to stop and search conveyance
		Section 50	Conditions under which search of persons shall be conducted
		Section 51	Provisions of the code of Criminal Procedure, 1973 to apply to warrants, arrests, searches and seizures
		Section 52	Disposal of persons arrested and articles seized
		Section 52 A	Disposal of seized narcotic drugs and psychotropic substances.
		Section 55	Police to take charge of articles seized and delivered.

		Section 57	Report of arrest and seizure
		Section 57 A	Report of seizure of property of the person arrested by the notified officer.
		Section 60	Liability of illicit drugs, substances, plants, articles and conveyances to confiscation
		Section 61	Confiscation of goods used for concealing illicit drugs or substances
		Section 62	Confiscation of sale proceeds of illicit drugs or substances
		Section 63	Procedure in making confiscations.
		Section 68 F	Seizure or freezing of illegally acquired property.
		Section 68 G	Management of properties seized or forfeited under this Chapter
		Section 68 H	Notice of forfeiture of property
		Section 68 I	Forfeiture of property in certain cases.
		Section 68 Z	Release of property in certain cases.
44	Poisons Act 1919	Section 7	Power to issue search warrants.
45	Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994	Section 30	Power to search and seize records, etc the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) relating to searches and seizures shall, so far as may be, apply to every search or seizure made under this Act
46	Prevention of cruelty to Animals Act 1960	Section 13	Destruction of suffering animals

		Section 18	Power of entry and inspection
		Section 25	Power to enter premises
		Section 29	Power of court to deprive person convicted of ownership of animal.
		Section 32	Power of search and seizure
		Section 33	Search warrants the provisions of the Code of Criminal Procedure relating to searches shall, so far as those provisions can be made applicable, apply to searches under this Act.
		Section 34	General power of seizure for examination
47	Prevention of Food Adulteration Act 1954	Section 10 (2)	Power to enter, search any place, take samples and seize misbranded and adulterated food items.
		Section 10 (4(A)) and section 11(5)(ii)	Destruction of adulterated food and drink
		Section 18	Forfeiture of property on conviction
48	Prevention of Money laundering Act 2002	Section 5	Attachment of property involved in money- laundering
		Section 9	Vesting of property in Central Government.
		Section 10	Management of properties confiscated under this Chapter.
		Section 17	Search and seizure
		Section 18	Search of persons

		Section 20	Retention of property
		Section 21	Retention of records.
		Section 58 A	Release of property to the person entitled
		Section 58 B	Letter of request of a contracting State or authority for confiscation or release the property.
		Section 60	Attachment, seizure and confiscation, etc., of property in a contracting State or India
		Section 65	The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, to arrest, search and seizure, attachment, confiscation investigation, prosecution and all other proceedings under this Act.
49	Protection of Human Rights Act 1993	Section 13 (3)	Power to enter any building or place and seize any document or take extracts or copies
50	Public Gambling Act 1867	Section 5	Power to enter and authorise police to enter and search.
		Section 8	On conviction for keeping a gaming-house, instruments of gaming to be destroyed.
		Section 13	Seizure and destruction of instruments of gaming found in public street
51	Public Premises Eviction of Unauthorized occupants Act 1971	Section 6	Disposal of property left on public premises by unauthorised occupants.
52	Railways Act 1989	Section 180B	While making an inquiry, the officer

			authorised shall have power to enter and search any premises or person and seize any property or document which may be relevant to the subject-matter of the inquiry.
		Section 180E	Search, seizure and arrest how to be made.
53	Railway Property Unlawful Possession Act	Section 11	All searches and arrests made under this Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1898(5 of 1898), relating respectively to searches and arrests made under that Code
		Section 13	Power of courts to order forfeiture of vehicles, etc
54	Railway Protection Force Act, 1957	Section 13	Power to search without warrant.
55	Small Coins offences Act 1971	Section 8	Any small coin or metal in relation to which any offence against this Act has been committed shall be forfeited to Government
56	Telegraph Wires (Unlawful Possession) Act, 1950	Section 6A	Powers of search and seizure.
		Section 6B	Confiscation of telegraph wires, conveyances,
57	Trade Marks Act	Section 111	Forfeiture and destruction
		Section 115	Power to search and seize without warrant the goods, die, block, machine, plate, other instruments or things and power for restoration of the articles

		Section 135	Power to grant the relief of delivery of marks and labels for destruction and erasure
58	Unlawful activities Prevention Act 1987	Section 24A.	Forfeiture of proceeds of terrorism.
		Section 25	Powers to seize the property and appeal against order of Designated Authority
		Section 26	Court to order forfeiture of proceeds of terrorism.
		Section 30	Claims by third party
		Section 33	Forfeiture of property of certain persons.
		Section 43 A	Power to arrest, search, etc.
		Section 43 B	Procedure of arrest, seizure, etc.
59	Water Prevention and control of pollution Act 1974	Section 23	Power of entry, inspection and seizure.
60	Wild life Protection Act 1972	Section 50	Power of entry, search, arrest and detent
		Section 51(2)	Forfeiture
		Section 58 C (2)	Illegally acquired property is liable to be forfeited to the State Government concerned
		Section 58 F	Seizure or freezing of illegally acquired property.
		Section 58 G	Management of properties seized or forfeited

		Section 58 I	Forfeiture of property in certain cases.
61	Wireless Telegraphy Act 1933	Section 7	Power of search and taking possession
62	Young Persons Harmful Publications Act 1956	Section 4	Power of Government to declare harmful publications forfeited
		Section 6	Power to seize and destroy harmful publications or dispose of
63	Goods and Service Tax Act	Section 67	Power of Inspection, Search and Seizure
		Section 68	Inspection of goods in movement
	Section 71	Access to business premises	
64	Mines And Minerals (Development And Regulation) Act, 1957	Section 21 (4) Section 21(4A) Section 23 B	Seizure Confiscation Power to Search

Provisions for search/seizure in some other Indian Law

65	Motor Transport Workers Act 1932	Section 5
66	Merchant Shipping Act 1958	Section 401
67	Special Economic Zone Act, 2005	Section 23
68	RBI Act, 1934	Section 45T
69	Official Secrets Act 1923	Section 11
70	Central Industrial Security Force Act 1968	Section 12.
71	Insurance Act, 1938	Section 34
72	University Grants Commission Act, 1956.	Section 13
73	Medicinal and Toilet Preparations (Excise Duties) Act, 1961	Section 14 & 17.

74	Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979	Section 20.
75	Insecticides Act 1968	Section 21.
76	Prisons Act, 1894	Section 24 & 41
77	Income Tax Act	Section 132
78	Companies Act 2013	Section 209
79	Insolvency and Bankruptcy Code 2016	Section 218

APPENDIX - III

PROVISIONS OF SEARCH, SEIZURE, CONFISCATION, DESTRUCTION ETC. IN CERTAIN BIHAR LOCAL LAWS

1	Bihar Prohibition and Excise Act, 2016	Section 56	Things liable for confiscation
		Section 58(4)	Collector to order destruction of spurious liquor Section 73 Power to enter, inspect, search and seize
2	Bihar Ancient Monuments and Archaeological Sites Remains And Art Treasures Act, 1976	Section 34	Powers of Entry, Search, Seizure, etc.
3	Bihar Ban on Lotteries Act 1993	Section 7	Power of entry and search
4	Bihar Taxation of Luxuries in Hotels Act, 1988	Section 12	Inspection, search and seizure.
5	Bihar Control of the Use & Play of Loud-Speakers Act, 1955	Section 7	Power to seize loud-speaker
6	The Indian Forest (Bihar Amendment) Act, 1989	Section 52	Seizure and its procedure for the property liable for confiscation.

		Section 52 A	Appeal against the order of confiscation
		Section 52 D	Power of entry, inspection, search and seizure
7	Bihar Prevention of Beggary Act 1951	Section 8	Articles and money found on search and inspection to be entered in register
		Section 9	Disposal of articles by destruction, sale, burning, or storing after disinfection
		Section 10	Staff not to buy articles auctioned
		Section 11	Disposal of articles after passing of Court's order
8	Bihar Kendu Leaves (Control of Trade) Act, 1973	Section 14	Power of entry, search, seizure, etc
9	Bihar Mica Act, 1947	Section 23	Seizure and detention of mica removed without pass.
		Section 24	Power of search and seizure.
10	Bihar Saw Mills (Regulation) Act, 1990	Section 8	Power of entry, inspection, search, seizures, etc
		Section 13	Confiscation of saw mills etc.
11	Bihar Protection of Interests of Depositors (in Financial Establishments) Act, 2002	Section 4	Confiscation and forfeiture of property
		Section 59	Power to enter, inspect, search and seize
12	Bihar Minerals (concession, Prevention of Illegal Mining, Transportation & Storage) Rules, 2019	Section 60	Power to stop and check any carrier, transport or vessel.
		Section 63	Reports of Searches and Seizures

13	Bihar Goods and Service Tax Act	Section 67	Power of search, inspection and seizure
		Section 68	Inspection of goods in movement
		Section 71	Access to business premises
		Section 83	Provisional attachment to protect revenue in certain cases
		Section 129	Detention, seizure and release of goods and conveyances in transit.
15	Bihar Power Alcohal Act 1948	Section 14	Entry and search
		Section 15	Inspection and stamping etc.
		Section 19	Confiscation
16	Bihar Private Forest Act, 1947	Section 51	Seizure of property liable to confiscation
		Section 53	Power to release property seized under Section 51
		Section 54	Trees, timber, forest-produce, tools, etc, when liable to confiscation
		Section 55	Disposal on conclusion of trial for forest offence of produce in respect of which it was committed
		Section 56	Procedure when offender not known or cannot be found
		Section 57	Procedure as to perishable property seized under Section 51
		Section 59	Property when to vest in the [State] Government.
		Section 60	Saving of power to release property seized
17	Bihar Shop and Establishments Act 1953	Section 30(a) and (b)	Power to enter, inspect and seizure

18	Bihar Special Courts Act 2009	Section 13	Confiscation of property
		Section 14	Notice for confiscation
		Section 15	Confiscation of property in certain cases.
		Section 16	Transfer To be null And void.
		Section 17	Appeal against confiscation
		Section 18	Power to take possession
		Section 19	Refund of Confiscated money or property
		Section 22	Bar to proceedings
19	Essential Commodities (Bihar Amendment) Act	Section 6 A	6.A. Confiscation of food grains, edible oil-seeds, edible oils, etc
20	Bihar Preservation and improvement of Animals Act 1955	Section 10	Power to seize and release infective animal by veterinary officer
		Section 27	Power to seize bull
21	Bihar Preservation and Improvement of Animals Rules 1960	Rule 12	Destruction of infected animals
22	Bihar Juvenile Justice (Care and Protection of Children) Rules 2017	Rule 61(4)	Inspection by in charge of the institution
		Rule 68	Search, seizure, destruction and disposal
		Rule 70	Prohibited Articles
		Rule 71	Articles found on search
		Rule 72	Disposal of articles

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Topic No. – 11

Principle, practice & procedure relating to disposal of criminal cases without a full trial.

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"The greatest drawback of the administration of justice in India today is because of the delay of cases……The law may or may not be an ass, but in India, it is certainly a snail, and our cases proceed at a pace which would be regarded as unduly slow in the community of snails. Justice has to be blind, but I see no reason why it should be lame. Here it just hobbles along, barely able to work."

– Nani Palkhivala

A proper trial, as governed by the Code of Criminal Procedure, starts with framing of charge or explaining of accusation, entails recording of evidence of the prosecution, recording of the statement of accused, recording of the evidence of the defence, argument of both sides, followed by the judgment, which may be an order of acquittal or conviction. The mandate of fair trial requires that the court must follow this procedure in all criminal trials. However, under certain given circumstances, there are provisions wherein a criminal case may be disposed without full trial. In view of the huge pendency of cases and in the present scenario where cases drag on for decades, it has become necessary to revisit these provisions of Cr.P.C and ensure that they are used in appropriate cases to provide timely justice. These provisions and procedures may be analysed under the following broad heads, for ease of discussion:

A. Disposal of Case prior to commencement of trial

B. Disposal of Case at any stage.

A. DISPOSAL OF CASE PRIOR TO COMMENCEMENT OF TRIAL

1. Acceptance of Final Report

Upon completion of investigation in a cognizable offence after registration of FIR, the police is required to file a report under section 173 of Cr.P.C before the Magistrate. After investigation, if the police find the case to be untrue or true but no clue to proceed, they submit a Final Report instead of a charge sheet. In **Abhinandan Jha and others v. Dinesh Mishra[1],** the Apex Court, while stipulating as to what is a final report, held, *"13. It will be seen that the Code, as such, does not use the expression 'charge-sheet' or 'final report'. But it is understood, in the*

1. AIR 1968 SC 117 / (1967) 3 SCR 668

Police Manual containing Rules and Regulations, that a report by the police, filed under Section 170 of the Code, is referred to as a 'charge-sheet'. But in respect of the reports sent under Section 169 i.e. when there is no sufficient evidence to justify the forwarding of the accused to a Magistrate, it is termed variously, in different States, as either 'referred charge', 'final report', or 'summary'."

It has been well settled that in the case of final report the Magistrate has four options, first, he may agree with the conclusion of the police and accept the final report and drop the proceeding; second, he may take cognizance under Section 190(1)(b)Cr.P.C. and issue process straightaway to the accused without being bound by the conclusion of the investigating agency where he is satisfied that upon the facts discovered by the police, there is sufficient ground to proceed; third, he may order for further investigation if he is satisfied that the investigation was made in a perfunctory manner and; fourth, he may, without issuing process or dropping the proceedings, decide to take cognizance under Section 190(1) (a) Cr.P.C. upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202Cr.P.C. and proceed to dismiss the case or issue summons.

Here we are only concerned with the first option where the Magistrate decides to accept the FR and drops the proceedings. Regarding the practice to be adopted in this scenario, the Apex Court indicated in **Bhagwant Singh case**[2] that where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, notice to the informant and grant of opportunity of being heard in the matter becomes mandatory. Thus, prior to acceptance of FR by the Magistrate, it is mandatory to issue notice to the victim. The victim's right to be heard on Final Report and to file a Protest Petition is absolute. Hence, care must be taken to follow this procedure before accepting the filed FR.

2. Dismissal of Complaint

As per Sec 203 of Cr.P.C, if after considering the statement on oath (if any), of the complainant and of the witnesses and the result of inquiry or investigation (if any) under Sec 202, the Magistrate is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for doing so. In this regard, in the case of, **S. Nihal Singh And Others vs Arjan Das**[3]**,** the Delhi High Court has observed that, *"Indeed an alert and experienced Magistrate with a little circumspection and sagacity can see through the game of the complainant and can call for any documents or summon any witnesses who in his opinion, will be able to throw light on the case and help in arriving at a conclusion whether the complaint is devoid of any substance or a prima facie case is made*

2. (1985) 2 SCC 537: 1985 SCC (Cri) 267: AIR 1985 SC 1285

3. 1983 CriLJ 777, 1983 (1) Crimes 438

out. There is no strait-jacket rule. If there is any hesitation or doubt in the mind of the court, it can summon any witnesses or call for any documents which in the opinion of the court can aid the court in confirming or removing such hesitation or doubt. Of course, the discretion vesting in him in this respect has to be exercised judicially. He is neither expected to play into the hands of the complainant and chew meekly what he is fed by the complainant nor is he expected to hold a brief for the accused and summon witnesses with a view to find out the defence of the accused, if any. He is neither a post office nor an automation and he is to exercise his jurisdiction as the exigency of the situation demands, the only limitation being that he cannot convert the enquiry into a full-scale trial."

Thus, the object of an enquiry under Section 202 is clearly, to ascertain whether the allegations made in the complaint are intrinsically true and the Magistrate acting under Section 203 has to satisfy himself that there is sufficient ground for proceeding. In order to come to this conclusion, he is entitled to consider the evidence taken by him or recorded in an enquiry under Section 202, or statements made in an investigation under that section, as the case may be. He cannot consider any material other than this. In **Laxminarayan Upadhyay v. State of Chhattisgarh**[4], it has been specified that the words "sufficient grounds" used by the Legislature in Section 203 is construed to mean the satisfaction that a prima facie case is made out against the persons accused by the evidence of the witnesses entitled to a reasonable degree of credit. This clearly means that if in the opinion of the Magistrate, a reasonable degree of credit is not attached to the testimony of the witness examined before him for the purpose of his satisfaction regarding prima facie case, and he is not satisfied, then, the Magistrate would be fully competent to dismiss the complaint under the provisions of Section 203 Cr.P.C. The law imposes a serious responsibility on the Magistrate to decide if there is sufficient ground for proceeding and while discharging this duty, the Magistrate cannot act in a mechanical manner. If this power is exercised judiciously and with keen and alert mind, many a frivolous case will be nipped in the bud, preventing gross abuse of the judicial process.

Dismissal of Complaint or rejection of complaint filed for offence under Section 138 of Negotiable Instruments Act

An offence committed under Section 138 is a non-cognizable and a bailable offence. The offence under this section will be completed with following components:

(1) Drawing of Cheque by the drawer for the discharge of debt or other liability

4. Cri Misc. 94 of 2007

(2) Presentation of Cheque within 6 months form the date on which it is drawn.

[RBI vide Circular RBI/2011-12/251 DBOD AML BC No. 47/14.01.001/2011-12, dated 4-11-2011, has changed the default period within which a cheque may be presented for payment, from a period of six months from the date of the instrument, to a period of only three months from such date, w.e.f. 01-04-2012]

(3) Dishonour of cheque and return unpaid by the drawee bank

(4) Statutory Notice within 30 days of receipt of information from the bank regarding the return of cheque as unpaid to the drawer demanding payment of cheque amount

(5) Failure to make payment by the drawer within 15 days from the date of receipt of Notice

(6) As per sec 142 (b), a complaint u/s 138 NI Act has to be filed within 30 days from the date on which the cause of action arises. However, by Amendment Act of 2002 court is empowered to take cognizance of the offence even if complaint is filed beyond one month by condoning the delay if sufficient cause is shown.

A complaint for dishonour of cheque u/s 138 NI Act is liable for being dismissed for non-compliance of any of the mandatory components. It may also be dismissed for default when the complainant remains continuously absent. In **Vishal Sharma vs. Balkaran Singh**[5] and **Yogender Pratap Singh vs. Savitri Devi**[6] it was held by the Hon'ble Court that the Complaint filed before expiry of 15 days from the date of receipt of notice by the accused is not maintainable. In **V.K. Bhat vs. G. Ravi Kishore and another**[7] it was held by the Hon'ble Supreme Court that when complaint under section 138 of the Act is dismissed in default, it amounts to acquittal of accused under Section 256 of Cr.P.C.

3. Discharge

The Legal Maxim 'Let a hundred guilty be acquitted, but one innocent should not be convicted' is the guiding principle behind rules of the procedure and evidence guiding and inspiring our courts. The basic object being that an innocent man should not be convicted for a crime that he did not commit. If the allegations which have been made against him are false, the Code provides for filing a discharge application. If the evidence given before the Court is not sufficient to satisfy the offence and in the absence of any prima facie case against him, he is entitled to be discharged. Cr.P.C provides for several types of trial – Warrant trial, Summon Trial, Summary trial, Session trial, Magisterial trial. It also differentiates between the trial in cases instituted on the basis of Police

5. 2015(4) RCR (Criminal) 916 (P&H)
6. 2014 (4) CCC 305 (SC)
7. 2016(2) RCR (Criminal) 793 (SC)

Report and the cases instituted on the basis of complaint. The procedure of discharge in these cases and trials is also different and shall be discussed under the following basic heads:

In Warrant Cases Instituted on the basis of Police Report

Section 239 and 227 of Cr.P.C, provide that in warrant cases instituted on the basis of police report, before the charges are framed against an Accused person, he can be discharged.

As per section 239 Cr.P.C, *If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.*

Section 227 of the Code defines that *if the judge considers that there is no sufficient ground for proceeding against the accused, upon hearing the submissions of the prosecution and the accused in that behalf and consideration of the record of the case along with the documents submitted therewith, he shall discharge the accused and record his reasons also for so doing.*

Thus, Sec 239 of Cr.P.C is for discharge in cases triable by Magistrate and Sec 227 of Cr.P.C is for discharge in Session trial cases. On a bare perusal of the sections as mentioned above and in view of the various judicial pronouncements on the subject over the years, the following guiding principles can be spelled out for passing an order of discharge:

(a) The court shall consider the police report and documents sent under sec 173 Cr.P.C by the police.

(b) The court may examine the accused if he so chooses.

(c) The court shall give an opportunity to the accused and the prosecution of being heard.

(d) If the accused produces any convincing material at the stage of framing of charge which might drastically affect the very sustainability of the case, such material should be considered by the court at this stage. In the case of **Satish Mehra v. Delhi Administration and Another**[8]**,** the Hon'ble Supreme Court observed that nothing in the Code limits the ambit of such hearing to oral arguments only and, therefore, the trial court can consider the material produced by the accused at the stage observed under Section 227 of the Code.

(e) The test to determine as to whether the accused in a given case is to be charged or

8. (1996) 9 SCC 766

discharged rests on the fact that a prima facie case or a grave and strong suspicion backed by judicial mind can be said to have been made on the basis of evidence available on record. **[Rudolf Fernandes vs State of Goa[9]]**

(f) The expression "groundless" means that there is no ground for presuming that the accused is guilty. The materials placed should not make out or should not be sufficient to make out a prima facie case against the accused. **[Mahanta Swamy vs Dr D L Raja Gopal[10]]**

(g) If a prima facie case is made out, charge must be framed **[Abbey Das vs Gurdial Singh[11]]**

(h) At the stage of section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. The sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him. **[Union of India vs Prafulla Kumar[12]]**

(i) If two views are equally possible and the Judge is satisfied that the evidence adduced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused. **[State of HP vs Sher Singh[13]]**

(j) The order of discharge must be a reasoned order.

At this stage, it is incumbent upon the court to take an intelligent part in the proceedings and judicially consider whether or not there is any ground for presuming commission of offence as alleged. There must be an intelligent application of mind and a clear understanding of the entire events that occurred, so that the provision is not reduced into a dead letter.

In Cases Instituted on the basis of Complaint:

In a case instituted upon a private complaint, the procedure for charge or discharge is completely different from a police case. Sec. 245 of Cr.P.C lays down the procedure for discharge in such cases. As per Sec 245 Cr.P.C, "When accused shall be discharged;

(1) If upon taking all the evidence referred to in section 244, the Magistrate considers, for

9. 1993 (2) Crimes 1059
10. 1977, Cri L J NOC 228
11. AIR 1971 SC 834
12. AIR 1979 SC 366
13. 2010 (3) Crimes 391 (HP)

reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such magistrate, he considers the charge to be groundless"

This section provides for discharge of accused in a complaint case under two circumstances. First, after evidence of the complainant u/s 244 Cr.P.C has been recorded and second, at any previous stage ie, prior to recording of evidence. In the first case, when the accused appears or is brought before the Magistrate under Section 244(1)Cr.P.C., the Magistrate has to hear the prosecution and take all such evidence, as may be produced in support of the prosecution. In this, the Magistrate may issue summons to the witnesses also under Section 244(2)Cr.P.C. on the application by prosecution. All this evidence is evidence before charge. It is after all this evidence is taken, that the Magistrate has to consider the question of discharge under Section 245(1)Cr.P.C. Here the court has to analyse the adduced evidence and, if the evidence adduced by the complainant u/s 244 Cr.P.C is of such nature that it will not warrant conviction of accused if it is considered by itself, then it is unnecessary to drag the trial through the subsequent prescribed stages. The Code mandates that in such a circumstance, the trial be cut short at this very stage by discharging the accused. Here it must be ensured that the complainant has been given sufficient and reasonable opportunity to adduce his entire evidence u/s 244 Cr.P.C.

Under 245(2), the accused can be discharged at any previous stage if the Magistrate considers the charge to be groundless. Hon'ble Apex Court in **Ajai Kumar Ghose vs State Jharkhand and another**[14] has observed that, under Section 245(2)Cr.P.C. the Magistrate has the power of discharging the accused at any previous stage of the case, i.e., even before evidence is led. However, for discharging an accused under Section 245 (2) Cr.P.C., the Magistrate has to come to a finding that the charge is groundless. There is no question of any consideration of evidence at that stage, because there is none. The Apex Court in the said case has specified that "previous stage" could be from Sections 200 to 204Cr.P.C. and till the completion of the evidence of prosecution under Section 244Cr.P.C and observed that, the Magistrate can discharge the accused even when the accused appears, in pursuance of the summons or a warrant and even before the evidence is led under Section 244Cr.P.C..

Discharge in Summons Trial cases

Section 251 of Cr.P.C states that, when in a summons case the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked whether he pleads guilty or has any defence to make, but it shall not be necessary to frame a formal charge. On perusal of this section, it is clear that there is no specific

14. (2010) 1 SCC (Cri.) 1301

power of discharge or dropping of proceedings available with the Magistrate in a Summons Trial. This issue first came to be taken up in the case of **KM Mathew vs State of Kerala**[15] where the accused had sought recalling of the summoning order in a Summons Case. In this case it was held that, ***"No specific provision is required for the Magistrate to drop the proceedings or rescind the process. The order issuing the process is an interim order and not a judgment. It can be varied or recalled. The fact that the process has already been issued is no bar to drop the proceedings if the complaint on the very face of it does not disclose any offence against the accused"***

This issue again came up for consideration in **Adalat Prasad v. Rooplal Jindal &Ors (2004) 7 SCC 338,** wherein a three judge bench held that *"If the Magistrate issues process without any basis, the remedy lies in petition u/s 482 of the Cr.P.C, there is no power with the Magistrate to review that order and recall the summons issued to the accused"* The decision in Adalat Prasad was reaffirmed by the Supreme Court in **Subramanium Sethuraman v. State of Maharashtra &Anr**[16].This continued till 2009 when, in **Bhushan Kumar v. State**[17] it was held that ***"It is inherent in Section 251 Cr.P.C that when an accused appears before the trial court pursuant to summons issued under Section 204 in a Summons Trial case, it is the bounden duty of the trial court to carefully go through the allegations made in the charge-sheet or complaint and consider the evidence to come to a conclusion, whether or not, commission of any offence is disclosed and if the answer is in the affirmative, the Magistrate shall explain the substance of the accusation to the accused and ask him whether he pleads guilty otherwise, he is bound to discharge the accused as per Section 239 of the Cr.P.C, "*** The decision of the court in Bhushan Kumar was followed in a catena of decisions including **Urrshila Kerkar v. Make My Trip (India) Private Ltd**[18]**.** However, the scheme of things seems to have been reverted back in the recent order of the Supreme Court in **Amit Sibal v. Arvind Kejriwal**[19] which suggests that the trial court has no power to drop proceedings/discharge in a Summons Trial.

So, placing reliance on Subramanium Sethuraman judgment, supported broadly by **Amit Sibal v. Arvind Kejriwal** and, the bare provisions of Cr.P.C, it may be concluded that there is no such provision in Cr.P.C, that permits a 'discharge' or 'dropping of proceedings' in a Summons Case.

4. Absence or non-appearance of complainant:

Section 249 Cr.P.C, under the Chapter XIX – Trial of Warrant Cases by Magistrate, states

15. (1992) 1 SCC 217
16. (2004) 13 SCC 324
17. NCT of Delhi (2012) 5 SCC 424
18. 2013 SCC OnLine Del 4563
19. (2016 SCC OnLine SC 1516)

that, "When the proceedings have been instituted upon complaint, and on any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed discharge the accused." Thus, for discharge of an accused and disposal of the case under this section, it has to be ensured that all the following conditions are met:

- It is a warrant trial case, instituted upon complaint.
- The Offence is compoundable u/s 320 of Cr.P.C.
- The Offence is non-cognizable.
- Charge is yet to be framed against the accused ie, trial is yet to commence.
- The complainant is absent on the day fixed for hearing.

Second Complaint is permissible

In **Maj. Genl. A.S. Gauraya & Anr vs S.N. Thakur And Anr[20],** it was held that the order of dismissal of a complaint by a criminal court due to the absence of a complainant is a proper order and, the Court sought to decide whether a magistrate can restore a complaint to his file by revoking his earlier order dismissing it for the non- appearance of the complainant and proceed with it when an application is made by the complainant to revive it. It was held that a second complaint is permissible in law if it could be brought within the limitations imposed by the Apex Court in **Pramatha Nath Taluqdar v. Saroj Ranjan Sarkar[21].** Filing of a second complaint is not the same thing as reviving a dismissed complaint after recalling the earlier order of dismissal. The Criminal Procedure Code does not contain any provision enabling the criminal court to exercise such an inherent power.

Thus, section 249 of the Criminal Procedure Code enables a Magistrate to discharge the accused in warrant cases instituted on the basis of complaint when the complainant is absent and when the conditions laid down in the said section are satisfied. It is a discretionary power of the Court which is very wide in ambit and must be exercised judiciously.

5. Plea Bargaining

In a trial, an accused can make three types of pleas: Not guilty, Guilty, or Nolo contendere. The doctrine of Nolo Contendere, which is a legal term that comes from the Latin phrase for "I do not wish to contend". It is also referred to as a plea of no contest and forms the basis of the concept of Plea Bargaining. The term Plea Bargaining can be defined as pre-trial negotiations between the accused and the prosecution where the accused pleads guilty in exchange for certain concessions by the prosecution.

20. 1986 AIR 1440

21. [1962] Suppl. 2 S.C.R. 297

The concept of Plea Bargaining can be traced back to 19th Century America. It was relied upon quite extensively by the courts but the general sentiment relating to it, was one of disregard and, till 1958 it appeared that the United States Supreme Court might hold it illegal. However, in its 1970 decision in **Brady v. United States,** the Court concluded that plea bargaining was "inherent in the criminal law and its administration." Since then, the concept of plea bargaining has virtually become the main stay of criminal trial there. In India, Plea Bargaining has been introduced by Criminal Law Amendment Act, 2005 by inserting a new Chapter XXI A on Plea Bargaining was introduced in the Criminal Procedure Code, 1973. Prior to this, in India as well, the concept initially had not found favour with the supreme court judges who called it immoral, a law leading to more corruption and the law being violative of Article 21. The Hon'ble Supreme Court examined the concept of plea bargaining for the first time in **Murlidhar Meghraj Loya v. State of Maharashtra[22],** followed by other cases like **Kasambhai v. the State of Gujarat[23]; Thippaswamy v. the State of Karnataka[24],** wherein it was held that a conviction of an accused based on plea bargaining is contrary to public policy, and it is not permissible to dispose of the case based on plea bargaining. However, later on a clear and decided shift evolved in the approach of Courts towards Plea Bargaining which can be noticed in the case of **State of UP v. Nasruddin JT[25]** wherein the Supreme court held that reduction of the sentence should undergo as a result of plea bargaining. Similarly, in **State of Gujarat v. Natwar Harchandji Thakore[26],** the court emphasized the introduction of plea bargaining because the law intends to provide accessible, cheap and expeditious justice by resolution of disputes.

For the purposes of punishment, a plea of nolo contendere is the same as the plea of guilty. The benefit that a defendant gets is that unlike a guilty plea, it cannot be used against a defendant as an admission of guilt in a subsequent civil or criminal case.

Plea bargaining can take three distinct forms –

- Charge bargaining, where the accused pleads guilty in exchange of the promise made by prosecutor to reduce or dismiss some of the charges brought against him.
- Sentence bargaining, where the accused pleads guilty in exchange of a promise by the prosecutor to recommend a lighter or alternative sentence or
- Fact bargaining –accept certain evidence as fact in return for no other evidence to be produced further in the case

The Procedure

Section 265A to 265L of the chapter XXIA of the Code of Criminal Procedure, 1973, deal

22. (AIR 1976 SC 1929)

23. 1980 AIR 854, 1980 SCR (2)1037

24. AIR 1983 SC 747

25. 2000 (8) SC 487

26. (2005) Cr. L.J. 2957

with the provision and procedure of plea bargaining. The process of Plea Bargaining commences when an application is filed by an accused person before the Court in which the case is pending for trial. The application should contain a brief description of the case and the offence to which it relates and has to be supported by an affidavit. After filing of the application, the Court shall issue notice to the Public Prosecutor/Complainant and the accused to appear on date fixed. The application is subject to the following conditions:

- The offence should be one in which the maximum sentence is less than or up to 7 years of imprisonment
- The offence must not have been committed against a woman or a child below 14 years of age.
- The offence must not be one which affects the socio-economic condition of the country.
- The accused must not have been previously convicted for the same offence
- It must be voluntarily made by the accused.

[The Central Government has, ***by S.O. 1042(E), dated 11thJuly, 2006,*** *determined the offences under the following laws for the time being in force which shall be the offences affecting the socio-economic condition of the country for the purposes of sub-section (1) of section 265A, namely,-(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 place in Schedule I and Part II of the Schedule II as well as offences related to altering of 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.]*

On the date fixed, when both parties appear, the Court shall examine the accused alone in camera. If the Court finds that the accused has been previously convicted for the same offence or,

that the application has not been made voluntarily, then Court shall proceed further as per normal procedure of trial.

The Court shall grant a time to the parties to work out a mutually satisfactory agreement, which may include compensating the victim.

In cases instituted on the basis of police investigation, the Public Prosecutor, Investigating Officer, the accused and the victim shall participate in the meeting and; in a case instituted on the basis of complaint, the victim and the accused shall be present in the meeting. The accused as well as the victim shall be at liberty to include their private pleader in the process and it has to be ensured by the Court that the entire process is completed by voluntary participation of all involved. In the case of **Thippaswamy v. State of Karnataka**[27] the Court said that the act of inducing and leading the accused to plead guilty under an assurance or a promise will violate Article 21 of the Constitution of India.

In cases where a satisfactory disposition is worked out, a report of the disposition shall be prepared by the Court. It shall bear the signatures of the participants and shall be signed by the Presiding Officer of the Court. Thereafter, the court may dispose the case, awarding the compensation to victim as agreed upon and, hearing the parties on the quantum of punishment.

While awarding sentence, the following points have to be adhered to:

- In cases where Section 360 of Cr.P.C or the provisions of Probation of Offenders Act or any other law for the time being in force, are attracted, the accused may be released on probation of good conduct or after due admonition as well.
- In cases where minimum sentence has been provided, accused may be sentenced to half of such minimum sentence.
- In other cases, the accused may be sentenced to 1/4th of the punishment provided for the offence.
- The provisions of Sec 428 Cr.P.C, for setting of the period of detention undergone by the accused shall apply in the same manner as they apply in respect of the imprisonment under other provisions of this Code.

The Judgment has to be delivered in open court and signed by the PO. This judgment shall be final and no appeal shall lie in any court against such judgment. The remedy against this judgment lies in filing SLP under article 136 or Writ Petition under Article 226 & 227 of the Constitution.

Non-Application of Provisions

Section 265 L of the code of criminal Procedure 1973, provides that nothing in this Chapter shall apply to any Juvenile or Child as defined in sub-clause (k) of section 2 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000).

27. (1983) 1 SCC 194

Advantages to the accused -

(a) It ensures a speedy disposal of the case, without being subjected to the vagaries of trial.

(b) The accused has the apparent advantage of getting away with lesser punishment and in appropriate cases, he may even be released on probation or after due admonition.

(c) Section 12 of the Probation of Offenders Act, 1958 provides that a person found guilty of an offence and dealt with under section 3 or 4 of the said Act, shall not suffer any disqualification attached to the conviction.

(d) The Government employees who are released on probation under the Probation of offenders Act are saved from the disqualification which is attached to conviction in view of **Charan Singh Vs. M.C.D.**[28] decided on 05/10/2006

(e) As per Section 265-K of Cr.P.C, the statements or facts stated by an accused in an application for plea bargaining file under section 265-B shall not be used for any other purpose except for the purpose of this Chapter.

Advantages to the Victim

(a) Plea Bargaining affords the victim a chance for quick Justice.

(b) The Victim can also get compensation for injury suffered and expenses incurred without having to go through a procrastinated trial.

Despite having apparent advantages, plea bargaining has not really taken off in India. As per the data by National Crime Records Bureau, only 0.45% of cases under the Indian Penal Code were disposed after plea bargaining in 2015. It is also a fact that these cases are also mostly of those accused who could not afford bail and have thus remained in custody for major part of their trial. This may be because, firstly, the provision for plea bargaining has been restricted to a very narrow selection of offences. Secondly, the inability of prosecution to produce evidence in most cases is matter of common knowledge and when the accused is sure of an acquittal eventually, there is no inclination to opt for plea bargaining.

6. Absence or non-appearance of complainant (in Warrant Trial Case)

Section 249 Cr.P.C, under the Chapter XIX – Trial of Warrant Cases by Magistrate, states that, "When the proceedings have been instituted upon complaint, and on any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed discharge the accused." Thus, for discharge of an accused and disposal of the case under this section, it has to be ensured that all the following conditions are met:

28. (Writ Petition (Civil) No. 18725/2005)

- It is a warrant trial case, instituted upon complaint.
- The Offence is compoundable u/s 320 of Cr.P.C.
- The Offence is non-cognizable.
- Charge is yet to be framed against the accused ie, trial is yet to commence.
- The complainant is absent on the day fixed for hearing.

Second Complaint

In **Maj. Genl. A.S. Gauraya & Anr vs S.N. Thakur And Anr[29],** it was held that the order of dismissal of a complaint by a criminal court due to the absence of a complainant is a proper order and, the Court sought to decide whether a magistrate can restore a complaint to his file by revoking his earlier order dismissing it for the non- appearance of the complainant and proceed with it when an application is made by the complainant to revive it. It was held that a second complaint is permissible in law if it could be brought within the limitations imposed by the Apex Court in **Pramatha Nath Taluqdar v. Saroj Ranjan Sarkar[30].** Filing of a second complaint is not the same thing as reviving a dismissed complaint after recalling the earlier order of dismissal. The Criminal Procedure Code does not contain any provision enabling the criminal court to exercise such an inherent power.

Thus, section 249 of the Criminal Procedure Code enables a Magistrate to discharge the accused in warrant cases instituted on the basis of complaint when the complainant is absent and when the conditions laid down in the said section are satisfied. It is a discretionary power of the Court which is very wide in ambit and must be exercised judiciously.

A. DISPOSAL OF CASE AT ANY STAGE

1. Absence or death of Complainant – (in Summons Trial Case)

Chapter XX of Cr.P.C is for Trial of Summons Cases by Magistrate. As per sec. 256 under this chapter, if the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day: Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case. Sub-section (2) specifies that the provisions of sub- section (1) shall, so far as may be, apply also to cases where the non- appearance of the complainant is due to his death.

29. 1986 AIR 1440

30. [1962] Suppl. 2 S.C.R. 297

Thus, as per this section, in summons trial complaint cases, if the complainant is absent on any date or is dead, then the Magistrate has two choices – first is to acquit the accused and second is to dispense with attendance of complainant and proceed with the case.

If the Magistrate decides to acquit the accused, then this will amount to dismissal of the case. While dismissing the case u/s 256 Cr.P.C, the Magistrate has to ensure that:

- **The personal attendance of complainant is necessary and hearing cannot be adjourned to another date**. If a complainant is represented by a pleader then the complainant can generally get exemption from personal attendance, except when it is found to be necessary. The necessity of personal appearance of complainant has to be gauged by ascertaining if it will impede the progress of the case and, if it is justified that the case be adjourned to another date due to any other reason. If both these points are decided to be in affirmative then, the Court is free to dismiss the complaint and acquit the accused.
- **Non-appearance of the appellant as well his counsel is intentional and wilful.** Any intentional negligence on the part of the complainant will be a very important consideration in the matter.

In the case of **Padam Singh Saini v. Megh Singh**[31]**,** the Himachal High Court was of the view that the trial court was not right in dismissing appellant's complaint. The Court noted that non-appearance of the appellant, as well as his counsel, was not due to inadvertence. The appellant was relying on his counsel to appear before the trial court as it was a formal hearing, and the counsel was busy in conducting the criminal trial as stated hereinabove. The Court was of the opinion that such non-appearance was due to unavoidable circumstances. The High Court allowed the appeal and set aside the impugned judgment of the trial court dismissing the complaint of the appellant. On the other hand, in the case of **Champalal Kapoorchand Jain v. Navyug Cloth Stores**[32]**,** it was noted that the matter was listed before the trial-court on 31 occasions, out of which, the complainant (appellant herein) was absent 11 times. On the 31st occasion as well, when the matter was placed for evidence, the complainant and his advocate were absent. Consequently, the trial Magistrate acquitted the accused-respondent for the absence of the complainant-appellant and his advocate. Noting that speedy trial is a fundamental right of the accused and the Magistrate cannot allow a case to remain pending for an indefinite period, The Bombay High Court observed that, **"Section 256 mandates that if the complainant does not remain present on the appointed day after the summons has been issued on the complaint and unless attendance of complainant has been dispensed with, the Magistrate shall acquit the accused. If the Magistrate feels that the order of acquittal should not be passed on that date, the Magistrate has to give reasons."**

31. 2018 SCC OnLine HP 784

32. 2019 SCC OnLine Bom 4805

Revival of the Complaint

The Code does not permit revival of the case after an order of acquittal has been passed under sec 256. An acquittal owing to the absence of the complainant bars a subsequent trial of the accused for the same offence. **(Bhupati bhooshan Mukherji v. Amiyabhooshan Mukherji[33]**

Regarding recalling of such order passed by a Magistrate, it was held in the case of **Bindeshwari Prasad Singh v. Kali Singh[34]** that, *"..... Even if the Magistrate had any jurisdiction to re-call this order, it could have been done by another judicial order after giving reasons that he was satisfied that a case was made out for re-calling the order. We, however, need not dilate on this point because there is absolutely no provision in the Code of Criminal Procedure of 1908 (which applies to this case) empowering a Magistrate to review or re-call an order passed by him. Code of Criminal Procedure does contain a provision for inherent powers, namely, Section 561-A which, however, confers these powers on the High Court and the High Court alone. Unlike Section 151 of Civil Procedure Code, the subordinate criminal courts have no inherent powers. In these circumstances, therefore, the learned Magistrate had absolutely no jurisdiction to re-call the order dismissing the complaint. The remedy of the respondent was to move the Sessions Judge or the High Court in revision."*

In **Mohd. Azeem v. A. Venkatesh and another,[35]** the Court has considered dismissal of the complaint on account of one singular default in appearance on the part of the complainant as a very strict and unjust attitude resulting in failure of justice.

Section 256(1) of the Criminal Procedure Code enables a Magistrate to acquit the accused in a summons case if the complainant does not appear. However, this discretion has to be exercised judiciously, with care and caution clearly mentioning in the order that there was no reason to think it proper to adjourn the hearing of the case to some other day. So, if in a case the complainant is absent on a particular day, the Court must first decide if the personal attendance of the complainant is essential on that day for the progress of the case and also if, due to any other reason, it is justified to adjourn the case to another date. When neither of these is a viable choice under the particular circumstances of the case, only then the Court is free to dismiss the complaint and acquit the accused. *"….. if the presence of complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of power envisaged under Section 256*Cr.P.C."**(N.K. Sharma versus M/s Accord Plantations Pvt. Ltd. & another, reported in 2008 (2) Latest HLJ 1249)**

Death of the Complainant

Recently, in the case of **Chand Devi Daga v. Manju K. Humatani[36],** the Supreme Court

33. (1935)62 Cal 1119)

34. [1977] 1 S.C.R. 125

35. (2002) 7 SCC 726

36. (2018) 1 SCC 71

relied upon Section 302 of Criminal Procedure Code (and certain other sections) and certain previous judgments to hold that, with the permission of the court, a criminal complaint can be prosecuted by the successors of the complainant after his death.

As per Sec 302 of Cr.P.C –

"(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the Advocate General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader."

It is quite clear from the above section that the court has the power to permit the prosecution to be conducted by **any person** other than a police officer below the rank of Inspector. And, such "any person" would definitely include the heirs of the complainant.

However, the successors of the complainant will need to obtain permission from the court to continue prosecution after death of the complainant.

2. When Criminal proceedings are barred by limitation of time

Section 468 of Cr.P.C prescribes the period of limitation for filing a complaint in the Court either by State or a private person. The bar to taking cognizance applies only to those offences which are punishable with imprisonment for a term up to three years. As per this section, "Except as otherwise provided elsewhere in this Code, no Court, shall take cognizance of an offence of the category specified in sub-section (2) after the expiry of the period of limitation. The period of limitation shall be — (a) six months, if the offence is punishable with fine only; (b) one year, if the offence is punishable with imprisonment for a term not exceeding one year; (c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years. (d) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment"

The reasons which prompted insertion of the new chapter for putting a bar of limitation on prosecution were as follows -

(1) As time passes the testimony of witnesses becomes weaker and weaker because of lapse of memory and evidence becomes more and uncertain with the result that the danger of error becomes greater.

(2) For the purpose of peace and repose it is necessary that an offender should not be kept under continuous apprehension that he may be prosecuted at any time particularly because with

the multifarious laws creating new offences many persons at some time or the other commit some crime or the other. People will have no peace of mind if there is no period of limitation even for petty offences.

(3) The deterrent effect of punishment is impaired if prosecution is not launched and punishment is not inflicted before the offence has been wiped off the memory of the persons concerned.

(4) The sense of social retribution which is one of the purposes of criminal law loses its edge after the expiry of a long period.

(5) The period of limitation would put pressure on the organs of criminal prosecution to make every effort to ensure the detection and punishment of the crime quickly.

The Apex Court has analysed this section quite extensively in **Japani Sahoo v Chandra Sekhar Mohanty**[37] and held that, *"for the purpose of computing the period of limitation, the relevant date must be considered as the date of filing of complaint or initiating criminal proceedings and not the date of taking cognizance by a Magistrate or issuance of process by a Court. We, therefore, overrule all decisions in which it has been held that the crucial date for computing the period of limitation is taking of cognizance by the Magistrate/Court and not of filing of complaint or initiation of criminal proceedings."* It is thus clear that the limitation prescribed is only for filing of the complaint or initiation of prosecution and not for taking cognizance of offence and, the period of limitation starts from the date of commission of offence or from the date of knowledge of commission of offence. The point of time the Court takes cognizance of a Criminal complaint is the stage at which the complaint is presented to the Court or filed in the Court and, it is this date which is relevant for computing the limitation.

The question of bar of limitation can be raised at any stage of proceeding but, it cannot be raised for the first time at the revisional stage. Though, it must be noted that the delay can be condoned by the Court under section 473 of Cr.P.C if the Court is satisfied that the delay has been properly explained or if it is necessary to do so in the interest of justice. However, it is necessary to give notice to the accused for being heard on this point and, a specific order must be passed in this regard. Normally this order of condoning delay should be passed at the time of cognizance, however, court can extend benefit of sec 473 to the prosecution even after taking cognizance when full facts are brought before it during trial. **[Shankar Lal Bhargava vs State of UP**[38]**]** The remedy against an order of taking cognizance against the provisions of Sec 468 Cr.P.C lies in filing Revision under section 397(1) or filing for Quashing of Proceedings under section 482 of the Code.

3. Double Jeopardy

Double jeopardy, non bis in idem or ne bis in idem is a procedural defence that prevents

37. 2007 Cri LJ 4068 (SC)

38. 1985(1) Crimes 265

an accused person from being tried again on the same (or similar) charges following a valid acquittal or conviction in the same jurisdiction. This principle has been enshrined as a fundamental right in our Constitution in article 20 (2) which states that no person shall be prosecuted and punished for the same offence, more than once. It has also been incorporated into Cr.P.C as Sec 300.

As per Sec 300(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Sub-Section (1) of section 221, or for which he might have been convicted under Sub-Section (2) thereof.

If the accused raises a plea that he was earlier tried for the same offence and was convicted or acquitted of the same and that according to the principle of autrefois convict or autrefois acquit he cannot be tried again, then the proceeding is barred. In order to stop the trial of a person already tried, it must be shown that—

(1) Person has been tried by a competent Court for the same offence or one for which he might have been charged or convicted at that trial, on the same facts

(2) He had been convicted or acquitted at the trial; and

(3) Such conviction or acquittal is in force.

P. Ramanatha Aiyar's Advanced Law Lexicon states that the doctrine of double jeopardy is a protection against prosecution twice for the same offence. Article 20(2) of The Constitution of India adopts this principle though by limiting its applicability in a case where the accused has been both prosecuted and punished for the same offence previously. The American principle is that there may be jeopardy even though the person was not actually punished in the previous proceeding. Thus, the principle of double jeopardy has a twin role. One is to ensure that no one should be punished twice for the same offence. And the other is to ensure that no one should be prosecuted twice for the same offence. **[Union of India ... vs Rayees-Ul-Haque And Another[39]]** In **Mohammad Safi v. The State of West Bengal[40]** the accused was tried on the previous occasion by a special court on the basis of a charge-sheet submitted by the police under Section 409, Indian Penal Code. After the conclusion of the trial the special court acquitted him not on merits but on the erroneous conclusion that the court had no jurisdiction to take cognizance of the offence on the police challan and, therefore, the whole proceeding was without jurisdiction. Thereafter, a formal complaint was preferred by the public prosecutor as required by law and the Special Judge took cognizance of the offence and commenced a fresh proceeding against the accused. Plea of autrefois acquit was pressed into service by the accused on basis of the previous

39. 2018, Allahabad High Court, Writ-A No. 57572 of 2012

40. AIR 1966 69(12)

acquittal but the same was repelled by the High Court. In appeal by certificate, the Supreme Court upheld the view taken by the High Court and held that the previous acquittal of the petitioner-accused could not operate as an acquittal in the eyes of law so as to bar a subsequent trial. This has been explained well in a recent case in which it was held that, where the accused has not been tried at all and convicted or acquitted, the principles of "double jeopardy" cannot be invoked at all. **[State of Mizoram vs. Dr. C. Sangnghina][41]**

Maqbool Hussain vs The State of Bombay[42], "…. The fundamental right which is guaranteed in article 20(2) enunciates the principle of "autrefois convict" or "double jeopardy". The roots of that principle are to be found in the well-established rule of the common law of England "that where a person has been convicted of an offence by a court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence." (Per Charles J. in Beg. v. Miles (1). To the same effect is the ancient maxim "Nemo bis debetpunire pro uno delicto", that is to say that no one ought to be twice punished for one offence or as it is sometimes written "pro eadem causa", that is, for the same cause…… the issue is whether the defendant has previously been in jeopardy in respect of the charge on which he is arraigned, for the rule of law is that a person must not be put in peril twice for the same offence. The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting one, are sufficient to justify a conviction of the other, not that the facts relied on by the Crown are the same in the two trials. A plea of 'autrefois acquit' is not proved unless it is shown that the verdict of acquittal of the previous charge necessarily involves an acquittal of the latter."

The Constitution Bench of the Apex Court in **S. A. Venkataraman v. Union of India and Anr[43]** had again occasion to consider the scope of Article 20(2) of the Constitution, of India. In the aforesaid case, the writ petitioner had filed a petition for quashing criminal proceedings started against the petitioner in the Court of Special Judge, Sessions Court, Delhi. The petitioner was a member of the Indian Civil Service and against him, an enquiry was directed to be conducted in accordance with provisions of Public Servants (Inquiries) Act of 1850. In the said Inquiry, the charges against the petitioner were found proved and he was dismissed from service after consultation with the Union Public Service Commission. Subsequent to dismissal, a charge-sheet was submitted in the Court of Special Judge under Section 161/165 of the Indian Penal Code and Section 5(2) of the Prevention of Corruption Act. The said criminal case was sought to be quashed by the writ petitioner on the ground that the said criminal proceeding is barred by principle of double jeopardy. The Apex Court rejected the contention and held that in the aforesaid case, the principle of double jeopardy is not attracted. It was observed by the court that the words "prosecuted and punished" are to be taken not distributively so as to mean prosecuted 'or' punished. Both the factors must exist in order that the operation of the clause may be attracted. It

41. AIR 2018 SC 5342

42. 1953 AIR 325

43. AIR 1954 SC 375

was held that the proceedings under the Sea Customs Act before a Customs authority, who ordered confiscation of goods, were not "prosecution", nor the order of confiscation a 'punishment' within the meaning of Article 20(2) inasmuch as the Customs authority was not a Court or a judicial tribunal and merely exercised administrative powers vested in him for revenue purposes.

In **Union of India and others v. Sunil Kumar Sarkar[44],** the Apex Court had occasion to consider the principle of double Jeopardy. In the aforesaid case in a court-martial under Army Act, rigorous Imprisonment for one year was awarded and, in the meantime, disciplinary proceedings were initiated under Rule 19 of Central Civil Services (Classification, Control and Appeal) Rules, 1956. The respondent in that case was dismissed from service. He challenged the conviction order as well as the dismissal order. The argument on the basis of principles of double jeopardy was expressly repelled, holding that the two proceedings operate in two different fields though the crime or the misconduct might arise out of the same act. The court-martial proceedings deal with the penal aspect of the misconduct while the proceedings under the Central Rules deal with the disciplinary aspect of the misconduct. The two proceedings do not overlap.

In view of above discussion, it is thus clear that the principle of double jeopardy has a twin role. One is to ensure that no one should be punished twice for the same offence and, the other is to ensure that no one should be prosecuted twice for the same offence. If a petition is filed on behalf of accused u/s 300 Cr.P.C, the court must decide the same in consonance with the prescribed law in this regard and the guiding principles as laid down by various judicial pronouncements on this point.

4. Power of court to stop proceedings in certain cases

Section 258 of the Code corresponds to Section 249 of the Code of Criminal Procedure, 1898 with minor changes. It states that, "In any summons- case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case, release the accused, and such release shall have the effect of discharge."

From a bare perusal of the section itself, it is clear that this section applies to 1) A Summon Trial case, 2) Instituted on the basis of police report.

However, the Apex Court, vide judgment in the case of **M/S Meters and Instruments vs Kanchan Mehta[45]** has extended its applicability to check bounce cases u/s 138 NI Act which though a summons trial case, is instituted on the basis of complaint and not police report. The

44. 2001 (3) SCC 414

45. AIR 2017 SC 4594

Supreme Court held that, *"While it is true that in Subramanium Sethuraman versus State of Maharashtra this Court observed that once the plea of the accused is recorded under Section 252 of the Cr.P.C., the procedure contemplated under Chapter XX of the Cr.P.C. has to be followed to take the trial to its logical conclusion, the said judgment was rendered as per statutory provisions prior to 2002 amendment. The statutory scheme post 2002 amendment as considered in Mandvi Cooperative Bank and J.V. Baharuni (supra) has brought about a change in law and it needs to be recognised. After 2002 amendment, Section 143 of the Act confers implied power on the Magistrate to discharge the accused if the complainant is compensated to the satisfaction of the Court, where the accused tenders the cheque amount with interest and reasonable cost of litigation as assessed by the Court. Such an interpretation was consistent with the intention of legislature. The court has to balance the rights of the complainant and the accused and also to enhance access to justice…….. Appropriate order can be passed by the Court in exercise of its inherent power under Section 143 of the Act which is different from compounding by consent of parties. Thus, Section 258 Cr.P.C. which enables proceedings to be stopped in a summons case, even though strictly speaking is not applicable to complaint cases, since the provisions of the Cr.P.C. are applicable "so far as may be", the principle of the said provision is applicable to a complaint case covered by Section 143 of the Act which contemplates applicability of summary trial provisions, as far as possible, i.e, with such deviation as may be necessary for speedy trial in the context…….. Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view of presumption under Section 139 but the standard of such proof is "preponderance of probabilities". The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect…… In view of the above, we hold that where the cheque amount with interest and cost as assessed by the Court is paid by a specified date, the Court is entitled to close the proceedings in exercise of its powers under Section 143 of the Act read with Section 258 Cr.P.C".*

It has been held that power u/s 258 must be exercised sparingly and only if exceptional circumstances appear. The underlying principle behind this provision is clearly to prevent miscarriage of justice. The circumstances where its application has been held to be justified are:

- Where police did not complete investigation in a summons trial case within 6 months of the arrest of accused as mandated by sec. 167(5) of Cr.P.C and, cognizance was taken by Magistrate, the proceedings were quashed by The Delhi High Court, allowing application of accused u/s 258 Cr.P.C (Raj Singh vs State 1984 (1) Crimes 755)

- In a case u/s 279 and 337 of IPC wherein the victim and the IO had been examined and, the victim had turned hostile to prosecution, but Magistrate refused to exercise jurisdiction u/s 258 Cr.P.C, The Karnataka High Court, taking into consideration that the offence had taken place in December 1983 and despite being at the fag end of 1987, very little or tardy progress was made by the prosecution in this case, and taking into consideration that the remaining witnesses in the case were formal, held that this would be a fit case in which the Magistrate ought to have exercised the power vested in him under Section 258Cr.P.C. **(M. Subramanyam vs State Of Karnataka)**[46] In **Kamala Rajaram vs State Of Kerala**[47]**,** it was held by Kerala High Court that in a summons case instituted otherwise than upon a complaint, Section 251 read with Section 258Cr.P.C. clothes the learned Magistrate with the requisite power to discontinue further proceedings and release the accused at the stage of Section 251Cr.P.C or later if the learned Magistrate feels that the allegations and the materials placed before him do not justify continuance of the proceedings against the indictee. Directing continuance of proceedings when allegations and materials collected do not justify such continuance will be the worst form of injustice.
- In **Ellanda Pratap And Anr. vs The State**[48]**,** a petition was filed to quash the proceedings for case under Essential Commodities Act on the ground that the proceedings have not been continued after the court was apprised of the absence of sanction order and such termination of proceedings should be considered as stopping the proceedings contemplated under Section 258, Cr. P.C. The petition was dismissed by Andhra High Court with observation that, *"….The discontinuation of proceedings for whatever reason cannot be brought within the purview of Section 258. In a situation where the proceedings are abated in view of want of jurisdiction or sanction of prosecution and allied reasons the question of acquittal or discharge does not arise and Section 258 cannot be pressed into service. After certain progress in the trial, it was discovered that there was no sanction and as such initiation of prosecution proceedings is not authorized and the complaint is rejected on that score and further proceedings are dropped and such an order or proceedings are totally alien to Section 258."*
- In **State of Gujarat vs Lohana Dhirajlal Mohanlal**[49] the learned Magistrate found from the Police papers that along with the articles which were seized by the Police from the accused, there was one permit, which authorised the possession of one bottle of denatured spirit for domestic purpose. The spirit which was seized by

46. ILR 1988 KAR 210

47. 2006 CriLJ 1447

48. 1986 CriLJ 2108

49. 1973 CriLJ 82

the Police from the accused, was less than one bottle in quantity. In view of this, the learned Magistrate passed an order under Section 249 of the Criminal Procedure Code stopping further proceedings of the case and "releasing the accused." This order was set aside by Gujarat High Court with observation that, it was only from the perusal of the Police papers that he came to know that the accused was holding a permit. This permit does not appear to have been produced in the evidence. Moreover, there is absolutely nothing in the record of the case to show or to suggest that there was any impediment in proceeding with the case in a normal and usual way under the procedure to be adopted in summons cases.

- **It has been held that failure to secure presence of accused is not a reason to invoke section 258 Cr.P.C. In Suo Motu v. State of Kerala**[50] Kerala High Court noted that Section 258 Cr.P.C is an enabling section which gives power to a Magistrate of the First Class or with the previous sanction of the Chief Judicial Magistrate, any other judicial Magistrate, to stop the proceedings at any stage without pronouncing a judgment by recording the reasons for the same. The provision states, "*when stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, the learned Magistrate shall pronounce a judgment of acquittal. In any other case, the court is empowered to release the accused and such release shall have the effect of discharge*". The provision could be applied only in unusual circumstances wherein, prima facie no case could be made out against the accused or for the reason that the prosecution was bound to fail due to a technical error. The reason that the accused had absconded or that despite the initiation of coercive proceedings, his presence could not be secured was held to be not enough to invoke Section 258 of the Cr.P.C.

Revival of the Proceedings

As per Section 300 (5) of Cr.P.C a person discharged under Section 258 shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first mentioned Court is subordinate. From the very construction of the provision contained herein, it is clear that revival of a case in which proceeding has been stopped has not been totally barred by statute.

Renuka vs State Of Karnataka & Anr[51] A first information report on the said basis was lodged for commission of offences punishable under Sections 447, 341, 323 and 427 of the Indian Penal Code. Cognizance of offences was taken after submission of charge-sheet. Processes were issued against the accused. The same having not been served, non-bailable warrant was issued. The matter was listed on various dates. Thereafter, the learned Magistrate stopped proceedings

50. 2019 SCC OnLine Ker 2239

51. 2009(l) Crimes 421 (SC)

u/s 258 Cr.P.C on the ground that accused had vacated her address and her whereabouts were not known. Subsequently, a requisition was filed praying for issuance of non-bailable warrant of arrest to the accused upon reopening the case. On the basis of the said purported requisition, the case was reopened and a non- bailable warrant of arrest was issued against the appellant. The appellant filed an application u/s 482 Cr.P.C before the Karnataka High Court, which was dismissed and, the matter reached the Supreme Court. It was held by the Supreme Court that in the case, no order for release of the accused was passed. No order of releasing the accused was necessary to be passed as the appellant was not before the court. She had not even been arrested. Non-bailable warrant of arrest issued against her had not been executed. The proceedings were stopped by the learned Magistrate in terms of the order dated 14.10.2004. No consequential order was passed and indeed could not have been passed. The benefit of effect of discharge could have been claimed by the appellant had she been directed to be released; the effect of discharge being correlated with release. If she had not been released, the question of her obtaining the benefit of the effect of discharge does not arise. It was held that Magistrate in a situation of this nature could revive the proceedings.

5. Withdrawal by Prosecution

Any crime is said to be committed not against just the individual but the entire society and generally the Public Prosecutor or the Assistant Public prosecutor is the authority responsible to conduct the case against the accused in the court of law. The power to withdraw prosecution under certain given circumstances has also been vested by legislature in the Public Prosecutor. The peculiar power of Public Prosecutor from withdrawal of prosecution can be found in the common law of many countries. Under English Law Section 23 of the Prosecution of Offences Act 1985 speaks about the withdrawal from prosecution. So far as American legal system is concerned, the dogma of withdrawal from prosecution is designated as ***Nolle prosuqui*** entering in the records that the prosecution will no longer proceed further. Section 321 of Criminal Procedure Code, 1973 deals with the aspect of withdrawal from prosecution by the Public Prosecutor. This section corresponds to Sec 494 of the old Cr.P.C.

Section 321 of the Cr.P.C. reads as follows, *"The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal,*

1. *if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;*
2. *if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences:*

Provided that where such offence

i. was against any law relating to a matter to which the executive power of the Union extends, or

ii. was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or

iii. involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

iv. was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution."

The interpretation of this section has been the subject of many judicial pronouncements. The legal debate regarding this aspect began in **Devendra Kumar Rai v Syed Yar Bakht Chaudhury**[52] wherein it was held that the Magistrate ought not to have permitted withdrawal of the case as there was prima facie evidence to support the occurrence. It was observed by the Court that, *"In the public interests it is desirable, nay more, it is necessary, that matters of that kind should be proved to the full and that if anyone has been guilty of any offence against the law, in connection with it he should be punished."*

In the case of **M.N. Sankara Narayanan Nair v P.V. Balakrishnan**[53] the Supreme Court tried to outline the guideline in regard to which the public prosecutor can exercise his or her discretion. The court observed that the discretion is guided by the implicit requirement that the withdrawal should be in the interest of administration of justice. The Supreme Court in **Rajender Kumar Jain v State**[54] observed that in cases when going ahead with prosecution causes or threatens to cause violence, mass agitations, communal violence, student unrests etc., it is okay and in the interests of public for the public prosecutor to withdraw from prosecution in such particular cases. The court further observed that when deciding between going forward with prosecution and withdrawing from prosecution in cases which threaten the peace of public, the state government is right in withdrawing from the prosecution. The court held that the narrower public interest of prosecuting the accused ought to be jettisoned for securing larger public interest of maintaining peace and tranquility in society.

52. AIR 1939 Cal 220

53. (1972) 1 SCC 318

54. (1980) 3 SCC 435

In the case of **Subhash Chandra Vs. Chandigarh Administration**[55] it was held that the Public Prosecutor who alone is entitled to pray for withdrawal, is to act not as a part of executive but as a judicial limb and in praying for withdrawal he is to exercise his independent discretion even if it incurs the displeasure of his master affecting continuance of his office.

In **Sheonandan Paswan v State of Bihar**[56] while explaining the ambit of the Section, Supreme Court observed that albeit the Public Prosecutor is the officer of the court but he is also the agent or representative of the government and thus, he is bound to follow the advice or opinion of the government or leave the post. It was further observed that the court hearing the application for withdrawal from prosecution acts as a supervisor and thus need not to go into the evidence of the case concerned. The court should not be concerned with what the result would be if all the evidence is considered. All the court should be concerned with is that in considering the material placed before it, whether the public prosecutor applied his free mind and whether the reasoning adopted by him suffers from inherent perversity which may lead to injustice.

The Supreme Court further elaborated in the case that neither complainant nor charge sheet witness has any locus standi in the exercise of discretion of the Public Prosecutor to withdraw from the prosecution. If a citizen who has some concern deeper than that of a busybody, the door of the court will be kept ajar for him. He cannot be turned away at the gates. If the issue raised by him is justifiable, it may still be considered. However, if it is merely a question to be gone into and examined in criminal case, registered against accused persons, it is for them and them alone to raise such questions and challenge the proceedings initiated against them at the appropriate time before the proper forum and not for third parties under the grab of public interest litigant. A person who is acting bona fide and having sufficient interest in the proceedings alone can initiate Public Interest Litigation. The clear implication of this observation is that there is no bar to opposition of the withdrawal by a third party, but such third party must have genuine concern.

In the case of **R.K. Jain etc., v. State through Special Police Establishment and Ors**[57] the summary of legal position of section 321 Cr.P.C has been aptly given by Chinnappa Reddy, J. as:

> "1 . Under the scheme of the Code prosecution of an offender for a serious offence is primarily the responsibility of the Executive.
>
> 2. The withdrawal from the prosecution is an executive function of the Public Prosecutor.
>
> 3. The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else.
>
> 4. The Government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.

55. (1980) 2SCC 155

56. (1987) 1 SCC 288

57. [1980] 3 S.C.R. 982

5. The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and, political purposes
6. The Public Prosecutor is an officer of the Court and responsible to the Court.
7. The Court performs a supervisory function in granting its consent to the withdrawal.
8. The Court's duty is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The Court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution. We may add it shall be the duty of the Public Prosecutor to inform the Court and it shall be the duty of the Court to appraise itself of the reasons which prompt the Public Prosecutor to withdraw from the Prosecution. The Court has a responsibility and a stake in the administration of criminal justice and so has the Public Prosecutor, its 'Minister of Justice'. Both have a duty to protect the administration of criminal justice against possible abuse or misuse by the Executive by resort to the provisions of s.321 Criminal Procedure Code. The independence of the judiciary requires that once the case has travelled to the Court, the Court and its officers alone' must have control over the case and decide what is to be done in each case."

In the case of **Abdul Wahab K vs State of Kerala**[58] it was held that, *"We are compelled to recapitulate that there are frivolous litigations but that does not mean that there are no innocent sufferers who eagerly wait for justice to be done. That apart, certain criminal offences destroy the social fabric. Every citizen gets involved in a way to respond to it; and that is why the power is conferred on the Public Prosecutor and the real duty is cast on him/her. He/she has to act with responsibility. He/she is not to be totally guided by the instructions of the Government but is required to assist the Court; and the Court is duty bound to see the precedents and pass appropriate orders."*

In **Rahul Agarwal v. Rakesh Jain**[59]**,** the Court while dealing with the application under Section 321 Cr.P.C, referred to certain decisions where the earlier decision of the Constitution Bench in **Sheonandan Paswan** *(supra)* has been referred and held: *"10. From these decisions as well as other decisions on the same question, the law is very clear that the withdrawal of prosecution can be allowed only in the interest of justice. Even if the Government directs the Public Prosecutor to withdraw the prosecution and an application is filed to that effect, the court must consider all relevant circumstances and find out whether the withdrawal of*

58. [2017 (3) KLT 548]

59. (2005) 2 SCC 377

prosecution would advance the cause of justice. If the case is likely to end in an acquittal and the continuance of the case is only causing severe harassment to the accused, the court may permit withdrawal of the prosecution. If the withdrawal of prosecution is likely to bury the dispute and bring about harmony between the parties and it would be in the best interest of justice, the court may allow the withdrawal of prosecution. The discretion under Section 321 of the Code of Criminal Procedure is to be carefully exercised by the court having due regard to all the relevant facts and shall not be exercised to stifle the prosecution which is being done at the instance of the aggrieved parties or the State for redressing their grievance. Every crime is an offence against the society and if the accused committed an offence, society demands that he should be punished. Punishing the person who perpetrated the crime is an essential requirement for the maintenance of law and order and peace in the society. Therefore, the withdrawal of the prosecution shall be permitted only when valid reasons are made out for the same."

In **Bairam Muralidhar v. State of A. P**[60]**,** while appreciating the said provision, it has been laid down that, *"…. The court as has been held in Abdul Karim case, is required to give an informed consent. It is obligatory on the part of the court to satisfy itself that from the material it can reasonably be held that the withdrawal of the prosecution would serve the public interest. It is not within the domain of the court to weigh the material. However, it is necessary on the part of the court to see whether the grant of consent would thwart or stifle the course of law or cause manifest injustice. A court while giving consent under Section 321 of the Code is required to exercise its judicial discretion, and judicial discretion, as settled in law, is not to be exercised in a mechanical manner. The court cannot give such consent on a mere asking. It is expected of the court to consider the material on record to see that the application had been filed in good faith and it is in the interest of public interest and justice. Another aspect the court is obliged to see is whether such withdrawal would advance the cause of justice. It requires exercise of careful and concerned discretion because certain crimes are against the State and the society as a collective demands justice to be done. That maintains the law-and-order situation in the society. The Public Prosecutor cannot act like the post office on behalf of the State Government. He is required to act in good faith, peruse the materials on record and form an independent opinion that the withdrawal of the case would really subserve the public interest at large. An order of the Government on the Public Prosecutor in this regard is not binding. He cannot remain oblivious to his lawful obligations under the Code. He is required to constantly remember his duty to the court as well as his duty to the collective."*

Based on these judicial pronouncements, the following rules emerge for the Public Prosecutor who seeks to withdraw a case:

60. (2014) 10 SCC 380

- The Public Prosecutor may proceed to withdraw a case if there is no sufficient or requisite evidence to proceed against the accused.
- The Public Prosecutor may proceed to withdraw a case if he realises that furthering the prosecution case will lead to negating the prosecution evidence.
- The Public Prosecutor may proceed to withdraw a case if proceeding with the case may not be in the larger public interest, peace or tranquility.
- The Public Prosecutor must act in good faith. He must not act as a part of executive but as a judicial limb.
- He must peruse the materials on record. He/she is not to be totally guided by the instructions of the Government but is required to assist the Court.
- He must form an independent opinion and must and must not be guided by the dictates of the state.

It is well settled that consent of the Court is a pivotal factor under section 321 Cr.P.C. Hence, court also has to ensure certain facts before grant of consent. The guidelines for the Court before granting consent may be enumerated as follows:

- Whether the material on record supports the fact that the application had been filed in good faith
- Whether the public prosecutor applied his free mind and whether the reasoning adopted by him suffers from inherent perversity which may lead to injustice.
- Whether such withdrawal would advance the cause of justice. It must be ensured that the consent does not jeopardize the public interest and public policy.

6. Withdrawal by Complainant

Sec. 257 of Cr.P.C provides for withdrawal of complaint by the complainant. As per this section, if a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint against the accused, or if there be more than one accused, against all or any of them, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused against whom the complaint is so withdrawn.

The conditions to which withdrawal of a complaint is subject may be listed as follows:

- This section is under Chapter XX of Cr.P.C which relates to trial of Summons cases by Magistrates. Hence, it is clear that it only applies to summons cases instituted on complaint.
- There must exist, a request from the complainant with sufficient grounds for a case to be disposed u/s 257 Cr.P.C. However, the complainant cannot claim to withdraw the complaint as a matter of right.

- The withdrawal of the complaint is subject to the satisfaction of the Magistrate that there are sufficient grounds for permitting such withdrawal. The Magistrate is required to apply his judicial mind to the reasons which the complaint presents for withdrawing the complaint. Before granting permission, the Magistrate must satisfy himself as to the adequacy of the reasons. In the case of **Satish Dayal Mathur vs Mackinnon Mackenzie & Co.**[61] the respondent-Company instituted a complaint against the petitioner under Section 630(1)of the Companies Act and, the Magistrate summoned the petitioner to face trial under the said section. Thereafter, the complainant sought permission to withdraw the complaint on the ground that due to inadvertence/ oversight the Court had not examined the complainant under Section 200 of the Code which was mandatory in the case of a private complaint before issuing process against the accused i.e, the petitioner. This prayer was allowed by the Magistrate. Regarding this, it was held by Delhi High Court that, there was no sufficient ground for granting permission to withdraw the complaint.
- Once the permission is granted by the Magistrate to the withdrawal of the complaint, he shall acquit the accused against whom the complaint is so withdrawn.

Maintainability of second complaint after withdrawal of first

It is settled position of law that there is no provision in the Criminal Procedure Code (Cr.P.C) or any other statute which debars a complainant from making a second complaint on the same allegations, when the first complaint did not lead to conviction, acquittal or discharge, was not decided on merits. However, if the earlier disposal of the complaint had been on merits and in a manner known to law, the second complaint on almost identical facts which were raised in the first complaint would not be maintainable. Traversing through the judicial pronouncements regarding this matter, over the years will be helpful to establish the accepted practice.

In **Yusopalli Mulla v. The King**[62] the Judicial Committee of the Privy Council had to consider the effect of an order of acquittal under Section 403 of the Code of Criminal Procedure passed by a Court without jurisdiction on a subsequent trial on the same facts. The appellant was a dealer in crockery, glassware and cutlery in Bombay and was charge-sheeted for an offence of hoarding and profiteering under the Hoarding and Profiteering Prevention Ordinance, 1943. After the charge was framed and the prosecution witnesses were examined, it was submitted for the prosecution that the Court was not competent to try the accused for the offence as the sanction granted for the prosecution under Section 14 of the Ordinance was not valid and that the prosecution did not wish to recall the other witnesses for cross-examination. On that submission, the learned Magistrate passed an order that "as the invalidity of the sanction invalidates the prosecution in Court, the accused was acquitted." In a subsequent trial on the same facts and for

61. 1986 (3) Crimes 203

62. AIR 1949 PC 264

the same offence after obtaining a valid sanction, it was contended that the former order operated as an order of acquittal. Their Lordships of the Judicial Committee held that ".... the order of acquittal in such a case would be without jurisdiction and would only operate as order of discharge, and would not bar a second trial of the same accused on same facts.

In **Veerathaiah And Anr. vs Ramaswamy Iyengar**[63] it was held that the order passed by the Magistrate permitting the complainant to withdraw his private complaint with liberty to file a fresh complaint was one without jurisdiction and that the legal effect of that order is one of discharge of the accused without trial and not of acquittal. In this view, the present prosecution was not barred by the provisions of Section 403 of the Code.

In **Satish Dayal Mathur vs Mackinnon Mackenzie And Company**[64]**,** as mentioned above, the Delhi High Court had held that there was no sufficient ground for granting permission for withdrawal of the first complaint. It was observed that the learned Additional Chief Metropolitan Magistrate was of the view, though erroneously, that the entire proceedings were illegal because of noncompliance with the mandatory provisions of Section 200 so, he could not have passed an order of acquittal under sec 257 Cr.P.C. It was further held that, the prosecution evidence had yet to start and no objection whatsoever seems to have been taken by the accused i.e. the petitioner to the legality of the trial. Hence, it cannot be deemed to be an acquittal by legal fiction so as to operate as a bar to a subsequent prosecution.

Hence, as per the settled principle, once withdrawal of a complaint is allowed, maintainability of a second complaint on the same facts will be permissible only if the permission granting withdrawal did not amount to acquittal as per esc 257 Cr.P.C

7. Abatement of Proceedings on the Death of the Accused

The ultimate object of the criminal proceedings is to punish the accused on being found guilty and convicted of any offence. The legal maxim, 'actio personalis moritur cum persona' [a personal action dies with the person] explains the rational of abatement of proceedings on the death of the accused. The continuance of criminal proceedings after the death of the accused will be infructuous and meaningless. This is a basic legal principle of common logic, hence, there is no specific provision in the Code regarding abatement of proceedings on the death of the accused.

Since there is no specific provision for this, the procedure is also to be decided by the Court. The practice in this regard is generally to call for a report from the Police Station within the area of which the deceased accused resided. This usually takes a very long time to be procured and at times, the cases go on awaiting confirmation report of death of accused for several years. The alternate procedure is directing the advocate of the accused, who reports his death, to file the death certificate in original. If it is found satisfactory and reliable, a copy of same is retained on record and the proceedings against the accused are dropped.

63. AIR 1964 Kant 11

64. 1986 (3) Crimes 203

Abatement of Appeal against conviction on death of convicted accused

Section 394 Cr.P.C. deals with abatement of appeals. It reads as follows –

"394. Abatement of appeals.

(1) Every appeal under section 377 or section 378 shall finally abate on the death of the accused.

(2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant: Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply tithe Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate.

Explanation - In this section," near relative" means a parent, spouse, lineal descendant, brother or sister."

In the case of **Hodgson v. Lakeman[65],** Viscount Caldecote C.J. permitted the executors of the deceased appellant claiming an interest in the appeal against his conviction and sentence of fine to prosecute the appeal. The fine, though a small one, would have been a burden on the estate and thus the executors could be said to have had an interest in having that burden removed. This case was distinguished in **Regina v. Rowe[66].** In that case the widow of the deceased appellant sought leave to prosecute the appeal in which he had challenged his conviction on four counts of obtaining money by false pretences and the sentence of imprisonment to 18 months. The ground on which the widow's application was supported was that the conviction against her husband affected her chances of employment and her position among her friends and that if interest is the test, then the widow also had an interest. This argument was repelled by Lord Goddard C.J. who said that the Court cannot take notice of that because the interest she has was not a pecuniary one.

In the case of **Bondada Gajapathy Rao vs State of Andhra Pradesh[67],** it was submitted before the Supreme Court that the applicants have an interest in as- much as the estate of the deceased appellant would be enriched by Rs. 40,000/- if this Court ultimately finds the appellant innocent and if the Government, acting on the basis of the decision of this Court which is binding upon it, rescinds the suspension order passed against the appellant and in conformity with it pays the arrears of salary due to the appellant. The apex court observed that the only interest which the applicants have is a contingent one and is not one which could flow directly out of the ultimate decision of this Court. Relying upon the Rowe judgment, the court refused to grant the applicant leave to prosecute the appeal.

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65. [1943] 1 K.B. 15

66. [1955] 1 Q. B.D. 573

67. 1964 AIR 1645

In the recent judgment of **Ramesan (dead) through lr. Girija A vs the State of Kerala**[68] the Apex Court has decided upon the question that where the accused dies after being sentenced for imprisonment as well as for fine, whether there will be abatement of the appeal in toto. It was held that, appeal filed by the accused was not to abate and was required to be heard and decided on merits and, an opportunity was to be given to the legal heirs of the accused to make their submissions against the sentence of fine.

Thus, an appeal shall continue after the death of accused only against a sentence of fine, irrespective of whether sentence of imprisonment is part of the sentence.

8. Compounding of offences

The provision regarding compounding of offences is under sec 320 of Cr.P.C. This is the most resorted to mode of disposal without complete trial and is referred to as compromise in the common parlance. Sec 320 of Cr.P.C provides for compounding of offences.

Section 320(1) Cr.P.C provides a chart which lists offences which may be compounded by the victim with the accused, without the involvement of court. These are non-serious offences which involve a personal or private damage to the victim and can be compromised as a matter of right by the victim. The court's role herein is limited only to satisfying itself that the compromise has been done voluntarily and without any coercion or pressure. The High Court of Andhra Pradesh in the case of **Chanda Papa Rao and Ors. V. State and Anr.**[69] has held, *".... If the offence is compoundable, it can be compounded Under Section 320, Cr.P.C. For the purposes of compounding the offence, there must be a joint petition by the defacto complainant and the accused. More important feature of Section 320, Cr.P.C. is that the Court cannot refuse permission to the parties to compound the offence when they have expressed their willingness to compound the offence."*

Sec 320(2) of Cr.P.C provides a chart which lists offences which can be compounded by the victim with permission of the court. These are cognizable offences in which police can file a report and arrest without warrant. Hence, there is a statutory requirement of consent of court to be compromised. These offences cannot be compromised without the permission of court. The consent of the Court is granted where there is no adverse impact of dispute to society and the compromise is held to be done with the free consent and without any pressure.

As per proviso (3) of Sec 320 of Cr.P.C, the abetment or attempt to commit compoundable offences or, when the accused is liable u/s 34 or 149 of IPC, is also compoundable.

Who may Compound?

The general rule here is that the person to whom injury has been caused is competent to

68. Criminal Appeal no. 77 of 2020

69. 2002 (1) ALD (Crl.) 519

compromise the offence. If there is more than one victim/injured, then all such persons have to compromise for the compounding to be considered lawful.

In a case where the victim/injured is a minor, or is insane, then Sec 320 (4) provides that a person who is competent to contract on his behalf, may compound the offence. As per Sec 320(5), if the victim/injured is dead, then the offence may be compromised by his legal representative (as per the definition of the term in CPC). In both these scenarios, the consent of the court to such a compromise is mandatory.

Permission of Court

The permission or consent of the Court is mandatory in the following conditions:

- When Offence is one mentioned under Sec 320(2) of CrPC
- Where the Offence is being compounded by legal representative on behalf of the victim as per Sec 320(4) and (5) of CrPC
- Where a case which has been committed or, in which the accused has been convicted and appeal is pending, as per Sec 320 (6) of CrPC, compromise can be done only with the consent of the court before which it is pending. The rationale behind this is simply the fact that once a case is committed or judgement is pronounced, the court becomes functus officio and jurisdiction gets transferred to the court to which the case has been committed or before which an appeal against the judgment is pending. Hence, for a lawful compromise, the consent of that court is required for compromise in the case. Kerala High Court in the case of **Sudheer Kumar @ Sudheer v. Manakkandi M.K.Kunhiraman and Anr.** in Crl. M.C. No.1540 of 2007(B), ILR 2008 (1) Kerala 159, "There is no provision for compounding the offence after conviction without permission of or intervention from the court, whether the offence is compoundable, with or without permission as classified under Table I or Table II. This is because the compounding will have the effect of an acquittal and setting aside of conviction. Conviction, in the absence of appeal or revision, becomes a concluded matter. Sub-clauses 5 and 6 of Section 320 allows the compounding of offence after conviction, if appeal or revision is pending by the permission of the appellate court or revisional court as the case may be. If the case is committed for trial also, leave of the committal court is necessary for compounding. Once High Court confirms the conviction in revision, it cannot be interfered with by the High Court in view of the subsequent compounding out of court. There is no provision under Section 320 or any in the N.I. Act enabling the court to accept or permit the compounding after conviction has become final and no appeal or revision is pending against the conviction. Once the order of conviction is confirmed in revision, the revisional court cannot review or alter the conviction in view of the specific bar under Section"

Presence of Accused during Compromise

The procedure in practice for disposing a case on the basis of compromise involves filing of a joint compromise petition, signed by the victim, accused and the learned lawyers on their behalf. Hence, most courts insist on the presence of accused before any prayer of compromise on behalf of victim can be entertained. However, the Kerala High Court decided the matter quite contrary to the adopted procedure in the case of **Y.P. Baiju vs State of Kerala And Ors**[70] wherein it was held that compromise is a unilateral act to be performed by the victim alone. In this case, the questions that arose for consideration before Kerala High Court were – "Is composition of a criminal offence a unilateral act or a bilateral one? Is it necessary to insist on the appearance of an accused person to enable the victim to compound a criminal offence? Is a Criminal Court justified in insisting on a joint application for composition by the victim and the accused for invoking the powers under Section 320, Cr.P.C to accept and/or accord permission for a composition? Is there any distinction between "withdrawal" of a complaint under Section 257, Cr.P.C and composition of an offence under Section 320, Cr.P.C? Even if there be such a distinction, is that distinction relevant in the dynamics of operation under Section 320, Cr.P.C? Does such alleged distinction justify insistence by the Court on the personal appearance of the accused to consider an application for composition? In a case where the Court has chosen to issue non-bailable warrant against the accused, is it essential that such accused must appear personally before the, Court for any further steps-even for a further step for which personal presence of the accused is not essential?" After considering the questions, the Court narrated the following conclusions:

"… (1) Composition under Section 320, Cr. P. C. is a unilateral act.

(2) The victim (person shown in column 3 of Section 320(1) and 320(2)) can himself make an application for composition.

(3) It is not necessary for the Court to insist on a joint application for composition. The victim can of course make a joint application along with the accused.

(4) It is not necessary for the Court to insist on the personal appearance of the accused before Court to consider an application for composition under Section 320, Cr. P.C.

(5) The mere fact that the Court has already issued a non-bailable warrant against the accused and that is pending is no reason for the Court not to proceed further with the case. All steps for which personal presence of the accused is not necessary can be continued even if the non-bailable warrant remains unexecuted and the accused has not personally appeared."

Compromise under Negotiable Instruments Act

Section 147 of the Negotiable Instruments Act, 1881 provides for the compounding of

70. 2008 Cri L J 928

offences prescribed under the same Act, thereby serving as an exception to the general rule incorporated in sub-section (9) of Section 320 of the Cr.P.C which states that 'No offence shall be compounded except as provided by this Section'. However, the section does not specify the stage at which the offence may be compounded. This has been decided in **Damodar S. Prabhu Vs. Sayed Babalal H**[71] by the Supreme Court gave certain guidelines to be followed for compounding of cheque bounce cases. These are as follows:

- That Summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused.
- If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the Court deems fit.
- Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.
- Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount.

It was also clarified that any costs imposed in accordance with these guidelines should be deposited with the Legal Services Authority operating at the level of the Court before which compounding takes place.

Compromise in a non-compoundable Offence

Sec 320(9) Cr.P.C mandates that no offence shall be compounded except as provided by this section. In **Ram Lal vs State of J&K**[72] it has been specifically held that, offence which the law declares to be non-compoundable even with the permission of the court cannot be compounded at all. The offences which have been kept in this category are serious offences and there can be no acquittal on the basis of a compromise in a non-compoundable offence though, the fact of compromise between parties may be considered by the Court when deciding the quantum of sentence.

The recourse available to parties who mutually settle their dispute in non-compoundable cases is to get the proceedings quashed by the High Court u/s 482 of Cr.P.C. In the case of **State**

71. (2010) 5 SCC 663

72. (1999) 2 SCC 213

of Rajasthan v Shambhu Kewat[73], it was observed by Supreme Court that the power of a criminal court is circumscribed by Section 320 of the Cr.P.C while compounding of offences and it is guided solely by it. On the other hand, the high court is guided by the material on record to form an opinion whether to quash a criminal complaint in exercise of its power under Section 482 of the Cr.P.C. The exercise of this power is to meet the ends of justice, although the ultimate consequence of this may be acquittal or dismissal of indictment. It is well settled now that the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

The issue of compounding of non-compoundable offences by a high court in exercise of its inherent power under Section 482 of the Code of Criminal Procedure (Cr.P.C) has been addressed by the Supreme Court of India (Supreme Court) in a catena of decisions. However, there was a conflict in law due to varying observations made by the Supreme Court. To address this conflict, a three-judge bench of the Supreme Court comprising A K Sikri J, S Abdul Nazeer J and M R Shah J, in the case of **The State of Madhya Pradesh v Lakshmi Narayan and others[74],** laid down guidelines for the exercise of inherent power of high courts under Section 482 of the Cr.P.C while quashing criminal proceedings in case of non-compoundable offences. It was laid down that that the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised–

(i) In prosecutions having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

(ii) In respect of non-compoundable offences, which are private in nature and do not have a serious impact on society. Here, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc.

It was further observed that such power **must not be exercised –**

(i) In those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc., such offences are not private in nature and have a serious impact on society. The offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground of compromise. However, the High Court would not rest its decision merely because there is a

73. (2014) 4 SCC 149

74. Criminal Appeal No 349 of 2019 along with Criminal Appeal No 350 of 2019

mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delicate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and not when the matter is still under investigation

(ii) The offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender

9. Absence or non-appearance of accused

A stark and undeniable practical reality of the court cases is that nearly half the cases are pending at the stage of appearance of the accused. Chapter VI of the Code of Criminal Procedure, 1973 deals with the process to compel appearance. The said chapter is divided in four parts. Part 'A' relates to summons; Part 'B' relates to warrant of arrest, Part 'C' relates to proclamation and attachment; and Part 'D' relates to other rules regarding processes. The procedure adopted for compelling appearance of an accused begins with issuance of summons. If the accused does not appear after the summons being served upon him, the court issues a warrant of arrest. If the accused is reported to be evading that as well and Court has reason to believe that he has absconded or is concealing himself so that such warrant cannot be executed, the Court may publish a written proclamation as provided by section 82 of Cr.P.C. If the appearance of the accused is still not secured, the Court takes recourse to section 83 of Cr.P.C, which provides that the Court issuing a proclamation under section 82 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person if the Court is satisfied that such person is about to dispose of the whole or any part of his property or; is about to remove, the whole or any part of his property from the local jurisdiction of the Court. In most cases, even after exhausting this entire process, the appearance of accused cannot be secured and these cases linger on, overloading the case docket of the courts. To tackle such situations, Patna High Court issued letter no. 952-79 dated 27th January 1983, wherein it was specified that, *"In cases where the accused have not appeared for 2 years, warrant of arrest should be issued and thereafter actions under sections 82 & 83 of Cr.P.C should be taken and if their appearance is not secured, the cases should be closed and a report should be sent to High Court. Before passing such orders, Courts should be rather vigilant and should not depend on the note of the Office. In case some accused persons appear and some do not in the same case, they should be declared as absconders and their case should be separated and trial should proceed against the rest who have appeared. They should not be released on bail and the cases should be decided expeditiously."*

In light of this letter, when accused does not appear despite having complete knowledge of the case and, despite all processes to compel his appearance being exhausted, he is declared absconder. The name of accused is recorded in absconder register which is maintained as per Form no. (R) 5-A of Criminal Court Rules, and a permanent warrant is issued against him in red ink.

Thereafter, an opportunity is given to prosecution for adducing evidence u/s 299 of Cr.P.C, which reads as under –

299. Record of evidence in absence of accused.

(1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try , or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of- delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India

Once the process under sec 299 Cr.P.C has been exhausted, whether after recording evidence or without recording evidence, the record of the absconding accused is consigned to record room, to be produced after the absconder accused appears or is produced before court in execution of the permanent warrant issued against him.

Requisite Condition

It is well settled that, in order to declare a person as absconder the court must have a subjective reason to believe that the person has knowledge of the fact that his appearance is required in a case, but willfully avoids his appearance and delays the proceedings. This has been emphasized in several judgments. In **Joti Prasad v. State of Haryana**[75] it has been observed that evidence displays the knowledge that the person concerned was aware of his actions. Similarly, in **Arun Nivalji More v. State of Maharashtra**[76] it was observed that in order to

75. AIR 1993 SC 1167 (1169)

76. AIR 2006 SC 2886

determine whether a person has absconded it is pertinent to know that he had the required knowledge of the circumstance and had received notice to appear before the court on that requested date, time and venue. The knowledge reflects the person's state of mind being conscious of the fact of the situations. In **Sanjay Kumar vs State of Bihar &Anr**[77] the Hon'ble Patna High Court has observed that, *"10.……. basic purpose of Criminal Procedure Code is to ensure fair trial where none of the rights of the accused are compromised nor are, they unjustifiably favoured. In order to ensure presence of the parties who are relevant to the trial before the Judge concerned, it is important to follow the procedure prescribed for their appearance.……..it is the duty of the court to enquire about the service of the summonses upon the accused. If the summonses are not served, it is the bounden duty of the court to see to it that they are served. If it is found that summonses are received by the accused persons and still, they fail to appear before the court it would be a gross case of disobedience of the order of the court and in that case, it would be the duty of the Court of Magistrate to issue warrant, if necessary non-bailable to ensure the presence of the accused in the court"*

Conclusion

The time taken to dispose a case is very often a major factor in determining whether or not people consider the justice system to be just and fair. The words of William Goldstone 'Justice delayed is Justice denied' have often been quoted to describe our judicial system. However, we must remember that this maxim goes hand in hand with the other oft quoted maxim – "Justice hurried is justice buried". They reflect the two extremes in any situation and must be avoided. The need of the hour is to tread the middle path and aim to ensure speedy justice within the framework, and with assistance of the prescribed procedure under the Code.

77. Cr.Misc. No.629 of 2018

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Topic No. – 12

Methods of recording evidence by criminal courts including the recording of evidence on commission and through electronic mode; challenges, objections and solutions.

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INTRODUCTION

Entire attitude and discourse as to the way of handling the process of administration of justice, stands changed in the wake of Covid 19 pandemic along with other aspects of the formal business of the society. The word "virtual" has frequently been in the domain of discussion and also occasionally in action, but time has now come to make virtual mode not only an alternate mode of business but a regular mode of business to live with. Virtual pockets have mushroomed within and beyond the Court precincts so as to run the business of the Court to meet its cherished ends and objectives. Though in a virtual mode, the appearance of court proceeding may appear at variance but ultimate endeavor remains dispensation of efficient and expeditious justice.

Basically, the Virtual Hearings denote a process of use of technology to facilitate a hearing without the judge, counsels, parties and witnesses being physically gathered in one location. New technology and the evolution of communications systems have already transformed the process of exchanging information. Production of Evidence is a key aspect of those virtual hearings. Much can be gleaned from the ways other types of organizations do business virtually but, however, the Courts have unique needs that require thoughtful attention as they impact how evidence is submitted, stored, and shared to support a virtual hearing without compromising with the fundamentals of the criminal justice system.

The theme of this write-up is around the process of recording of evidence in a criminal trial and emphasis would be on the changing ambiance thereof after the advent of virtual modes of hearing such as. Objective of this write-up is basically to study the challenges, objections and solutions in recording of evidence in criminal trials be it in conventional mode or electronic mode or by way of commission.

The statutory law with respect to the process of recording of evidence including the prospect and permissibility of recording of evidence on Commission and through Electronic Mode (Audio-Visual Mode), may be gleaned from Chapter XXIII of Criminal Procedure Code, 1973 which comprises S.272 to 299. For easy reference the provisions are quoted below :

Statutory Provisions :

Chapter XXIII Evidence in Inquiries and Trials :

A.—Mode of taking and recording evidence

272. Language of Courts —The State Government may determine what shall be, for purposes of this Code, the language of each Court within the State other than the High Court.

273. Evidence to be taken in presence of accused — Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.

Explanation —In this section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.

274. Record in summons-cases and inquiries—(1) In all summons-cases tried before a Magistrate, in all inquiries under sections 145 to 148 (both inclusive), and in all proceedings under section 446 otherwise than in the course of a trial, the Magistrate shall, as the examination of each witness proceeds, make a memorandum of the substance of the evidence in the language of the Court:

Provided that if the Magistrate is unable to make such memorandum himself, he shall, after recording the reason of his inability, cause such memorandum to be made in writing or from his dictation in open Court.

(2) Such memorandum shall be signed by the Magistrate and shall form part of the record.

275. Record in warrant-cases — (1) In all warrant-cases tried before a Magistrate, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the Magistrate himself or by his dictation in open Court or, where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence, by an officer of the Court appointed by him in this behalf:

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

(2) Where the Magistrate causes the evidence to be taken down, he shall record a certificate that the evidence could not be taken down by him for the reasons referred to in sub-section (1).

(3) Such evidence shall ordinarily be taken down in the form of a narrative; but the Magistrate may, in his discretion take down, or cause to be taken down, any part of such evidence in the form of question and answer.

(4) The evidence so taken down shall be signed by the Magistrate and shall form part of the record.

276. Record in trial before Court of Session—(1) In all trials before a Court of Session, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by

the presiding Judge himself or by his dictation in open Court, or under his direction and superintendence, by an officer of the Court appointed by him in this behalf.

(2) Such evidence shall ordinarily be taken down in the form of a narrative, but the presiding Judge may, in his discretion, take down, or cause to be taken down, any part of such evidence in the form of question and answer.

(3) The evidence so taken down shall be signed by the presiding Judge and shall form part of the record.

277. Language of record of evidence—In every case where evidence is taken down under section 275 or 276 —

(a) if the witness gives evidence in the language of the Court, it shall be taken down in that language;

(b) if he gives evidence in any other language, it may, if practicable, be taken down in that language, and if it is not practicable to do so, a true translation of the evidence in the language of the Court shall be prepared as the examination of the witness proceeds, signed by the Magistrate or presiding Judge, and shall form part of the record;

(c) where under clause (b) evidence is taken down in a language other than the language of the Court, a true translation thereof in the language of the Court shall be prepared as soon as practicable, signed by the Magistrate or presiding Judge, and shall form part of the record:

Provided that when under clause (b) evidence is taken down in English and a translation thereof in the language of the Court is not required by any of the parties, the Court may dispense with such translation.

278. Procedure in regard to such evidence when completed — (1) As the evidence of each witness taken under section 275 or section 276 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or presiding Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness and shall add such remarks as he thinks necessary.

(3) If the record of the evidence is in a language different from that in which it has been given and the witness does not understand that language, the record shall be interpreted to him in the language in which it was given, or in a language which he understands.

279. Interpretation of evidence to accused or his pleader — (1) Whenever any evidence is given in a language not understood by the accused, and he is present in Court in person, it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

(3) When documents are put for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

280. Remarks respecting demeanour of witness.—When a presiding Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

281. Record of examination of accused — (1) Whenever the accused is examined by a Metropolitan Magistrate, the Magistrate shall make a memorandum of the substance of the examination of the accused in the language of the Court and such memorandum shall be signed by the Magistrate and shall form part of the record.

(2) Whenever the accused is examined by any Magistrate other than a Metropolitan Magistrate, or by a Court of Session, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full by the presiding Judge or Magistrate himself or where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence by an officer of the Court appointed by him in this behalf.

(3) The record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable, in the language of the Court.

(4) The record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(5) It shall thereafter be signed by the accused and by the Magistrate or presiding Judge, who shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(6) Nothing in this section shall be deemed to apply to the examination of an accused person in the course of a summary trial.

282. Interpreter to be bound to interpret truthfully.—When the services of an interpreter are required by any Criminal Court for the interpretation of any evidence or statement, he shall be bound to state the true interpretation of such evidence or statement.

283. Record in High Court — Every High Court may, by general rule, prescribe the manner in which the evidence of witnesses and the examination of the accused shall be taken down in cases coming before it, and such evidence and examination shall be taken down in accordance with such rule.

B.— Commissions for the examination of witnesses

284. When attendance of witness may be dispensed with and commission issued.— (1) Whenever, in the course of any inquiry, trial or other proceeding under this Code, it appears to a Court or Magistrate that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the Court or Magistrate may dispense with such attendance and may issue a commission for the examination of the witness in accordance with the provisions of this Chapter:

Provided that where the examination of the President or the Vice-President of India or the Governor of a State or the Administrator of a Union territory as a witness is necessary for the ends of Justice, a commission shall be issued for the examination of such a witness.

(2) The Court may, when issuing a commission for the examination of a witness for the prosecution, direct that such amount as the Court considers reasonable to meet the expenses of the accused, including the pleader's fees, be paid by the prosecution.

285. Commission to whom to be issued — (1) If the witness is within the territories to which this Code extends, the commission shall be directed to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate, as the case may be, within whose local jurisdiction the witness is to be found.

(2) If the witness is in India, but in a State or an area to which this Code does not extend, the commission shall be directed to such Court or officer as the Central Government may, by notification, specify in this behalf.

(3) If the witness is in a country or place outside India and arrangements have been made by the Central Government with the Government of such country or place for taking the evidence of witnesses in relation to criminal matters, the commission shall be issued in such form, directed to such Court or officer, and sent to such authority for transmission as the Central Government may, by notification, prescribed in this behalf.

286. Execution of commissions — Upon receipt of the commission, the Chief Metropolitan Magistrate, or Chief Judicial Magistrate or such Metropolitan or Judicial Magistrate as he may appoint in this behalf, shall summon the witness before him or proceed to the place where the witness is, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials or warrant-cases under this Code.

287. Parties may examine witnesses — (1) The parties to any proceeding under this Code in which a commission is issued may respectively forward any interrogatories in writing which the Court or Magistrate directing the commission may think relevant to the issue, and it shall be lawful for the Magistrate, Court or officer to whom the commission, is directed, or to whom the duty of executing it is delegated, to examine the witness upon such interrogatories.

(2) Any such party may appear before such magistrate, Court or Officer by pleader, or if not in custody, in person, and may examine, cross- examine and re-examine (as the case may be) the said witness.

288. Return of commission — (1) After any commission issued under section 284 has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the Court or Magistrate issuing the commission; and the commission, the return thereto and the deposition shall be open at all reasonable times to inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record.

(2) Any deposition so taken, if it satisfies the conditions prescribed by section 33 of the Indian Evidence Act, 1872 (1 of 1872), may also be received in evidence at any subsequent stage of the case before another Court.

289. Adjournment of proceeding —in every case in which a commission is issued under section 284, the inquiry, trial or other proceeding may be adjourned for a specified time reasonably sufficient for the execution and return of the commission.

290. Execution of foreign commissions — (1) The provisions of section 286 and so much of section 287 and section 288 as relate to the execution of a commission and its return shall apply in respect of commissions issued by any of the Courts, Judges or Magistrates hereinafter mentioned as they apply to commissions issued under section 284.

(2) The Courts, Judges and Magistrates referred to in sub-section (1) are—

(a) any such Court, Judge or Magistrate exercising jurisdiction within an area in India to which this Code does not extend, as the Central Government may, by notification, specify in this behalf;

(b) any Court, Judge or Magistrate exercising jurisdiction in any such country or place outside India, as the Central Government may, by notification, specify in this behalf, and having authority, under the law in force in that country or place, to issue commissions for the examination of witnesses in relation to criminal matters.

291. Deposition of medical witness — (1) The deposition of civil surgeon or other medical witness, taken and attested by a Magistrate in the presence of the accused, or taken on commission under this Chapter, may be given in evidence in any inquiry, trial or other proceeding under this Code, although the deponent is not called as a witness.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such deponent as to the subject-matter of his deposition.

291A. Identification report of Magistrate — (1) Any document purporting to be a report of identification under the hand of an Executive Magistrate in respect of a person or property may be used as evidence in any inquiry, trial or other proceeding under this Code, although such Magistrate is not called as a witness:

Provided that where such report contains a statement of any suspect or witness to which the provisions of section 21, section 32, section 33, section 155 or section 157, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), apply, such statement shall not be used under this sub-section except in accordance with the provisions of those sections.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or of the accused, summon and examine such Magistrate as to the subject-matter of the said report.]

292. Evidence of officers of the Mint.—(1) Any document purporting to be a report under the hand of any such officer of any Mint or of any Note Printing Press or of any Security Printing Press (including the officer of the Controller of Stamps and Stationery) or of any Forensic Department or Division of Forensic Science Laboratory or any Government Examiner of Questioned Documents or any State Examiner of Questioned Documents, as the case may be, as the Central Government may, by notification, specify in this behalf, upon any matter or thing duly submitted to him for examination and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code, although such officer is not called as a witness.

(2) The Court may, if it thinks fit, summon and examine any such officer as to the subject-matter of his report:

Provided that no such officer shall be summoned to produce any records on which the report is based.

(3) Without prejudice to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), no such officer shall, except with the permission of the General Manager or any officer in charge of any Mint or of any Note Printing Press or of any Security Printing Press or of any Forensic Department or any officer in charge of the Forensic Science Laboratory or of the Government Examiner of Questioned Documents Organisation or of the State Examiner of Questioned Documents Organisation, as the case may be, be permitted—

(a) to give any evidence derived from any unpublished official records on which the report is based; or

(b) To disclose the nature or particulars of any test applied by him in the course of the examination of the matter or thing.

293. Reports of certain Government scientific experts — (1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

(3) Where any such expert is summoned by a Court, and he is unable to attend personally, he may, unless the

Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

(4) This section applies to the following Government scientific experts, namely:

(a) any Chemical Examiner or Assistant Chemical Examiner to Government;

(b) the Chief Controller of Explosives;

(c) the Director of the Finger Print Bureau;

(d) the Director, Haffkeine Institute, Bombay;

(e) the Director, Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

(f) the Serologist to the Government;

(g) any other Government scientific expert specified, by notification, by the Central Government for this purpose.

294. No formal proof of certain documents — (1) Where any document is filed before any 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, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed: Provided that the Court may, in its discretion, require such signature to be proved.

295. Affidavit in proof of conduct of public servants — When any application is made to any Court in the course of any inquiry, trial or other proceeding under this Code, and allegations are made therein respecting any public servant, the applicant may give evidence of the facts alleged in the application by affidavit, and the Court may, if it thinks fit, order that evidence relating to such facts be so given.

296. Evidence of formal character on affidavit —(1) The evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavit.

297. Authorities before whom affidavits may be sworn — (1) Affidavits to be used before any Court under this Code may be sworn or affirmed before—

(a) any Judge or Judicial or Executive Magistrate, or]

(b) any Commissioner of Oaths appointed by a High Court or Court of Session, or

(c) any notary appointed under the Notaries Act, 1952 (53 of 1952).

(2) Affidavits shall be confined to, and shall state separately, such facts as the deponent is able to prove from his own knowledge and such facts as he has reasonable ground to believe to be true, and in the latter case, the deponent shall clearly state the grounds of such belief.

(3) The Court may order any scandalous and irrelevant matter in the affidavit to be struck out or amended.

298. Previous conviction or acquittal how proved.— In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force —

(a) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was held, to be a copy of the sentence or order, or

(b) in case of a conviction, either by a certificate signed by the officer in charge of the Jail in which the punishment or any part thereof was undergone, or by production of the warrant of commitment under which the punishment was suffered, together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

299. Record of evidence in absence of accused.—(1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try , or commit for trial] such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India.

Aforesaid scheme of Cr.P.C suggests three vital aspects of the manner of recording of evidence viz:

(i) Open Court,

(ii) Presence of Accused and

(iii) Avoidance of any sort of inconvenience or prejudice to the parties.

As to the fundamental aspect of Open Court, S.327 of the Cr.P.C too stands pertinent to be considered.

327. Court to be open.— (1)The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them: Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court. Notwithstanding anything contained in sub- section (1), the inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C, 5 [section 376D or section 376E of the Indian Penal Code (45 of 1860)] shall be conducted in camera:

Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the Court:

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

(2) Where any proceedings are held under sub- section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings except with the previous permission of the Court:

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

Thrust of Section S.274 to 276 inter alia is the recording of evidence in open Court whereas S.327 is categorical about the place where the Criminal Court is held and its mandate is that the said place should have open access to the public.

The idea of open courts has been furthered to maintain public confidence in the administration of justice.

In **Narsh Shridhar Mirjakar Vs State of Maharashtra, AIR 1967 SC 1** a Nine Judges Bench of the Hon'ble Supreme Court held that it is well settled that in general, all cases brought before the courts, whether civil, criminal, or others, must be heard in open court. The Court further went to elaborate therein that the public trial in open court is essential for the healthy, objective and

fair administration of justice. The court held that trial under public scrutiny and gaze naturally acts as a check against judicial caprice or vagaries, and serves as a powerful instrument for creating confidence of the public in the fairness, objectivity, and impartiality in the administration of justice. The court was of the opinion that public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial tribunals, courts must generally hear causes in open and must permit the public admission to the court-rooms. In the same case while considering the submissions for in camera proceedings, the court held that decision to hold in camera proceedings, must be exercised with great caution and such an order may be passed only if the court is satisfied beyond a doubt that the ends of justice themselves would be defeated if a case is tried in open court.

Use of Video Conferencing in trials :

Now the question that arises for the consideration is as to how far the hearings in virtual court rooms would fulfill the requirements of the principle of open court hearings or whether open court hearings necessarily mean hearing in physically open, traditional courts of bricks and mortar where anyone can come and access and see the proceedings. Antagonists hammer to say that video conferencing cannot replace open court hearings as the fundamental principle of the administration of justice that the courts must be open to the public, could not be adhered in virtual mode.

Though S.327 of Criminal Procedure Code gives room to the presiding officer in some exceptions to narrow down the accessibility of public to the court and the same can be imported to address the situation caused by the pandemic too, to some extent but as a temporary measure only. Here the question is to make the virtual hearing a regular phenomenon running side by side to physical mode so as to ease the business of court and therefore, all the salient attributes of openness must be there in virtual mode too. This must be assured that public would have access to the court proceeding conducted in virtual mode and for that end threads, links or streaming of such proceeding may be made public.

Therefore, to ensure that the principle of open court hearings is achieved holistically and that it does not interfere with the administration of justice or the dignity and majesty of the open court hearing or impinge upon any rights of the litigants or witnesses, the technological innovations are to be implemented in a progressive, structured and phased manner, with adequate safeguards.

With respect to the presence of accused during course of trial, in **State of Maharashtra Vs. Dr Praful B. Desai, (2003) 4 SCC 601** the Hon'ble Apex Court held:

> 12……. Section 273 provides for dispensation from personal attendance. In such cases evidence can be recorded in the presence of the pleader. The presence of the pleader is thus deemed to be presence of the accused. Thus Section 273 contemplates constructive presence. This shows that actual physical presence is not a must. This indicates that the term "presence", as used in this section, is not used in the sense of

actual physical presence. A plain reading of Section 273 does not support the restrictive meaning sought to be placed by the respondent on the word "presence". One must also take note of the definition of the term "evidence" as defined in the Indian Evidence Act. Thus, evidence can be both oral and documentary and electronic records can be produced as evidence. This means that evidence, even in criminal matters, can also be by way of electronic records. This would include video- conferencing.

The Hon'ble Court further observed that

20. Recording of evidence by video- conferencing also satisfies the object provided in Section 273, that evidence be recorded in the presence of the accused. The accused and his pleader can see the witness as clearly as if the witness was actually sitting before them. In fact, the accused may be able to see the witness better than he may have been able to if he was sitting in the dock in a crowded courtroom. They can observe his or her demeanour. In fact, the facility to playback would enable better observation of demeanour. They can hear and rehear the deposition of the witness. The accused would be able to instruct his pleader immediately and thus cross-examination of the witness is as effective, if not better. The facility of playback would give an added advantage whilst cross-examining the witness. The witness can be confronted with documents or other material or statement in the same manner as if he/she was in court. All these objects would be fully met when evidence is recorded by video-conferencing. Thus, no prejudice, of whatsoever nature, is caused to the accused. Of course, as set out hereinafter, evidence by video-conferencing has to be on some conditions."

It may be noticed from the reading of S.274 to 276 of Criminal Procedure Code that though the Amendments of 2009, provided for examination of witnesses through video conferencing in warrant trial cases but strangely no corresponding amendment was made for recording of evidence by video conferencing in sessions trial and summons trial cases.

In **Sujoy Mitra Vs. State of W.B., (2015) 16 SCC 615,** the Apex Court held that examination of a witness via video conference is permissible in law. Therein the Apex Court permitted examination of a foreign national via video conference by adopting the following procedure: -

"(I) The State of West Bengal shall make provision for recording the testimony of PW5 in the trial Court by seeking the services of the National Informatic Centre (NIC) for installing the appropriate equipment for video conferencing, by using "VC Solution" software, to facilitate video conferencing in the case. This provision shall be made by the State of West Bengal in a room to be identified by the concerned Sessions Judge, within four weeks from today. The NIC will ensure, that the equipment installed in the

premises of the trial Court, is compatible with the video conferencing facilities at the Indian Embassy in Ireland at Dublin.

(II) Before recording the statement of the prosecutrix-PW5, the Embassy shall nominate a responsible officer, in whose presence the statement is to be recorded. The said officer shall remain present at all times from the beginning to the end of each session, of recording of the said testimony.

(III) The officer deputed to have the statement recorded shall also ensure, that there is no other person besides the concerned witness, in the room, in which the testimony of PW5 is to be recorded. In case, the witness is in possession of any material or documents, the same shall be taken over by the officer concerned in his personal custody.

(IV) The statement of witness will then be recorded. The witness shall be permitted to rely upon the material and documents in the custody of the officer concerned, or to tender the same in evidence, only with the express permission of the trial Court.

(V) The officer concerned will affirm to the trial Court, before the commencement of the recording of the statement, the fact, that no other person is present in the room where evidence is recorded, and further, that all material and documents in possession of the prosecutrix-PW5 (if any) were taken by him in his custody before the statement was recorded. He shall further affirm to the trial Court, at the culmination of the testimony, that no other person had entered the room, during the course of recording of the statement of the witness, till the conclusion thereof. The learned Counsel for the accused shall assist the trial Court, to ensure, that the above procedure is adopted, by placing reliance on the instant order.

(VI) The statement of the witness shall be recorded by the trial Court, in consonance with the provisions of Section 278 of the Code of Criminal Procedure. At the culmination of the recording of the statement, the same shall be read out to the witness in the presence of the accused (if in attendance, or to his pleader). If the witness denies the correctness of any part of the evidence, when the same is read over to her, the trial Court may make the necessary correction, or alternatively, may record a memorandum thereon, to the objection made to the recorded statement by the witness, and in addition thereto, record his own remarks, if necessary.

(VII) The transcript of the statement of the witness recorded through video conferencing (as corrected, if necessary), in consonance with the provisions of Section 278 of the Code of Criminal Procedure, shall be scanned and dispatched through email to the embassy. At the embassy, the witness will authenticate the same in consonance with law. The aforesaid authenticated statement shall be endorsed by the officer deputed

by the embassy. It shall be scanned and returned to the trial Court through email. The statement signed by the witness at the embassy, shall be retained in its custody in a sealed cover.

(VIII) The statement received by the trial Court through email shall be re-endorsed by the trial Judge. The instant statement endorsed by the trial Judge, shall constitute the testimony of the prosecutrix-PW5, for all intents and purposes."

On 09.08.2019 the Hon'ble Calcutta High Court in Md. Sarfaraz @ Bonu & Anr vs The Union of India, went on to hold that:

"Although the aforesaid case (Sujoy Mitra supra) related to a witness in a foreign country, the procedure laid down in the aforesaid decision may be utilized while examining official witnesses in narcotic cases subject to the modification that the official witness may depose via video conferencing facility from the district court complex nearest to his place of posting under the supervision of a responsible officer (e.g. Registrar of the said court) so authorized in that regard by the concerned District Judge. Procedure of recording evidence of witness in far off places via video conference in Sujoy Mitra (supra) were laid down by the Apex Court subsequent to Thana Singh (supra) and the ratio contained therein may be gainfully utilized for recording evidence of official witnesses who have been transferred to a distant place and their physical attendance in court cannot be promptly procured.

The Hon'ble High Court further elaborated that

In fact, examination of official witnesses via video conference has two-fold advantages over affidavit evidence. Firstly, when examination-in- chief of a witness is recorded by filing affidavit, the witness is not absolved from being physically present in Court as he has to prove the affidavit and offer himself for cross- examination and the wholesome object of saving time by avoiding travel of official witnesses from their place of posting to the trial Court is defeated. On the other hand, if evidence of the said witness is recorded via electronic/video linkage, he need not be physically present in the court premises and thereby the purpose of quick trial would be better served. Secondly, recording of evidence of witnesses via video linkage is better suited to the concept of fair trial than affidavit evidence. If a witness is examined via electronic/video linkage, his demeanour may be watched by the Court enabling it to form an opinion with regard to his creditworthiness. Similarly, it helps the accused to formulate his defence and pose appropriate questions in cross to test the veracity of his deposition. Demeanour of a witness cannot be assessed if his chief is recorded through affidavit. One cannot lose sight of the fact that criminal cases, unlike civil cases, are primarily based on oral evidence of witnesses of fact where demeanour and conduct of the witness during his examination-in- chief play a very vital role in assessing his truthfulness.

In **Amitabh Bagchi Vs. Ena Bagchi, AIR 2005 Cal 11,** while referring to State of **Maharashtra Vs. Dr. Praful B. Desai's (2003) 4 SCC 601,** the Court laid down various

safeguards to be taken by the Court for the purpose of recording evidence through audio-video link observing: -

(1) Before evidence of the witness under Audio-Video Link starts the witness will have to file an affidavit or an undertaking duly verified before a Judge or a Magistrate or a Notary that the person who is shown as the witness is the same person who is going to depose on the screen and a copy of such affidavit will be provided to the other side.

(2) The person who wishes to examine the witness on the screen will also file an affidavit or an undertaking in the similar manner before examining the witness with a copy of the other side with regard to identification beforehand.

(3) As soon as identification part is complete, oath will be administered through the media as per the Oaths Act, 1969 of India.

(4) The witness will be examined during working hours of Indian Courts. Plea of any inconvenience on account of time difference between India and other country will not be allowed.

(5) The witness action, as far as practicable, be proceeded without any interruption without granting unnecessary adjournments. However, discretion of the Court or the Commissioner will be respected.

(6) Witness includes parties to the proceedings.

(7) In case of non-party witness, a set of plaints, written statement and/or other papers relating to proceeding and disclosed documents should be sent to the witness for his acquaintance and an acknowledgement in this regard will be filed before the Court.

(8) Court or Commissioner must record any remark as is material regarding the demur of the witness while on the screen and shall note the objections raised during recording of witness either manually or mechanically.

(9) Depositions of the witness either in the question answer form or in the narrative form will have to sign as early as possible before a Magistrate or Notary Public and thereafter it will form part of the record of the proceedings.

(10) Mode of digital signature, if can be adopted in this process, such signature will be obtained immediately after day of deposition.

(11) The visual is to be recorded at both the ends. The witness alone can be present at the time of video conference, Magistrate and Notary is to certify to this effect.

(12) In case of perjury Court will be able to take cognizance not only against the witness who gave evidence but also who induced to give such evidence.

(13) The expenses and the arrangements are to be borne by the applicant who wants to this facility.

(14) Court is empowered to put condition/s necessary for the purpose."

In the scheme of Criminal Procedure Code this has been made abundantly clear that when in the course of the inquiry or the trial, the judge or the Magistrate thinks that the presence of the witness is necessary for proper dispensation of justice but the attendance of the witnesses would incur delay and expenses which would be unreasonable, then the court may dispense the presence of the witness and it will then issue a commission that would ensure the examination of the witness according to the provisions of this code. Moreover, if it is necessary for the proper dispensation of justice to examine the president and vice president or governor of the state or administrators of the union territory, then the commission for such examination shall be issued.

It is also mentioned that where the court issues a commission for the examination of the witness, then the court can ask for a reasonable amount for the expenses that would incur during such examination like the pleader's fee etc.

It is a rule that the witness on whose testimony the entire case is built must be examined and the examination on the commission must be restricted to only on those cases where the witnesses cannot come or if he can then it will cause unreasonable delay or expenses. However, it is important to note that the complainant cannot be examined on commission.

The criminal courts have wide power to examine a foreign witness, provided the evidence of such witness is necessary. If the foreign witness is unwilling to come then he can be examined on commission.

Under S.285 of Code there is guideline as to who shall be given the commission. If a witness is within the territories to which this Code extends the commission shall be directed to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate, within whose local jurisdiction the witness is found.

If the witness is in India, but in an area where this Code does not extend, the commission shall be directed to the Court or officer as specified by the Central Government by way of a notification.

If the witness is in a place outside India but arrangements have been made by the Central Government with the Government of that country or place for taking the evidence of witnesses in relation to criminal law of that country or place, then commission will be issued in such form, directed to that Court or officer, and sent to the authority for transmission as specified through a notification issued by the Central Government.

Moreover, the court passes the order for the examination of witnesses in commission when the court is satisfied not only about the necessity of such evidence but also about the effective

enforceability of commission of examination of witnesses. When court finds that there are no reciprocal arrangements in existence it is not inclined to make any order.

As per the mandate of S.286 of the Code, upon the receipt of the Commission, the Chief Metropolitan Magistrate, or Chief Judicial Magistrate, can summon the witness before them or go to the place where the witness is, and shall take down his evidence in the same manner, and exercise the same powers, as in trials or warrant cases under the CrPC. Thus, only a Judicial Magistrate can be appointed as Commissioner. This aspect must be taken care of when a need occurs as to the examination of witness on commission.

The inconvenience which is to be considered by the Court is not only the inconvenience to the parties but also the inconvenience to the witness who is to be examined. Thus, an apprehension of arrest, or a risk to the personal safety of a witness caused by threats given by the accused, would amount to "inconvenience" in the eyes of the law. Moreover, the possibility of a witness, who is a foreigner losing his job in his own country if he were to disobey his employers and come to India to give evidence, would amount to "inconvenience" as per the provisions of this code.

As to the recording of evidence on commission and that too through audio video mode the Hon'ble Apex Court in **State of Maharashtra Vs. Dr Praful B. Desai** *(Supra)* has already held that

> "22. However, even if the equipment cannot be set up in court, the Criminal Procedure Code contains provisions for examination of witnesses on commissions. Sections 284 to 289 deal with examination of witnesses on commissions. Thus, in cases where the witness is necessary for the ends of justice and the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case would be unreasonable, the court may dispense with such attendance and issue a commission for examination of the witness……..……...Normally a commission would involve recording evidence at the place where the witness is. However, advancement in science and technology has now made it possible to record such evidence by way of video- conferencing in the town/city where the court is. Thus, in cases where the attendance of a witness cannot be procured without an amount of delay, expense or inconvenience, the court could consider issuing a commission to record the evidence by way of video-conferencing."

Electronic Evidence :

At this juncture and as a supplementary to the aforesaid discussion, it is pertinent to have a brief view of the furnishing of electronic record as a piece of evidence. After Amendment of year 2000, definition of "Evidence" under S.3 of Indian Evidence Act, now includes electronic records produced for the inspection of court. In the process of receiving evidence through electronic mode, the Court will have to frequently deal with

the questions pertaining to the proprietary and procurement of evidence through electronic mode. Since the evidence recorded through video-conferencing and the steps involved therein all would come within the parameter of Electronic Record so it is abundantly clear that in that context S.65A and 65B of Indian Evidence Act are relevant.

Section 65A provides that the contents of an electronic record (which was earlier used to be proved in accordance with Sections 61 to 65 of the Act) may be proved in accordance with the provisions of Section 65B.

Now the long-standing debate pertains to Section 65B of the Act, which has perplexed courts deciding admissibility of electronic evidence during the course of trial. According to this provision, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be also a document, provided the conditions mentioned under this section are satisfied.

In other words, the legislature, by way of a deemed fiction, has made a computer output also a document/primary evidence, provided the conditions mentioned in Section 65B of the Act are fulfilled. Before the year 2000, it was treated as secondary evidence but now after the enactment of Section 65B, it shall be treated as a document/primary evidence in order to prove the contents of the original.

Sub-section 4 of Section 65B of the Act states that when a party desires to produce secondary evidence as primary evidence as per Section 65B (1), a certificate is required to be produced stating any of the things mentioned under Section 65B (4) of the Act. When a certificate so required is produced by a party with regard to a computer output, it shall be deemed to be treated as a document/primary evidence.

A legal conundrum arose as to whether the requirement of certificate mentioned under Section 65B (4) is a mandatory pre- condition before producing a secondary evidence as a document/primary evidence?

The first case in which such issue arose was **State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 (Navjot Sandhu Case),** wherein a two-judge Bench of the Supreme Court held that even if a certificate is not produced as per the requirement mentioned under Section 65B (4) of the Act, electronic evidence is not held to be per se inadmissible. It can still be proved as per Section 63 read with Section 65 of the Act as secondary evidence. The issue with such position was that the Supreme Court, by giving such wide interpretation, had prima facie defeated the legislative intent behind enacting Section 65B of the Act.

For almost a decade, the law laid down in **Navjot Sandhu's case** was followed throughout the country. The said position was re- considered in **Anvar P.V. v P.K. Basheer, (2014) 10 SCC 473,** wherein a three-judge Bench of the Supreme Court rectified the error committed in former case and held that Section 65B is a special provision that overrides Section 65, which is a general

provision. The Court also held that any documentary evidence by way of an electronic record shall be proved only when accompanied by a certificate as prescribed under Section 65B (4). In absence of such certificate, secondary evidence of electronic records/computer output is per se inadmissible in evidence.

In **Sonu Vs State of Haryana (2017) 8 SCC 570,** although the Court relied upon the decision in Anvar's case, it held that Section 65A and Section 65B relate to mode of proof of the electronic record and not of its admissibility. The requirement of certificate is merely is a procedural defect which can be cured when an objection is raised by a party when the document was adduced as evidence during the course of trial and not at any other stage, it was held.

In **Shafhi Mohammad v. The State of Himachal Pradesh (2015) 7 SCC 178,** a two-judge Bench took a view contrary to Anvar's case and held that requirement of certificate under Section 65B (4) is procedural and can be relaxed by the court in the interest of justice. Such a requirement is not mandatory if a party is not in a position to produce it. Moreover, it is also open for a party to produce a computer output as secondary evidence in terms of Sections 63 and 65 of the Act.

The Hon'ble Supreme Court in **Arjun Panditrao Khotkar vs Kailash Kushanrao Gorantyal** had finally taken note of the conflicting views taken in Anvar's case and **Shafhi Mohammed's case,** and referred the matter to a larger bench for re-consideration.

While answering on the reference, the Supreme Court has finally held on 14 July, 2020 that the requirement of a certificate is a pre-condition to the admissibility of evidence by way of electronic record under Section 65B of the Act, while upholding the law laid down in Anvar's case. In the absence of such certificate, a party cannot let in electronic evidence and it is per se inadmissible as per Section 65B of the Act.

It is thus abundantly clear that there is a complete bar on a party to adduce any electronic evidence unless accompanied by a certificate as mentioned under Section 65B of the Act.

Conclusion

This is a matter of categorical perception that the technological progress in recording evidence via electronic/video linkage would be a boon and ought to effectively utilized to improve the quality of dispensation of justice by reducing the time taken for conducting trials and specially in cases involving official witnesses who are posted at far off places and whose attendance in Court cannot be promptly ensured. Courts are now e enabled to avail of electronic/video linkage facilities and examine official witnesses whose attendance cannot be procured without delay, undue expenses and/or other inconveniences so that the fundamental right of speedy and fair trial is effectively enforced and does not become a dead letter of law.

While video conferencing and virtual courts are becoming the way forward, they, however,

face certain challenges including admissibility and authenticity of the evidence through video conferencing. There is lack of adequate infrastructure in various parts of the country Even courts to this day do not have some basic infrastructure like uninterrupted, sufficient and an affordable Internet connection as well as electricity connections so as to facilitate recording of evidence through video conferencing and therefore, more is to be done to convince and connect other stakeholders to make the idea of virtual court a reality.

Though concern has been shown as to the proposition that the court is unable to judge the demeanor of the witness during video conferencing as opposed to a clear assessment a judge is able to make during an in person hearing but this apprehension will blow over once virtual courts start functioning in full swing with adequate safe-guards. Similarly, the apprehension of advocates, surfacing in write-ups, that the virtual hearings due to lack of audio-visual clarity do not allow an advocate to promptly and clearly catch the cues from witnesses which are possible through their verbal and non-verbal examination, is an apprehension of short time till a well-established virtual court comes into a play.

This is true that many judges and the appointed commissioners for taking evidence are not well acquainted with the know-how of technology for recording evidence but this also true that they have been and would be made sufficiently trained thereto.

There is no doubt that there is need for development of laws in a way so as to enable a more fluent transition to online mode. Standard operating procedure, too, needs to be developed for recording of evidence in virtual mode and addressing simultaneously the issues of authenticity, handling and use of evidences recorded or taken on board in virtual mode.

New technology occasions better service to the public by protecting digital information. In criminal matters, during the investigation, it is the police and the prosecutors who are responsible for collecting and guarding evidence in criminal proceedings. During the trial stage, it is the court that is in charge of admitting and guarding these evidences so onus is squarely on the Court to record evidence either in electronic mode or through commission-cum-electronic mode, in a way that the fundamental aspects of recording of evidence as discussed above are complied at par with physical mode.

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Topic No. – 13

Competence of witnesses : Procedure, precautions and safeguards while recording evidence of a child witness; deaf & dumb witness and witness deposing in a different language.

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Competence of witnesses : Procedure, precautions and safeguards while recording evidence of a child witness; deaf & dumb witness and witness deposing in a different language.

1. Introduction

"A judicial system is corrupt if truth is denied the right to be a witness."

—Suzy Kassem

The gravity of the topic at hand cannot perhaps be described in fewer yet profounder words. In ancient times, Justice was literally left *Ram Bharose* or on God's grace as reflected in the *Agni Pariksha* immortalized in Hindu scriptures or in trial by ordeal of Emma of Normandy, where Emma had to prove her innocence by taking nine steps on red hot ploughshares. Trial by combat –where the accused engaged in duel with the accuser - was another popular mode of trial wherein Justice was the biggest casualty. In trial by Oath of purgation, an oath by an accused was sufficient proof of his innocence. Trial through compurgators where the parties were required to produce fixed number of witnesses (called compurgators) ranging from 12 -600, depending on the social status of the accused, was another popular mode of trial. All these methods sought to create a farcical system where Justice only appeared to be met but was not actually done. The same farce was sought to be achieved in modern Judicial System by keeping as many witnesses out of the folds of the Courts as possible on frivolous grounds of incompetency which varied from skin colour to religion. This is why Taylor in his treatise 'Evidence' at page 1342 writes:

"motives to prevent the truth are so numerous in Judicial investigation than in the ordinary affairs of life that the danger of injustice, arising from this cause, has, till modern times, been thought to justify the observance of rules by virtue of which large and numerous classes of persons were rendered incompetent witnesses and their testimony was uniformly excluded."[1]

Whether truth will be casualty or a *fait accompli* in a trial depends on the quality of the witnesses produced and it was because of this eventuality that the modern judicial system portends more towards acceptability of witnesses than exclusion.

2. Meaning of the term "Witness":

Before launching ourselves in to the study of competency of witnesses, it is imperative to understand the meaning of the term witness. The term witness has not been defined anywhere in the Indian Evidence Act. As per Merriam Webster's dictionary witness means one who testifies in a cause or before a Judicial Proceeding or one who has personal knowledge of something.

1. " Law of Evidence' 19th Edition Woodroff and Amir Ali pg 4715

Black's law dictionary defines the word witness as a person who has seen a person sign or a person called in court to give evidence. Concise Law Dictionary defines the term witness as the one who gives evidence in a cause, an indifferent person to each party, sworn to speak the truth, the whole truth and nothing but the truth. According to Bentham, "Witnesses are the eyes and ears of justice."

In the words of Whittaker Chambers "A witness is a man whose life and faith are so completely one that when the challenge comes to step out and testify for his faith he does so, disregarding all risks, accepting all consequences."

In **Mahender Chawla Vs Union of India**[2] the Hon'ble Apex Court highlighted the importance of witness by quoting the following words from a book:

> *" In search of truth, he plays that sacred role of the Sun, which eliminates the darkness of ignorance and illuminates the face of justice, encircled by devils of humanity and compassion"*

In **M P Sharma and others vs Satish Chandra**[3] Hon'ble Supreme Court while dealing with the meaning of the term witness observed: *"A person can "be a witness" not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (see section 119 of the Evidence Act) or the like."To be a witness" is nothing more than "to furnish evidence", and such evidence can be furnished through lips or by production of a thing or of a document or in other modes. So far as production of documents is concerned, no doubt section 139 of the Evidence Act says that a person producing a document on summons is not a witness. But that section is meant to regulate the right of cross-examination. It is not a guide to the connotation of the word "witness", which must be understood in its natural sense, i.e., as referring to a person who furnishes evidence."*

3. Competency of witness in Ancient India:

Ancient Hindu Jurisprudence had different criteria for witnesses in Civil and criminal cases. In civil cases witnesses were required to have a strong moral character. Witnesses needed to be conscientious, trustworthy and free from hatred or affection towards any of the parties. Creditworthiness was in effect considered to be synonymous to competence.

In criminal matters, however, the criteria for competence of witnesses was considerably relaxed considering that the crimes may happen in secluded places and during the time of the day where witnesses may not always be easily available. The idea is crystassized by the principle ***"if a murder happens in a brothel only strumpets can be witnesses."***

In the Mughal Era, Certain classes of witnesses were held to be incompetent witnesses, viz.,

2. (2019) 1 PLJR 195
3. AIR 1954 SC 300

very close relatives in favour of their own kith and kin, or of a partner in favour of another partner. Certain classes of men, such as professional singers and mourners, drunkards, gamblers, infants or idiots, or bind persons in matters to be proved by ocular testimony were regarded as unfit for giving evidence.[4]

Under the Islamic law, generally a woman, a child, a sinner, a person who has committed perjury and a non-Muslim are incompetent witnesses.

A recognition of artificial character of these rules of exclusion which has no foundation or justification in actual experience and which led to frequent injustice and of the necessity of increasing as much as possible the media of investigation led gradually to the conversion of questions of competency into questions of credibility.[5]

4. Competency of witness:

Competency means having sufficient skills or knowledge to do a specific task. Thus understood, a witness may be competent if :

(1) He has knowledge about the matter at hand (which is inherent in the term witness itself)

(2) He is able to understand the questions put to him and give intelligible answers to them.

Witness is said to be incompetent to give evidence when the judge is bound as a matter of law to reject his testimony4.

Under the Indian Evidence Act, competency of witness is dealt with from sections 118-120 coupled with sec 133 of the Indian Evidence Act (the Act).

Section 118 of the Act declares that all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them and from giving rationale answers to them by tenders years, extreme old age, and disease whether of body or mind or any other cause of the same kind.

Explanation to the section provides that a lunatic is not incompetent to testify unless he is prevented by his lunacy to understand the questions put to him and to give rationale answers to them.

Section 119 of the Act declares that dumb witnesses are competent witnesses and provides that such witness may give evidence in any other manner in which he can make it intelligible as by writing or by signs. Such writing must be given and the signs made in open court.

Section 120 of the Evidence Act provides that in civil proceedings the parties to the suit and the husband or wife of any party to the suit shall be competent witnesses.

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4. https://shodhganga.inflibnet.ac.in/bitstream/10603/8788/11/11_chapter%202.pdf visited on July 5 2020
5. Woodroff and Amir Ai " Law of Evidence" 19th Editionpg no 4715

In criminal proceedings against any person the husband or wife of any such person respectively shall be competent witness.

5. Competency and Compellability:

Competency must not be confused with compellability. Whereas question of competency involves looking into the mental power of the witness to understand the questions and give rationale answers to them, compellability involves question of the power of the court to force an otherwise competent witness to appear and depose before it.

Generally a competent witness can be compelled by the Court to give evidence. The court may issue process such as summons and warrant to procure the attendance of a witness. Where the court orders a person to appear as a witness but the person willfully disobeys the order, he is liable to punished under section 174 of the Indian Penal Code (IPC). However if a person is not compellable to be a witness then the court cannot force him to depose. Phipson, writes: ***"Competency is to be distinguished from compellability. A person may be admitted to give evidence though in certain cases he will not be compelled by the court to do so. In general all persons are both competent and compellable. A person, however, though competent and compellable as a witness may not be competent or may not be compellable to give evidence as to particular matters."***[6]

A sovereign, foreign diplomatic agent, member of diplomatic staff such as retinues etc. enjoy special status by virtue of their office and cannot be compelled to attend the court as a witness.

6. Competency and Privilege:

Competency has to be distinguished from privilege as well. As already seen, competency refers to the power of comprehension and ability to give coherent answers to questions put, whereas privilege means protection from answering certain questions. In some cases even if the witness is willing to depose, then too the court will not allow the witness to speak on matters which come under the privilege. Sections 124,125,128 and 129 deal with conditions where a person will not be compelled to answer question before them. Whereas sections 122, 123, 126 and 127 of Indian Evidence Act deal with situations where a person will not even be permitted to depose about certain matters even if he is willing to depose about them.

Section 122 provides that a person who is or has been married shall not be permitted or compelled to disclose communications made by his or her spouse during the subsistence of marriage.

Section 123 prohibits giving of evidence from unpublished official records relating to any affairs of state, except with the permission of the officer at the head of the department concerned.

Section 124 provides that no public officer shall be compelled to disclose communications

6. Phipson on evidence 14th Edition, p 140

made to him in official confidence when he considers that public interest would suffer by such disclosure.

Section 125 provides that no magistrate or police officer shall be compelled to disclose the source of his information as to the commissions of any offence and no revenue officer shall be compelled to disclose his source of information as to any offence against public revenue.

Section 126 deals with privileged communication between legal professionals and his clients and provides that no barrister attorney etc shall be permitted to disclose any communication made to him by or on behalf of his client except with the previous permission of the client. Section 127 extends the provisions of section 126 to interpreters etc. section 129 provides that no one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional advisor.

7. Grounds of Incompetence:

As already seen, section 118 provides that a person is incompetent to testify if the court considers that he is unable to understand the questions put to him and give rationale answers to them on the ground of:

(1) Tender years

(2) Extreme old age and

(3) disease of body or mind

Thus tender years, old age or physical or mental disease per se do not make a person incompetent to testify unless the court after preliminary assessment is satisfied that by virtue of these limitations, the witness is unable to understand the questions and give answers to them.

Of all the three limitations mentioned in section 118, a child witness (witness of tender years) is the most crucial and great precaution is warranted before admitting the evidence of a child witness.

8. Competency of Child Witness:

It is said that children are most *dangerous witnesses,* for due to tender age they often mistake dreams for reality. They are capable of cramming things easily and reproducing them. They repeat as to their own knowledge what they have heard from others and are greatly influenced by fear of punishment, by hope of reward and by desire of notoriety.[7]

It is to be remembered that the term child witness is not used in section 118 rather it talks of a person who is unable to understand the questions put to him and is unable to give rationale answers to them by virtue of tender years. No specific age or range of age has been given when the

7. Akram Khan and Ors. vs. The State of West Bengal (29.06.2010 - CALHC) : MANU/WB/0267/2010

child will be excluded from giving evidence or when he shall be presumed to have attained sufficient understanding for being a witness. In practice it is usual to receive the testimony of children of eight or more years of age when they appear to possess sufficient understanding.[8]

In the case of **Wheeler v. United States**[9] it was held: ***"While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former."***

In this regard reference may be made to observation made by Dr. Hans Gross in his book, "Criminal Investigation". 1934 Ed., about the nature and character of evidence given by the children. According to Dr. Gross, in one sense the best witnesses are children of seven to ten years of age as at that time love and hatred, ambition and hypocrisy, considerations of religion, rank, etc., are yet unknown to them. He has, however, pointed out the great drawbacks which have made men distrustful of the capacity of children. They are apt to say much more from imagination than they actually know. To quote his words: ***"The child, as yet devoid of principles, places great faith in the words of grown up people; so if a grown up person brings influence to bear on it, especially some time after the occurrence, the child will imagine it has really seen what it has been led to believe."***

At another place Dr Gross has remarked as follows: ***"The result is the same, when the influence is undesigned. An important event happens; it is naturally much talked of, all sorts of hypothesis are started, there is gossip of what others have seen or might in certain circumstances have seen. If a child, which has itself seen something of the occurrence, hears these conversations, they become deeply engraved on its own mind, and ultimately it believes it has itself seen what the others have related."***[10]

Thus relying on testimony of a child witness is fraught with dangers and as such certain precautions and safe guards are required to be observed while recording the testimony of a child witness.

8.1 Precautions and Safeguards while recording the evidence of child witness:

Extreme care is required at the time of recording the evidence of a child witness, both for the purpose of determining the understanding of the child as well as for ensuring that the child is stress free and relaxed, so that the court may be able to elicit maximum information out of him. Further, considering the fickle nature of children, courts have to be cautious while acting on the testimony of the children. Thus the precautions and safeguards to be adopted are for the triple purpose of

8. Taylor, Evidence page 1377; Woodroof and Amir Ali Law of Evidence page 4729

9. MANU/USSC/0019/1895 : 159 U.S. 523 (1895),

10. Quoted with approval in SukhuMahton and Ors. vs. State of Bihar (26.02.1999 - PATNAHC)

ensuring the competency of the child witness, ensuring a stress- free environment for him and also for determining the probative value of the testimony of child witness.

Various techniques such as preliminary examination, administration of oath, creating a child friendly atmosphere, requirement of corroboration etc may be used to achieve these purposes.

8.1.1) Preliminary Examination to test competence of child witness (voire dire):

Since the test of competency is the intellectual understanding of a child witness therefore a preliminary examination of the witness to assess his intellectual capacity to understand the questions put to him and to give rationale answers to them is warranted. Such an examination is called Voire Dire. The purpose, scope and nature of *Voire dire* has been succinctly explained in **Mirajul Islam Sheik Vs. State of Kerala**[11] It was held by the Hon'ble Kerala High Court in this case that the purpose of voire dire is twin fold. If the child witness is incompetent, the detailed examination of the child can be avoided thereby saving the valuable time of the Court. The second advantage is that, there can be a formal record of *Voire Dire* which enables the appellate court to reevaluate whether the findings rendered by the court below regarding the competency of the child is justifiable or not.

In **Mamachan vs. State of Kerala**[12] it was held that whenever a witness appears before Court, the Court will proceed on the basis that he is competent to testify. When a witness is a person of tender years or extreme old age or a person who suffers from disease or other abnormality of the body or mind, the Court is alerted to test his competency. Similarly where a witness is a child the Court is alerted on the need to decide whether oath can be administered. Ordinarily this satisfaction is to be arrived at by preliminary examination of the witness by the Court. This does not mean that in the absence of preliminary examination the evidence becomes inadmissible since the general rule is in favour of the competency, and satisfaction, if necessary, can be arrived in the course of the evidence. However, it is better to conduct preliminary examination to satisfy about the competency under Section 118 of the Evidence Act as well as under the proviso to Section 4(1) of the Oaths Act. It is highly desirable to bring on record the questions and answers put to the witness and to make a record of the satisfaction of the Court. Even in the absence of specific record of preliminary questions or the satisfaction the appellate Court could examine the nature and tenor of the evidence recorded, the manner in which the witness faced cross-examination and satisfy itself about the competency under both the provisions.

Nature of the question that may be asked in *Voire Dire*

As to the nature of the questions that may be asked, it was held in **Mirajul Islam Sheikh** *(supra)* that the questions have to be so framed taking into consideration the age of the child, the social background, education and other facts. Definitely, the questions could not be intended to

11. MANU/KE/2088/2017.

12. MANU/KE/0843/2007

test the general knowledge of the witnesses. Questions should be to evaluate whether the witness was capable of giving rational answers.

Though the settled legal position is that, competency of the child witness has to be evaluated on the touchstone of facts proposed to be elicited in the evidence, that does not mean that in the course of *Voire Dire,* the court is expected to ask the questions which touch upon the facts, which are to be elicited in the course of evidence. Putting such questions is likely to prejudice both sides and may tend to cloud or influence the questions which the prosecution intend to put in the chief examination and which the accused proposes to cross examine. Normally, the courts should refrain from framing questions which have a direct bearing on the relevant facts or facts in issue.

After the preliminary assessment the Judge should assess the intellectual capacity of the child in a reasonable and practical manner and not on fanciful and whimsical grounds. **P Ramesh Vs State**[13] is an illustrative case in this regard. In that case two child witnesses were produced before the court and were subjected to following questions :

Question: What is your name?

Answer: 'S'

Question: What is your age?

Answer: 08-15

Question: What is your father's name?

Answer: Ramesh

Question: What is your village name?

Answer: ChinnaPerali

Question: What are you doing?

Answer: I am studying.

Question: Do you know where have you come?

Answer: Court

Question: Do you know why you are being brought?

Answer: To give evidence

Question: Do you know before whom you are standing?

Answer: Do not know

After questioning the witness the Court observed that even though the witness answered all the questions but when the Court asked the witness why haveyou come to depose?, the witness replied that she has come to depose about her mother's death. The witness also replied that she

13. MANU/SC/0956/2019

does not know who is standing in front of her in court and the persons beside her. On these grounds the court observed that it considers that the witness testimony is unacceptable as the witness does not know the judge and lawyers. Almost similar questions and observations were made in respect of the second child witness

The Hon'ble Apex Court held that the questions and the answers given by the child witnesses, show that they were able to understand the questions put to them. Merely because they were unable to tell before which persons were they deposing does not mean that they don't understand the questions put to them.

Thus there should be a satisfactory reason to judge a child incompetent to depose on the basis of preliminary examination.

Insufficient Questioning during *Voire Dire:*

Voire dire is not an empty formality to be observed in perfunctory and cavalier manner rather the court must adopt a line of questioning commensurate with the age of the witness and the circumstances of the case. In case of any doubt the court must not hasten to conclude rather it must probe further till satisfaction is reached about the competence or otherwise of the witness. In the case of **Bharat Sao vs. State of Bihar**[14] the only eye-witness of the occurrence was said to be the daughter of the deceased namely, RadhaKumari (PW-5). From her testimony, it appeared that she had divulged her age as three years on the date of giving deposition though the Court has assessed her age as six years. Said deposition of the informant was recorded on 08.05.2012 while the date of occurrence was 09.07.2010, hence PW-5 must be three years old at the time of occurrence. The trial Court had tested the competency of the said witness before recording her testimony by putting some questions to her and in reply to the question as to for what purpose she has come to the Court, she had replied that she had arrived at jail and she had failed to disclose reason for her visiting there. Though she had also replied to the questions about number of brothers and sisters she was having and as to whether speaking truth or lie is good, but she was not subjected to more questions to test her competency to depose before the Court. As she had no knowledge of the place of visit and reason for visiting the court therefore some further questioning was required to assess her competence, but instead of doing so, the Trial Court had certified her to be competent witness. In view of the aforesaid aspect of the case and considering such a tender age of the witness, the Hon'ble High Court found her to be an incompetent witness.

Non-Mandatory Nature of *Voire Dire:*

Now we shall probe whether preliminary examination of the child before recording his testimony is just a rule of caution or whether such evidence stands irretrievably stigmatized.

14. MANU/BH/1892/2018

In **Karu Singh Vs Emperor**[15] it was held that the holding of preliminary enquiry is merely a rule of prudence and not a legal obligation upon the Judge.

Likewise, in **The State of Bihar vs. Ramautar Singh**[16] the court did not satisfy itself about the competence of an 8 year old girl by putting questions to her whether she was capable of understanding questions and giving intelligent answers and convicted the accused on the basis of her testimony. In appeal, The Hon'ble Patna High Court held in view of section 118 it would ordinarily be prudent for a trial Judge to satisfy himself by putting questions to a child witness, about his or her mental capacity before proceeding to record the deposition of such a witness. The mere fact, however, that the trial Judge does not follow this course cannot make the evidence of a child witness inadmissible. The evidence itself will have to be examined with a view to ascertain the competency or otherwise of the witness.

8.1.2. Oath to Child Witness:

Whether oath should be administered to a child witness or not has been a subject of great speculation. Section 4 of Oath Acts 1965 provides that —

(1) Oaths or affirmations shall be made by the following persons, namely:— (a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence; (b) interpreters of questions put to, and evidence given by, witnesses; and (c) jurors:

Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.

Section 7 of oaths Act provides that no omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the administration of any oath or affirmation or in the form in which it is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

Thus from the reading of both the above provisions it is evident that oath is to be necessarily administered to a child of 12 years and above. However for a child aged below 12 years if the court is satisfied that even though the child understands the need to speak the truth but does not

15. AIR 1942 Pat 159

16. MANU/BH/0004/1956

understand the nature of the oath, then such a witness may be exempted from taking oath or making affirmation. Proviso to Section 4 further provides that failure to give oath to any such witness will not affect the admissibility of such witness or the obligation to speak the truth. Section 7 explains the position in this regard that failure to give oath or any defect in the form of oath will not affect the admissibility of any evidence nor will it invalidate any proceedings. Now after going through these two sections, a question may arise before us- does the failure of the court to record its satisfaction, in case of a child below twelve years, that the child does not understand the meaning of oath but it does understand the obligation to speak the truth effect the admissibility of evidence of such child witness?

In the case of **Rameshwar Vs. State of Rajasthan[17],** the Hon'ble Apex Court observed that ***:"an omission to administer an oath, even to an adult, goes only to the credibility of the witness and not his competency. It is desirable that Judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or judge really was of that opinion can, be gathered from the circumstances when there is no formal certificate"***

In **P Ramesh Vs State[18],** the Hon'ble Apex Court held that Judge may resort to any examination which will tend to disclose the capacity and intelligence of the witness as well as his understanding of the obligation of an oath.

In **Babrubahan Jal vs. State of Assam[19],** the question before the Hon'bleGuwahati High Court was whether it was wrong to give oath to a child below 12 years. After an intensive discussion on relevant laws, the Hon'ble High Court held that if the court finds that the witness is able to understand the significance of oath then the Court may give oath even to a child who is under 12 years of age.

8.1.3. Ensuring stress-free Environment for Child Witness:

The atmosphere of the Court coupled with the pressure of advocates may overwhelm the child and it is the responsibility of the Court to ensure that the Child is at ease. Unless and until the child is at ease and trusts the persons involved in the process, he might not be forthcoming. Therefore it would be prudent for the Court to try and strike some sort of familiarity with the child and to make him at ease.

17. AIR 1952 SUPREME COURT 54

18. MANU/SC/0956/2019

19. MANU/GH/0056/1990

Factors Contributing to the stress in Child witness[20]

(i) Multiple depositions and not using developmentally appropriate language.

(ii) Delays and continuances.

(iii) Testifying more than once.

(iv) Prolonged/protracted court proceedings.

(v) Lack of communication between professionals including police, doctors, lawyers, prosecutors, investigators, psychologists, etc.

(vi) Fear of public exposure.

(vii) Lack of understanding of complex legal procedures.

(viii) Face-to-face contact with the accused.

(ix) Practices are insensitive to developmental needs.

(x) Inappropriate cross-examination.

(xi) Lack of adequate support and victims services.

(xii) Sequestration of witnesses who may be supportive to the child.

(xiii) Placement that exposes the child to intimidation, pressure, or continued abuse.

(xiv) Inadequate preparation for fearless and robust testifying.

(xv) Worry about not being believed especially when there is no evidence other than the testimony of the vulnerable witness.

(xvi) Formality of court proceedings and surroundings including formal dress of members of the judiciary and legal personnel.

Though there is no mandate in this regard in any of the statutes, but prudence demands that the court should try and relax the child witness before he is subjected to the rigours of a formal examination. Hon'ble Delhi High Court has issued certain guidelines that are to be followed whenever evidence of a child witness is to be recorded. Though the guidelines are not universal in their applicability, still it's salient aspects are being summed up to act as pointers:

(1) The competence of the child has to be assessed only by the Judge. During such assessment only the Judge, court staff, lawyers, guardian-ad-litem, support person of the child and such other person as the court directs may be present. The accused may be present unless the Court determines that assessment can be fully carried out in the absence of the accused.

(2) The questions asked to assess the competency of the child shall be appropriate to the age and developmental level of the child; shall not be related to the issues at trial; and shall focus on the ability of the child to remember, communicate, distinguish between truth and falsehood, and appreciate the duty to testify truthfully. The court shall continue to assess the competency throughout their testimony.

20. Delhi High Court Guidelines for recording Evidence of Vulnerable witnesses.

(3) The child witness (called the Vulnerable Witness) shall be allowed a pre-trail visit to the Court.

(4) The Judge may meet a vulnerable witness before his evidence for explaining the court process.

(5) The court may appoint any person as guardian ad litem as per law to a witness who is a victim of, or a witness to a crime having regard to his best interests.

(6) A vulnerable witness may be provided with legal assistance by the court, if the court considers the assignment of a lawyer to be in the best interests of the child, throughout the justice process at the request of the support person or on its own motion.

(7) The court may provide a support person to the child witness who shall be person of the child's choice to provide the child witness support by holding hands etc. The court shall direct the support person not to influence the evidence of the child witness.

(8) To assist the vulnerable witnesses in effectively communicating at various stages of trial and or to coordinate with the other stake holders such as police, medical officer, prosecutors, psychologists, defence counsels and courts, the court shall allow use of facilitators.

(9) The vulnerable witness, guardian ad litem and support persons shall be well informed about the stage of the case, time and place of hearing, procedure of the criminal justice system etc.

(10) The court must ensure that the proceedings are conducted in a simple language which is comprehensible to the child witness and if required shall also provide an interpreter.

(11) The waiting area of the child witness shall be separate from the common waiting area and shall be so furnished so as to make the child comfortable.

(12) It shall be the duty of the court to ensure a comfortable environment for the child witness.

(13) The child may be allowed to depose from a place other than the witness chair.

(14) The court may order that the testimony of the child shall be recorded at a time when the child is well rested.

(15) The vulnerable witness may be allowed reasonable periods of relief while undergoing examination, as often as necessary depending on his developmental need.

(16) The Court must take measure to ensure the privacy and protection of the child witnesses and victims. These measures may include use of pseudonym, concealing of names from public records, use of one sided mirrors, using image and voice altering devices.

(17) Child witnesses shall receive high priority and shall be handled as expeditiously as possible, minimizing unnecessary delays and continuances.

(18) The court may permit live-link television testimony in criminal cases where the child witness is involved

(19) To facilitate the ascertainment of the truth the court shall exercise control over the questioning of vulnerable witness. For this the Court shall (i) ensure that questions are stated in a form appropriate to the developmental level of the vulnerable witness; (ii) protect vulnerable witness from harassment or undue embarrassment; and (iii) avoid waste of time by declining questions which the court considers unacceptable due to their being improper, unfair, misleading, needless, repetitive or expressed in language that is too complicated for the witness to understand. (iv) the court may allow the child witness to testify in a narrative form. (v) questions shall be put to the witness only through the court.

(20) Where the safety of a child victim or witness is deemed to be at risk, the court shall arrange to have protective measures put in place for the child. Those measures may include the following: (a) avoiding direct or indirect contact between a child victim or witness and the accused (b) restraint orders; (c) a pretrial detention order for the accused or with restraint or ?no contact? bail conditions which may be continued during trial; (d) protection for a child victim or witness by the police or other relevant agencies and safeguarding the whereabouts of the child from disclosure; (e) any other protective measures that may be deemed appropriate.

8.1.4. Child witness under POCSO Act:

Prevention of Children from Sexual Offences Act is a special legislation containing many provisions for protecting the privacy, safety and wellbeing of child victims of sexual offences. Under the act, the Court must observe the following additional precautions while recording the evidence of the child witness:

(1) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child. **[Section 33 (2) of POCSO Act]**

(2) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial. **[Section 33 (3) of POCSO Act]**

(3) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court. **[Section 33(4) of POCSO Act]**

(4) The Special Court shall ensure that the child is not called repeatedly to testify in the court. **[Section 33 (5) of POCSO Act]**

(5) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial. . **[Section 33 (6) of POCSO Act]**

(6) The Special Court shall ensure that the identity of the child is not disclosed at any time

during the course of investigation or trial provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child. **[Section 33 (6) of POCSO Act]**

(7) The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court. **[Section 35 (1) of POCSO Act]**

(8) The Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate. For this the Special Court may record the statement of a child through video conferencing or by utilizing single visibility mirrors or curtains or any other device. **[Section 36 of POCSO Act]**

(9) Wherever necessary, the Court may take the assistance of a translator or interpreter having such qualifications, experience and on payment of such fees as may be prescribed, while recording the evidence of the child. If a child has a mental or physical disability, the Special Court may take the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed to record the evidence of the child. **[Section 38 of POCSO Act]**

8.2. Corroboration of testimony of a child witness:

As has been seen, a child witness is susceptible to tutoring, false impressions, temptations and threats, and hence it has been held in several cases that the testimony of a child witness must be corroborated by other evidence. In **Panchhi and others vs. State of U.P.[21],** the Supreme Court observed as follows: ***"But we do not subscribe to the view that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and thus a child witness is an easy prey to tutoring."***

However can conviction be based on the uncorroborated testimony of a child witness has been the subject of much judicial deliberation. The Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. It is more a rule of practical wisdom than of law.[22]

The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence

21. (1998) 7 SCC 177

22. ibid

of a child witness is that the witness must be reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration of such evidence from other dependable evidence on record.[23]

In the case of **Raja Ram Yadav Vs State of Bihar**[24]conviction was based on the sole testimony of a child witness. In **Suresh Vs State of UP**[25] also conviction was based on the sole testimony of the child witness.

In **Kandayanathil vs. State of Kerala**[26] the trial Judge had put preliminary questions to the two child witnesses and after being satisfied that they were answering questions intelligently without any fear whatsoever, proceeded to record the evidence. In the chief examination, both the child witnesses had given all the details of the occurrence. Hon'ble Apex Court held the accused guilty on the testimony of two child witnesses holding that that there has been a searching cross-examination and the witnesses withstood the same and held them to be most natural witnesses who had been present in the house at the night time.

Thus from all the above cases it can be safely concluded that the testimony of child witness can form basis of conviction even without independent corroboration if the court is satisfied that the testimony was coherent and otherwise unblemished with tutoring etc. However prudence demands that the testimony of child witness should usually be corroborated by independent witnesses.

9. Incompetence due to extreme old age:

Just like tender years, extreme old, by itself, is not a ground of incompetence of witness. The principle is same in many other countries of the world. In USA, in the case of **Rodriguez v. State**[27]**,** an 83-year-old witness was held to be competent to testify in spite of the fact that she had Alzheimer's disease and did not remember certain things, but her testimony regarding the incident in question was "coherent and intelligible".

In India the law in this regard is clear that an extremely aged person will be incompetent to testify only if he is unable to understand the questions and give rationale answers to them or if he has lost the power of observation and giving rationale answers to them.[28]

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23. DattuRamraoSakhare and Ors. vs. State of Maharashtra (08.05.1997 - SC) : MANU/SC/1185/1997
24. 1999(2)BLJR979
25. 1981 AIR 1122
26. MANU/SC/0339/1993
27. 772 S.W.2d 167 (Tex. Ct. App. 14 Dist. 1989)
28. Law of Evidence by Justice CK Thakker (Fifth Edition) pg 2321

In the case of **Jnanada Govinda Choudhury vs. Birendra Nath Goswami**[29] it was held that merely because the witness was an old man of 75 years by itself carries no guarantee of truthfulness, if his evidence is otherwise unworthy of credence.

Where the Court is doubtful that a witness is incompetent to testify because of the old age, it may subject the witness to a preliminary enquiry as in the case of child witnesses.

10. Incompetence due to physical and mental disease:

Apart from tender years and extreme old age, inability to comprehend the questions and give rationale answers to them by virtue of diseases of body and mind is also a ground for incompetence of a witness.

Explanation to section 118 provides that a lunatic is not incompetent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rationale answers to them.

Thus in consistence with the general rule favouring competency and frowning upon exclusion of the witness , a person suffering from mental or physical illness, does not by virtue of the illness become incompetent to testify unless it is shown that he is unable to understand the questions put to him and to give rationale answers to them.

Commenting on incompetency arising out of physical illness, John Henry Wigmore, in his work ***"Treatise on Evidence in Trials on Common Law," Third Edition, observed: "The capacity of observation may be otherwise so lacking particularly through blindness that the witness may be incompetent to testify on the specific subject to which the incapacity relates. The capacity of recollection or of communication may also be so affected by disease or otherwise as to lead to the same results."***[30]

A leper who was able to understand the questions put to him and to give rationale answers to the questions was held to be a competent witness.[31]

A witness may be incompetent if he is in such extreme pain as to be unable to understand or to answer questions or he may be unconscious as if in a fainting fit, epilepsy or the like.[32]

Epilepsy does not always make a witness incompetent to testify nor does it prevent a person from understanding the questions put to him or giving rationale answers to them.[33]

With respect to incapacity due to mental illness, in 'A Practical Approach to Evidence' Peter Murphy has said as follows: ***"There was, at common law, an undeveloped view that 'lunacy'***

29. MANU/WB/0271/1938

30. Sourced from: "Law of evidence by Woodroff and Amir Ali" 19th Edition.pg 4758

31. Ram Krishna VsArjun AIR 1962 Ori 29

32. Law of evidence by Woodrof and Amirali 19th Edition pg 4758

33. Prakash @ AjayanetcVs State of Kerala 2009 CrLJ 2930

was a bar to competence. The view probably resulted both from the dangers of unreliability and from doubtful capacity to appreciate the nature of an oath….Although the position in contemporary law is largely unexploited, it seems that the court will take a pragmatic view, and accord competence to a person of defective intellect, which corresponds with the judge's view of his capacity to understand the nature of the proceedings and to speak the truth to the best of his ability. The question is whether the proposed witness is, at the time of being called, capable of giving proper evidence. If his lack of capacity is a temporary one, his evidence may be receivable after a suitable adjournment, as may be the case with a witness who arrives at court drunk. Incapacity will not be accepted if the witness's evidence can be taken with reasonably practicable precautions, particularly if the evidence may be important".[34]

The disease of the mind applies to idiocy and lunacy and an idiot is one who was born irrational; a lunatic is one who was born rational but has subsequently become irrational. The idiot never can become rational; but a lunatic may entirely recover, or have lucid intervals.[35]

It must be remembered that the competence of the witness is affected only where disease of the mind affects the capacity to understand questions and give rationale answers to them.

The 69th Law commission report made reference to R vs. Hill (1851) 2 Den. 254, and R vs. Barratt: (1996) Crim. L.R 495 C.A to underscore this point. In R vs Hill the witness believed that he had 20,000 spirits personally appertaining to him. On all other points, he was perfectly sane. His testimony in all other matters was accepted (Norton p. 305)

In R vs. Barratt (Supra) the witness's fixed belief paranoia caused her to have bizarre beliefs about her private life but still it was held that the illness did not render her incompetent to give evidence of finding finger prints.

Where the witness was suffering from mental illness and there was a certificate of doctor to that effect and she was also not able to answer the question put to her by the Court which was a very simple question, the Court was required to give a finding as to whether the witness was competent to depose after having found that the witness was suffering from mental disease. It was the bounden duty of the court to examine the witness with reference to the doctor's report and then give a finding that the witness is competent to depose. It is only after giving such a finding that the Court can permit the witness to be examined. Sec. 118 of the Act, lays down clearly that if the Court finds that the witness is competent to speak, it can permit him to depose. If the competency is affected by the circumstances mentioned there, the court cannot permit such witness to be examined.[36]

Where one of the persons who had received injuries in the course of occurrence was not produced as a witness since the Doctor who had treated her, had opined that she is suffering from

34. Sourced from: The State of Karnataka vs. Shabuddin (20.03.1995 - KARHC) : MANU/KA/0134/1995

35. ibid

36. ibid

retrograde amnesia and is not a competent witness and calling her to witness box may have an adverse effect on her health, the Court held that the certificate and testimony of the doctor in this regard is sufficient and it was not necessary for the Court to call her to test her competency. No adverse inference can be drawn against the prosecution for not producing the witness.[37]

11. Deaf and Dumb Witness:

Section 119 of Evidence Act provides that ***a witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.***

In 2013 a proviso was added to this section which provides that if the witness is unable to communicate verbally the court shall take the assistance of an interpreter or a special educator in recording the statement and such statement shall be videographed.

In **State of Madhya Pradesh Vs Ramesh[38],** the Hon'ble Apex Court observed that "The object of enacting the provisions of Section 119 of the Evidence Act reveals that deaf and dumb persons were earlier contemplated in law as idiots. However, such a view has subsequently been changed for the reason that modern science revealed that persons affected with such calamities are generally found more intelligent, and to be susceptible to far higher culture than one was once supposed." In line with this observation and in acknowledgment of the special abilities of mute witnesses, the heading of section 119 Evidence Act was also changed from "Dumb Witnesses" to "Witness unable to communicate verbally" by the 2013 amendment.

Even though, section 119 Evidence Act deals only with dumb witnesses but it equally applies to deaf witnesses as well.[39] This section also applies to witnesses who have taken religious vow of silence and gives his evidence in writing to questions put to him. In such a case he must be deemed as unable to speak within the meaning of this section.[40]

Where a witness is so deaf and dumb that is impossible to make him understand the question put to him in cross examination he cannot be a competent witness and his evidence ought to be struck out.[41]

11.1. Precautions and Safeguards to be adopted while recording the statement of deaf and dumb witnesses:

A Deaf and dumb witnesses, being special category of witnesses, face difficulty in understanding the question and giving answers to them under normal circumstances. Therefore the Courts need to exercise the following precautions while recording the deposition of such witnesses:

37. In Re: Govinda Reddy and Ors.1958AIR1958Kant150

38. (2011)4 SCC786

39. K SivaramVs K mangalamba (1985) 2 APLJ 189

40. LakhanVs Emperor AIR 1942 Pat 183

41. 1912 WN 100: 14 IC 655 (sourced from Law of evidence by CK Thakker Fifth Editionpg 2331)

11.1.1) Using the Services of an interpreter or special educator:

The Court, in order to understand and appreciate the evidence of such witnesses who express their ideas with the help of signs, should necessarily seek the assistance of an expert so as to safely rely on such evidence. [42]Section 282 CrPC provides that an interpreter is bound to state the true interpretation.

Interpreter should be a person of the same surrounding but should not have any interest in the case.[43]

The neutrality of the interpreter was the subject of contention in a case[44] in which the interpreter on the next day of the incident went to the Assistant Manager of the Mill where the deceased and accused were working and reported him the murder. Thereafter the room of the accused was searched where the interpreter was one of the witnesses. The interpreter also independently deposed before the sessions Judge. In such situation it was held that the Session Court should not have chosen that person as the interpreter.

Where the witness is able to read and write, there is no need of interpreter. In a case[45] the witness had lost the ability to speak due to an injury and his testimony was therefore recorded by permitting him to answer in writing. The defence counsel objected to the admissibility of the evidence on the ground that the help of expert was not taken. It was held in the case that the examination was conducted in the manner laid down in Section 119 of the Evidence Act in regard to the dumb witness who could not speak and therefore the learned trial Judge had resorted to the practice of recording the replies in question answer form and filing those replies with the record also. No infirmity can be found in the procedure adopted by trial Judge in recording the replies in question answer form which can be read in evidence under Section 119 of the Evidence Act.

Interpreters can be sourced from deaf and dumb schools.

Deaf and Dumb Schools in Bihar[46]

1. ShriKameshwariPriya Poor Home, RajkiyaMookBaghir Residential middle School, Darbhanga
2. RajkiyaMookBaghir (Balak) Residential middle School, Mahendru Patna
3. RajkiyaMookBaghir (Girls) Residential middle School, GaiGhat Patna
4. RajkiyaMookBaghir Residential middle School, Badikhanjarpur, Bhagalpur
5. RajkiyaMookBaghir Residential middle School, Munger

42. KadungothAlavi v. State of Kerala MANU/KE/0146/1981
43. State of Rajasthan vs. Darshan Singh AIR2012SC1973
44. Ah SoiVs King Emperor AIR 1926 Cal 922
45. Rajesh Kumar and Ors. vs. State of H.P. (14.03.2007 - HPHC) : MANU/HP/0076/2007
46. Courtesy: Social Welfare Department, Govt. of Bihar.

11.1.2) Oath should be given both to the interpreter and the witness:

In **State of Rajasthan Vs Darshan Singh**[47] neither the deaf and dumb victim-girl nor her father, who also acted as interpreter, were administered oath. It was held by the Hon'ble Supreme Court that both the witness and the interpreter should be administered oath.

11.1.3. The testimony given by the deaf and dumb witness should be videographed.[48]

11.1.4. If the witness is able to read and write then it is most desirable to adopt that method as it is more satisfactory than any sign language. The questions should be given to him in writing and seeking answers in writing.[49]

11.1.5. When a deaf and dumb witness is under cross-examination, the Court is required to take due care of the fact that vocabulary of such a person is limited as he or she speaks through sign language and it may not be possible for that witness to answer, or in detail explain every answer by sign language. This disability of a limited vocabulary of sign language does not affect either the competence or the credibility of such witness. The Court is required to exercise control over the cross-examination keeping in view the ability of the witness to answer the questions. When a deaf and dumb witness is under cross-examination, the Court is required to take due care of the fact that vocabulary of such a person is limited as he or she speaks through sign language and it may not be possible for that witness to answer, or in detail explain every answer by sign language. This disability of a limited vocabulary of sign language does not affect either the competence or the credibility of such witness. The Court is required to exercise control over the cross-examination keeping in view the ability of the witness to answer the questions.[50]

11.1.6) There must be record of signs and not merely interpretation of signs.[51]

12. Parties to proceedings, and their wives or Husbands:

As per section 120 of Indian Evidence Act, the following are competent witnesses in a civil suit:

(1) Parties to the suit

(2) Husbands and wives of parties to suits or of the accused

12.1 Parties to suits:

Earlier the rule in common law was that no one can be a witness in his own cause. However section 120 of the Indian Evidence Act has done away with that rule. In the vast majority of cases,

47. AIR2012SC1973

48. Proviso to S. 319 as amended by 2013 Amendment Act.

49. State of Rajasthan VsDarshan Singh AIR2012SC1973

50. Chander Singh Vs state 2016 SCC OnLine Del 3574

51. Siya Ram Vs State of Chattisgarh MANU/CG/0384/2018; State of Rajasthan VsDarshan Singh AIR2012SC1973

there can be none more interested in the success of their cause than the parties to the suit and the husband or wife of such party yet they are competent witnesses, as section 120 Evidence Act specifically prescribes. If the parties to a suit are to be disbelieved as interested witnesses, only because they are parties, that will nullify this section. So, the testimony of the parties or their spouses must be scrutinized in the same way as that of any other witnesses. [52]When a plaintiff has deposed in support of his case, the Court is free to attach to the evidence that amount of credence which it appears to deserve, from his demeanour, deportment under cross-examination, motives to speak or hide the truth, means of knowledge, power of memory, and other tests, by which the Value of a statement of a witness can be ascertained if not with absolute certainty yet with a reasonable amount of conviction as ought to justify a man of ordinary prudence in acting upon those statements.[53]

Normally a party to the suit is expected to step into the witness box in support of his own case and if a party does not appear in the witness box it would be open to the trial Court to draw an inference against him. If a party fails to appear in the witness box, it should normally not be open to his opponent to compel his presence by the issue of a witness summons. However the rule is not invariable and it does not mean that a party can never be compelled to be examined as a witness by the other side by issue of summons. In a case the defendant did not offer himself as a witness and the plaintiff wanted to prove an admission made earlier by the defendant. Under such circumstances Hon'ble Gujarat High Court held that the plaintiff may be allowed to examine the defendant.[54]

There is no provision to show that a party is debarred from examining its adversary as a witness on his behalf. A plaintiff can examine any witness he so likes — the witness may be a stranger, may be a man of his own party or party himself or may be a defendant or his man. Therefore, if a plaintiff wants to examine a defendant as a witness on his behalf, he cannot be precluded from examining him on the ground that the said defendant has neither appeared in the suit nor upon appearance filed written statement nor prayer for filing written statement has been rejected.[55]

12.2. Husband and wife of parties to the suit or of the accused.

Section 120 of Evidence Act provides that in civil suits husband and wife of the parties and in criminal proceedings against any person, the husband or wife of such person shall be competent witnesses.

A Bench of Hon'ble Andhra Pradesh High Court in the case of **Ved Pal v. Shakuntala @**

52. Binani Properties Pvt Ltd Vs GA Hossain and Company AIR 1967 Cal 390.

53. Jogendra Krishna Roy AndOrs.vsKurpalHarshi And Co.(on 2 May, 1921) 68 IndCas 993

54. VashramDayavs B Deva (1971) 12 Guj LR 40

55. Sri Awadh Kishore Singh and another VsSriBrijBihari Singh and others AIR 1993 Pat 122

Aruna[56] has categorically laid down that section 120 of the Evidence Act permits the husband to speak on behalf of wife and that the husband can always speak about the factual circumstances in order to establish the case.

Where the wife, admittedly did not involve herself personally either in purchasing or managing the suit land and was acting through husband, her not coming into the witness box is not much of consequence. As per Section 120 of Evidence Act, the spouse of a party is a competent witness. So, by examining her husband, who acted on her behalf, as P.W.1, respondent sufficiently discharged the onus that lay on her.[57]

In **Munni Devi Vs Sona Devi**[58]**,** it was held that the husband can depose about dispatch of a notice by his wife if he has personal knowledge about the same.

12.2.1. Limitation on the testimonial capacity of the husband or wife of the party to the suit or of the accused:

As per section 120 of Indian Evidence Act, husband and wives of accused are competent witnesses. However this section has to be read in conjunction with section 122 of the Act which provides that no person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married nor shall he be permitted to disclose any such communication except with the consent of the person who made it or in suit between married persons or proceedings in which one married person is prosecuted for any crime committed against the other.

In **Pringle Vs Pringle**[59] Sherwood J Observed "It is necessary to preserve family peace and maintain that full confidence which ought to subsist between husband and wife.

In the case of **Fateh Singh Vs state of UP**[60], the Hon'ble Allahabad High Court observed that the wife of the accused cannot be permitted to depose about the statements made to her by her husband but held that other parts of her testimony which were not covered under section 122 Evidence Act may be relied upon.

Ram Bharosey vs. State of Uttar Pradesh[61] is another illustrative case in this regard. In this case the trial Court has relied on the statement of the wife of the accused wherein she has said that:

> *"I awoke in the morning and saw that my husband was coming down the roof. Thereafter he went inside the Bhusa Kothri. He came out of the Bhusa Kothri and had*

56. 2005 (4) ALD 79, 2005 (3) ALT 352
57. Kurella Naga DruvaVudayaBhaskaraRao vs. GallaJanikamma 2009 (3) ALD 416
58. 2014 (107) ALR 224
59. 59 Pa 281,288
60. LQ 1994 HC 2931
61. AIR 1954 SC 704

a bath on the 'nabdan' after becoming naked. After this he wore on the same dhoti, which he was wearing before taking his bath. He sat at home after his bath and said to me that he would give me Chail Choori, Lachha, Kara and Zanjir.....I had asked him where he had gone at about 'moonh andherey', and he replied that he had gone to the middle house in order to get few things."

The middle house referred to in this deposition is the house in which deceased was living. The apex court held that the statements made by the accused to his wife that he would give her jewels, and that he had gone to the middle house to get them were inadmissible by virtue of section 122 of the Evidence Act.

Thus even though under section 120 of Evidence Act wife or husband of the accused are competent witnesses but such witness will not be allowed or compelled to depose about the statements made to them by the accused during the subsistence of the marriage except in suit between married persons or proceedings in which one married person is prosecuted for any crime against the other.

13. Accomplice as a competent witness:

As per section 133 of Indian Evidence Act, accomplice is a competent witness. The word Accomplice has not been defined in the Indian Evidence Act or even in Penal Code or the Code of Criminal Procedure. The term signifies a guilty associate in crime or when the witness sustains such a relation to the crime that he could be jointly indicted with the accused. The primary meaning of accomplice is any party to the crime charged and someone who aids and abets the commission of crime.[62] It may further be noticed that where a witness is not concerned with the commission of the crime for which the accused is charged, he cannot be said to be an accomplice in the crime, as it is well settled that all accessories before the fact, if they participate in the preparation for the crime are accomplices, but if their participation is limited to the knowledge that crime is to be committed, they are not accomplices. "Whether therefore a person is or is not an accomplice depends upon the facts in each particular case considered in connection with the nature of the crime; and persons to be accomplices must participate in the commission of the same crime as the accused persons in a trial are charged.[63]

Whether a decoy and a bribe giver is an accomplice or not, has been the subject of much judicial consternation. Wigmore on Evidence, Third Edition, (U. S. A. and Canadian edition) page 339 (s. 2060) has the following to say: ***"The case of a pretended confederate, who as detective, spy, or decoy, associates with the wrongdoers in order to obtain evidence, is distinct from that of an accomplice, although the distinction may sometimes be difficult of application..."***

62. Somasundaram vs. The State (03.06.2020 - SC) : MANU/SC/0467/2020

63. Narain Chandra Biswas and Ors. vs. Emperor (11.12.1935 - CALHC) : MANU/WB/0160/1935

The line should perhaps be drawn in this way : When the witness has made himself an agent for the prosecution before associating with the wrongdoers or before the actual perpetration of the offence, he is not an accomplice; but he may be, if he extends no aid to the prosecution.

A mere detective or decoy or paid informer is therefore not an accomplice; nor an original confederate who betrays before the crime's committal....": **Olmstead v. United States, (1927) 277 US 438 : 72 Law Ed 944 (Z9);** contra Canada : **R. v. Tommy, R. v. Kinney, R. v. McKinley, (1930) 1 DLR 973 (Z10**) (Police Officer investigating an offence); **R. v. Rodgers, (1926) 4 DLR 609 (Z11),** (elaborate opinion).[64]

A person offering a bribe to a public officer is an accomplice in the offence of taking illegal gratification.[65]

However, a distinction can be drawn between cases where a person offers a bribe to achieve his own purpose and where one is forced to offer bribe under threat of pecuniary loss or harm or coercion. Persons under the last category who are thus victimized can hardly be called accomplices. Persons giving illegal gratification under coercion and fear of being harassed are not accomplices.[66]

Although the above proposition is generally applicable to bribe givers, however trap cases stand on a different footing. A person who is not a willing party to the giving of bribe and who is only attracted by the motive of trapping another cannot be regarded as an accomplice but the evidence of such a witness is that of a partisan witness who wants to entrap another.[67]

A Rape victim cannot be put at par with an accomplice. She is a victim of the crime and there is no rule that her testimony cannot be accepted without corroboration.[68]

Any discussion on the testimony of the accomplice would be incomplete without looking into the provisions of section 306 which provides for tender of pardon to the accomplice. The section provides that with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into or the trial of the offence and the magistrate of the First Class inquiring into or trying the offence at any stage of inquiry or trial may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned whether as principal or abettor in the commission thereof. The provisions of this section applies only to an offence triable exclusively by a court of sessions or a court of special Judge appointed under the provisions of Criminal Law Amendment Act or to any offence punishable with imprisonment which may extend to seven years or with more severe

64. Sourced from In Re: M. Rangarajulu Naidu and Ors. (10.09.1957 - MADHC) : MANU/TN/0640/195713.1.

65. ILR 14 Bom 115: RR Chari Vs state AIR 1959 All 149

66. Dalpati Singh Vs State of Rajastan AIR 169 SC 17

67. AIR 1961 Guj 1

68. State of Maharashtra Vs Chandra Pk Jain 1990 CrLJ 889

punishment. Section 307 provides that if the persons who has been tendered pardon under section 306 does not comply with the conditions of the pardon then he may be tried for the original offence and also for the offence of giving false evidence but he shall not be tried jointly with any of the other accused.

Andhra Pradesh High Court in a case[69] observed the following principles to be followed by the Court while granting pardon:

(1) The power to grant pardon enjoined under sections 306 and 307 of the Code is a substantive power and it rests on the judicial discretion of the Court.

(2) The power of the court is not circumscribed by a condition except the one namely that the action must be with a view to obtaining the evidence of any person who is supposed to have been directly or indirectly concerned in or privy an offence.

(3) The court has to proceed with great caution and on sufficient grounds recognizing the risk which the grant of pardon involved of allowing an offender to escape just punishment at the expense of the other accused.

(4) The secrecy of the crime and paucity of evidence solely for the apprehension of the other offenders, recovery of the incriminating objects and, production of the evidence otherwise unobtainable might afford reasonable grounds for exercising the power.

(5) The disclosure of the person seeking pardon must be complete.

(6) While tendering pardon the court should make an offer to one least guilty among the several accused.

(7) The power to grant pardon shall be exercised when the prosecution joins in the request. When the Accused directly applies to the Court the Court must refer the request of the Accused to the prosecuting agency and obtain the statement regarding the said request.

13.1. Corroboration of testimony of an Accomplice

Section 133 of Indian evidence Act provides that an accomplice shall be a competent witness against an accused persons and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. This provision appears to be in dissonance with illustration b of section 114 of the Act which provides that the court may presume the accomplice is unworthy of credit unless he is corroborated in material particulars. However on closer scrutiny it would transpire that there is no repugnancy in the two provisions. Section 133 merely states that a conviction based on uncorroborated testimony of an accomplice is not illegal, whereas illustration (B) of section 114 provides a rule of caution and prudence. In **Bhiva Daulu Patil Vs State of Maharashtra[70],** it was held that the combined effect of sections 133 and 114 illustration b of the

69. KonajetiRajbabuVs State f AP 2002 CrLJ 2990

70. AIR 1963 SC 599

evidence Act was that accomplice is competent to give evidence but it would be unsafe to convict the accused on his testimony alone. Thought the conviction of an accused on the testimony of an accomplice cannot be said to illegal yet the courts will, as a matter of practice not accept the evidence of such a witness without corroboration in material particulars.

The rule of practice regarding the credibility of an accomplice is based on human experience and the court will look for corroboration[71]

In a case[72] which went up from Patna, their Lordships of the Judicial Committee of Privy Council observed, with specific reference to Section 133 and Section 114, illust. (b), Evidence Act: ***"Reading these two enactments together, the Courts in India have held that whilst it is not illegal to act upon the uncorroborated testimony of an accomplice, it is a Rule of prudence so universally followed as to amount almost to a Rule of law that it is unsafe to act upon the evidence of an accomplice unless it is corroborated in material respects so as to implicate the accused; and further that the evidence of one accomplice cannot be used to corroborate the evidence of another accomplice."***

The law in India, therefore, is substantially the same on the subject as the law in England though the Rule of prudence may be said to be based upon the interpretation placed by the Courts on the phrase "corroborated in material particulars" in illust. (b) to Section 114".

13.1.1. Nature and Extent of Corroboration:

For corroborative evidence the Court must look at the broad spectrum of the approver's version and then find out whether there is other evidence to corroborate and lend assurance to that version. The nature and extent of such corroboration may depend upon the facts of different cases. Corroboration need not be in the form of ocular testimony of witnesses and may be even in the form of circumstantial evidence. Corroborative evidence must be independent and not vague or unreliable.[73]

The Rules in this regard are lucidly dealt with in the case of **PyareMohan Vs State of UP**[74] where in two propositions were observed for corroboration of testimony of an accomplice. First, it is not necessary that there should be independent confirmation of every material circumstance. This implies that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should not necessarily be such that in itself be sufficient to sustain conviction. Secondly, the independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by

71. AIR 1963 SC 599 Sheikh Zakir v. State of Bihar: AIR 1983 SC 911); Niranjan Singh v. State of Punjab: AIR 1996 SC 3254.

72. BhuboniSahu v. The King A. I. Rule 1949 P. C. 257 (D)

73. Narayan ChetanramChaudhary and Ors. vs. State of Maharashtra (05.09.2000 - SC) : MANU/SC/0547/2000

74. Pyarey Mohan and Ors. vs. State (04.11.1955 - ALLHC) : MANU/UP/0130/1956

confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime".

The above propositions may be further elucidated in the word of Lord Heading: 'indeed, if it were required that the accomplice should be confirmed, in every detail of the crime, his evidence would not be essential to the case; it would be merely confirmatory of other and independent testimony. All that is required is that there must be 'some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it'.[75]

Corroboration need not be by direct evidence of the commission of offence by the accused. If it is merely circumstantial evidence of his connection with the crime it will be sufficient and the nature of corroboration will depend on and vary with the circumstance of the case.

Woodroffe and Amir Ali state the following rules for corroborative evidence:

(a) The corroborative evidence must not be inadmissible.

Any inadmissible evidence cannot be accepted by the court and therefore it has no value in the eyes of the law. In a prosecution case under section 337 IPC, evidence that other boys, like the complainant, visited the accused in his room does not amount to corroborative evidence nor would such fact be evidence (being evidence of similar facts inadmissible to prove the same fact)[76]. Such evidence must be corroborative of the same offence as deposed to by the accomplice and be not merely substantive evidence of several similar offences.

(b) It must be unambiguous:

If the facts to be proved are of an ambiguous nature they cannot be used for corroboration. Letters found in possession of an accomplice which were so worded as to admit of no unfavourable inference being drawn against an accused person without in the first place accepting as correct the interpretation suggested by the accomplice himself, were held as not affording any corroboration of the version of the accomplice.[77]

Corroboration of crime as well as accused:

One of the established rules is that the testimony of the accomplice should be corroborated in material particulars not only with regard to the commission of the crime but also with respect to accused.

Justice Maule in R Vs Mullins[78] observed that **"I quite agree that the confirmation of an**

75. ibid

76. BalMukundo Singh V r (1935) 61 CLJ 583 soured from Woodroff and Amir Ali. 19th Edition 4998.

77. RvsChatur (1876) Rat Unrep 102.Sourced from Woodroff and Amir Ali 19th Edition pg 4999

78. (1848) 3 Cox CC526 sourced from Woodroff and Amir Ali 19th Edition pg 5016

accomplice as to the mere fact of a crime having been committed or even the particulars of it, is immaterial, unless the fact of the prisoner being connected with it is proved. It often happens that an accomplice is a friend of those who committed crime with him and he would much rather get them out of the scrape and fix an innocent man his read associates."

In the case of **R vs Nawab Jan**[79] Macpherson J observed: **"Facts which do not show the connection of prisoner with the commission of the offence with which he charged are no corroboration in the sense in which the word is used in such cases, although they may tend to show that certain portions of what the accomplice says are true"**

In **R vs Issen Mundle**[80] the testimony of the accomplice was corroborated by the recovery of certain property which was hidden in a dry well but it was held that though it is a good corroboration of the fact that the accomplice was one of the dacoits but it is not corroboration against one of the dacoits.

The result of medical examination in a case may corroborate the approver's statement against himself but not against the other accused. It only shows that the manner of death as told by the accused is correct and that he was present when the death is caused but does not offer corroboration as to statements as to who caused the death of the deceased.[81]

13.1.2. Who may corroborate the testimony of an accomplice:

Now we shall paddle into the question as to who may corroborate. In this regard it was held that save in exceptional circumstances one accomplice can neither be used to corroborate another nor can he be used to corroborate a person who though not an accomplice is no more reliable than one.[82] In **R vs Ram Saran**[83] it was observed that: ***"There must be some corroboration independent of the accomplice ,or, as in the present case, of the accomplice and the co confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him. I may add that it is of no value and makes no difference if there are two accomplices. A second accomplice does not improve the position of the first nor does the fact there are two make it necessary that both should be corroborated."***

In **R vs Maganlal**[84], several persons who offered bribes to the accused were examined as witnesses and in the opinion of the magistrate there was no reason to disbelieve their evidence. The

79. (1867) 8 WR (cr) 19,26 sourced from Woodroff and Amir Al 19th Edition pg 5017
80. (1865) 3 WR (Cr)6, sourced from Woodroff and Amir Ali 19th Edition pg 5020
81. R Vs Sadhu Mandal (1874) 21 WR (CR) 69
82. Kashmira Singh v. State of Madhya Pradesh MANU/SC/0031/1952 : 1952CriLJ839
83. 1885 AWN 311,313.
84. (1889) ILR 14 Bom 114.

convictions were held illegal since there was no independent corroborative evidence apart from the testimony of the accomplice.

Testimony of approver's wife does not afford reliable independent corroboration of approver's evidence.[85] Likewise corroboration by son of approver was also held to be unreliable.[86]

14. Accused to be a competent witness:

Though generally, competence of witness has been dealt in the Indian Evidence Act but, the competency of accused as a witness has been dealt in Code of Criminal Procedure. Section 315 of Code of Criminal Procedure provides that: ***"315: Accused person to be competent witness: Any person accused of an offence before a criminal court shall be a competent witness for the defence and may give evidence on oath in disproof of charges made against him or any person charged together with him at the same trial:***

Provided that

(a) he shall not be called as a witness except on his own request in writing.

(b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against him or any person charged together with him at the same trial.

(2) Any person against whom proceedings are instituted in any criminal court under section 98, or section 107, or section 108or section 109, or section 110 or under chapter IX or under Part B, Part C or Part D or Chapter X may offer himself as a witness in such proceedings.

Provided that in proceedings under section 108, 109 or section 110, the failure of such person to give evidence shall not be made the subject of any comment by any of parties or the Court or give rise to any presumption against him or any other person proceeded against together with him at the same inquiry."

Under the section an accused person can be a competent witness for defence only. He can give evidence not only on his own behalf but also on behalf of the co accused. However an accused cannot give evidence on behalf of the prosecution or the complainant. This principle is in recognition of article 20(3) of the Indian Constitution which provides that no person can be compelled to be a witness against himself. In the case of **Subedar Vs State of UP**[87] the complainant, Dhanna, filed a case against three accused and when the Magistrate decided to make a preliminary enquiry under Sec. 202, Cr. P.C., got them summoned as his witnesses in order to satisfy the Magistrate that there was just ground for issuing process against them. Two of the

85. 34 CrLJ 450

86. AIR 1929 Raj587

87. AIR1957All 396

accused duly appeared and were examined as witnesses. But Subedar, the third accused, did not respond, and consequently Dhanna got a warrant issued against him. When he appeared in execution of the warrant he claimed the privilege of Art. 20(3) of the Constitution and contended that he could not be compelled to give evidence against himself. The learned Magistrate held that Subedar could not claim the privilege so long as he was not summoned as an accused person and directed him to give evidence u/s 202 Crpc. The Hon'ble High Court held that in India an accused cannot ever give evidence on behalf of the prosecution.

Permission to an accused to examine himself in defence can be granted only when a separate application on that behalf is filed under section 315.[88]

When the accused chooses to give evidence under section 315 on his own behalf, it does not have the effect of absolving the prosecution of its duty to prove the guilt of the accused. Nor is the accused required to prove his innocence.[89]

15. Witness deposing in other language:

It is sine qua non of competency of witness that he should be able to understand the questions put to him and to give intelligent answers to them. In vast majority of the cases the issue of competency involves the question of intellect except in the case of dumb and deaf witness. The case of persons deposing in a language unknown to the Judge is also akin to the case of deaf and dumb witness where even though the witness, in spite of having intellectual capacity, cannot comprehend the questions put to him and is prevented from giving answers to them because of language barrier.

Though evidence Act does not have any specific provision to provide for the course to be adopted when a witness deposes in another language, but the following general rules may be culled out from various other enactments and judicial pronouncements:

(1) If the witness deposes in the language of the Court, it shall be taken down in that language but if he testifies in any other language, it may be taken down in that language or if that is not practicable then a true translation of the evidence in the language of the court shall be prepared as the examination of the witness proceeds and it shall be signed by the magistrate or presiding judge and shall form part of the record.[90]

As per rule 6 of G.R.C.O (Civil) and rule 11 of GRCO (Criminal) of the State of Bihar, Hindi has been notified to be the only language of the Court. Therefore, whenever a witness deposes in English or any other language then the deposition has to be recorded in that language and if it is not possible to record the evidence in that language then the evidence will have to be recorded in Hindi and it shall be signed by the presiding officer of the Court.

88. Selvi J JaylalithaVs State (2000)9SCC 754

89. AIR 1958 Mad 368

90. S 277 (a) and (b) of Crpc

For the purpose of translation, services of an interpreter may be used. In **Shivnarayan v. State of Madras**[91] it was held that the failure to provide an **interpreter** would be at the highest an irregularity that would not affect the validity of the trial in terms of section 537 of the Code of Criminal Procedure 1898 (equivalent to Section 465 CrPC).

(2) If evidence is taken down in a language, other than the language of the Court then a true translation thereof in the language of the Court shall be prepared as soon as practicable and it shall be signed by the Judge and shall form part of the record. However if the deposition has been taken down in English and translation is not required by any of the parties then translation may be dispensed with.[92]

(3) If the record of the evidence is in a language different from that in which it has been given and the witness does not understand that language the record shall be interpreted to him in the language in which it was given or in a language which he understands. [93]Hon'ble Apex Court in **Mir Mohammad Omar vs State of West Bengal**[94] observed that the object of Section 278 is two-fold: firstly to ensure that the evidence of the **witness** as recorded is accurate and secondly to give the **witness** concerned an opportunity to point out mistakes, if any. If the correction suggested by the **witness** is one which the Judge considers necessary he will make it at once as required by subsection (1) but if the correction is such that the Judge does not consider necessary, subsection (2) requires that a memorandum of the objection be made and the Judge add his remarks, if any, thereto. The section is not intended to permit a **witness** to resile from his statement in the name of correction. Hon'ble Apex Court in **Bhagwan Singh v. State of Punjab**[95]**,** observed that If the deposition is not read over that would only amount to a curable irregularity and, as the Privy Council observed in **Abdul Rahman v. King Emperor** in the absence of prejudice which must be disclosed in an affidavit which shows exactly where the record departs from what the **witness** actually said, there is no point in the objection. Before prejudice can be substantiated on this score, it must be disclosed by affidavit exactly where the inaccuracy lies. Thus, the need to raise proper objection at the earliest possible stage in such situation is apparent. Accused also has to bring on record the prejudice suffered by him.[96]

(4) Whenever any evidence is given in a language not understood by the accused and he is present in court in person it shall be interpreted to him in open Court in a language understood by him. However if the accused appears by pleader and the evidence is given in a language other than the language of the Court and not understood by the pleader, it shall be interpreted to the pleader in that language. [97]It is at this stage that the accused shall have to communicate to the Court his

91. AIR 1967 SC 986

92. S 277 (c) Crpc and its proviso

93. S 278 (3) Crpc

94. (1989) 4 SCC 436,

95. 1952 SCR 812 : AIR 1952 SC 214 : 1952 Cri LJ 1131

96. Ashok Vs state of Maharashtra 2016 BHC 2297

97. S 279 (1) and (2) of Crpc.

inability to understand the proceedings. The grievance regarding not understanding the language should come from the accused himself or his counsel, so as to bring into play the provisions of Section 279(1) Cr.P.C. as to appointment of an **Interpreter** who can interpret the evidence to him in open Court in a language understood by him. Where the accused, at no stage during the trial or evidence, raised the objection regarding his inability to understand the proceedings nor did he demand that an **Interpreter** be provided therefore, it is necessarily implied that he was in a position to understand the language and the proceedings of the trial Court.[98]

5) In cases where in the Trial Court has to call-in-aid the services of **Interpreter** for any **witness,** the Court must satisfy its judicial conscience by insisting upon some tangible material on the basis of which it can feel convinced that the witness coming forward as an **Interpreter** is competent enough to discharge his duty of interpreting evidence. Where the trial court has requisitioned services of **Interpreter** straight-away honestly believing and taking for granted that he was having full knowledge of both the languages and therefore was competent enough to act as an **Interpreter**, it was held that such a blind acceptance of any person as an **Interpreter** particularly in absence of any satisfactory material to land assurance on that count is fraught with the great risk which can result into serious miscarriage of justice. A question may arise as to what could be that tangible material on the basis of which it can reasonably be said that the same is sufficient to satisfy the judicial conscience regarding competency of a person to act as an **Interpreter** before the Court. In this regard some certificate or some sort of evidence whereby the knowledge of **Interpreter** regarding the two languages could be tested and safely vouch-safe is necessary. Now what exactly indeed should be the nature of material to satisfy the judicial conscience of the Court is a matter left open for the concerned court which has to find out and record the same. As regards the interpreted evidence, the Court must be satisfied to the fullest for the simple reason that in a criminal trial a little mistake here or there can as well result in acquittal or conviction and thus either way any erroneous acquittal or conviction would be patent injustice either to accused or the society at large. In order to meet with such an eventuality the trial Court must fully satisfy itself regarding the competency of the **Interpreter** to act as **Interpreter** before he is asked to interpret. Further still in cases wherein the service of the **Interpreter** is indispensable and accordingly he is so examined then in that case the Court must record its finding as to how and on what basis it was satisfied regarding his competency so that the appellate court has an opportunity to objectively assess and appreciate the same.[99]

(6) Interpreter should be a neutral person.

(7) Oath should be administered to the interpreter and the witness.[100] However, merely because the oath was not administered to the interpreter, that by itself will not be sufficient to discard evidence of the witness.[101]

98. MinunnoVancenzoVs State of HPLQ 2005 HC 14053

99. Shankar DajiVs state LQ 1993 HC 2257

100. Section 4 of The Oaths Act.

101. Shankar DajiVs state LQ 1993 HC 2257

(8) The entire evidence should be videographed. There is no specific provision in any enactment for video recording of the evidence given by a witness deposing in any other language. However a pointer in this regard is provided by section 119 which provides for video recording of statement given by a dumb witness. Video recording of statements will help resolve future objections regarding the correctness of interpretation.

16. Conclusion:

Technicality of law is the refuge of criminals. It is perhaps due to this reason that the modern law has done away with all the archaic and complex rules of competency of witness and has enunciated the basic test of understanding for deciding the competence. However, in spite of well laid, simple and lucid statutory provisions and history of elaborate Judicial pronouncements, certain grey areas remain. A wide expanse of related matters -ranging from procedural issues such as amount of and procedure for reimbursement of expenses of translators, psychologists, etc, to legal complexities such as witness protection, to more intangible concerns such as issues relating to psychological aspects of vulnerable witnesses- has been left unattended by policy makers. Though it is a trite preposition that a draftsman's pen cannot be substitute for a Judge's prudence but still for uniformity of practice, guidelines are necessary to reduce inconvenience to the litigants and witnesses and also to ensure that Justice does not suffer on account of procedural lapses.

Apart from clear guidelines, there is also a need for tectonic shift in attitude of all stake holders (Judges, lawyers, prosecuting officers, police etc) towards witnesses in general and vulnerable witnesses in particular. Witnesses are the most important link to Justice and have to be treated as such. Tendency to defer the examination at the drop of a hat, long vexatious cross examination spread over several dates, reluctance to use modern technology such as video conferencing tools for recording of evidence, lack of clear witness protection programmes, failure to follow established protocols while examining child witness, and witnesses with special needs are symptomatic of system's apathy towards witnesses with special needs. It's time we realize that every time we fail to properly appreciate the competence of witness or their testimony, our own competence stands questioned.

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Topic No. – 14

Significance of judicial and extra-judicial confessions and its implications in a criminal trial. What is confession? The evidentiary value of inculpatory and exculpatory confession, confession of co-accused and retracted confession.

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ABBREVIATIONS USED

AIR	All India Reporter
CIS	Case information system
Cri. LJ	Criminal Law Journal
Cr.PC	Code of Criminal Procedure 1973
FIR	First Information Report
IA	Interim Application
IEA	Indian Evidence Act 1872
IPC	Indian Penal Code 1860
IT Act	Information Technology Act 2000
LR	The law Reports
PC	Privy council
PCI	Press Council Of India
PO	Probation Officer
RPF	Railway Protection Force
SCC	Supreme Court Case
SCR	Supreme Court Repoter
SHO	Station House Officer

INDIAN LEGISLATION

1. Code of Criminal Procedure 1898
2. Code of Criminal Procedure 1973
3. Constitution of India 1950
4. Indian Evidence Act 1872
5. Indian Penal Code 1860
6. Information Technology Act 2000

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Significance of judicial and extra-judicial confessions and its implications in a criminal trial. What is confession? The evidentiary value of inculpatory and exculpatory confession, confession of co-accused and retracted confession.

INTRODUCTION:

Chapter II of the Indian Evidence Act, 1872 (hereinafter "Act") deals with the subject of Relevancy of Facts, wherein Sections 17 to 31 talks about different dimensions of "Admission" and "Confession". Although the Act has defined "Admission" under Section 17, "Confession" hasn't been defined under the Act. However, in **Pakala Narayana Swami v. Emperor[1],** the Privy Council observed that *"a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence." Further, Section 31 of the Act prescribes that admission is not a conclusive proof, but may operate as estoppel, however nothing has been prescribed by the Act with regard to confession, except as provided under Sections 24 to 30. Furthermore, there has been a conflict of opinions of the Courts qua the evidentiary value of confessions.*

This paper aims at finding the meaning of confession and its various facets in criminal trial, particularly with respect to confession of accused containing inculpatory and exculpatory statements, confession of co-accused, retracted confession, extra-judicial confession and its implications.

The scheme of the law of evidence vis-a-vis confessions was stated in brief by the Hon'ble Supreme Court in **State (NCT of Delhi) v. Navjot Sandhu[2]** as follows:

> *"Under the general law of the land as reflected in the Evidence Act, no confession made to a police officer can be proved against an accused. "Confessions" which is a terminology used in criminal law is a species of "admissions" as defined in Section 17 of the Evidence Act. An admission is a statement, oral or documentary which enables the court to draw an inference as to any fact in issue or relevant fact. It is trite to say that every confession must necessarily be an admission, but, every admission does not necessarily amount to a confession. While Sections 17 to 23 deal with admissions, the law as to confessions is embodied in Sections 24 to 30 of the Evidence Act. Section 25 bars proof of a confession made to a police officer. Section 26 goes a step further and prohibits proof of confession made by any person while he is in the custody of a police officer, unless it is made in the immediate presence of a Magistrate. Section 24 lays*

1. Pakala Narayana Swami v. Emperor (1939 SCC Online PC 1)
2. 2(2005) 11 SCC 600

down the obvious rule that a confession made under any inducement, threat or promise becomes irrelevant in a criminal proceeding. Such inducement, threat or promise need not be proved to the hilt. If it appears to the court that the making of the confession was caused by any inducement, threat or promise proceeding from a person in authority, the confession is liable to be excluded from evidence. The expression "appears" connotes that the court need not go to the extent of holding that the threat, etc. has in fact been proved. If the facts and circumstances emerging from the evidence adduced make it reasonably probable that the confession could be the result of threat, inducement or pressure, the court will refrain from acting on such confession, even if it be a confession made to a Magistrate or a person other than a police officer. Confessions leading to discovery of a fact which is dealt with under Section 27 is an exception to the rule of exclusion of confession made by an accused in the custody of a police officer. Consideration of a proved confession affecting the person making it as well as the co-accused is provided for by Section 30."[3]

MEANING OF CONFESSION & ITS SCOPE IN A CRIMINAL TRIAL

As stated above, Confession is not defined in the Indian Evidence Act 1872. However, the law relating to confession is prescribed under Sections 24 to 30 of the Indian Evidence Act and Sections 164, 281 and 463 of the Criminal Procedure Code 1973. Under the Indian Evidence Act, the provisions relating to confession fall under the head of "Admission". According to Section 17, *"An admission is a statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned"*[4] Further, Section 31 states that *"Admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provisions hereinafter contained."*[5] Thus, admission refers to a statement suggesting some inference as to the existence of a fact in issue or relevant fact made by the party or his authorized agent (as per Section 18). Further, although admission as evidence is relevant, it is not conclusive proof of the facts admitted, that is, it is only a prima facie proof, and evidence can be adduced for disproving the statement admitted. Furthermore, according to Section 21, such aforesaid statement is relevant as against the party making it and can be proved against him; however, it cannot be proved by or on behalf of the person making the same except as provided under Section 21.

In simplest terms, Confession means an admission or an acknowledgement of guilt by the accused. Relying upon the definition of admission given under Section 17, confession can be defined as a statement made by an accused suggesting or stating any inference of guilt as to any

3. State (NCT of Delhi) v. Navjot Sandhu (2005) 11 SCC 600
4. S.17, The Indian Evidence Act, 1872
5. S.31, Ibid

facts in issue or relevant fact. However, Lord Atkin in **Pakala Narayana Swami v. Emperor**[6] observed as follows: *"Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, e.g., an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession. Some confusion appears to have been caused by the definition of confession in art. 22 of Stephen's Digest of the Law of Evidence which defines a confession as an admission made at any time by a person charged with crime stating or suggesting the inference that he committed that crime. If the surrounding articles are examined, it will be apparent that the learned author after dealing with admissions generally is applying himself to admissions in criminal cases, and for this purpose defines confessions so as to cover all such admissions, in order to have a general term for use in the three following articles: confession secured by inducement, made upon oath, made under a promise of secrecy. The definition is not contained in the Evidence Act, 1872: and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused "suggesting the inference that he committed the crime."*

On the point of distinction between "admission" and "confession", the Hon'ble Supreme Court in **Central Bureau of Investigation v. V.C. Shukla & Others**[7] observed as follows:

> *"It is thus seen that only voluntary and direct acknowledgement of guilt is a confession but when a confession falls short of actual admission of guilt it may nevertheless be used as evidence against the person who made it or his authorised agent as an "admission" under Section 21. The law in this regard has been clearly — and in our considered view correctly — explained in Monir's Law of Evidence (New Edn. at pp. 205 and 206), on which Mr. Jethmalani relied to bring home his contention that even if the entries are treated as "admission" of the Jains still they cannot be used against Shri Advani. The relevant passage reads as under:*
>
> *"The distinction between admissions and confessions is of considerable importance for two reasons. Firstly, a statement made by an accused person, if it is an admission, is admissible in evidence under Section 21 of the Evidence Act, unless the statement amounts to a confession and was made to a person in authority in consequence of some improper inducement, threat or promise, or was made to a Police Officer, or was made at a time when the accused was in custody of a Police Officer. If a statement was made by the accused in the circumstances just mentioned its admissibility will depend upon the determination of the question whether it does not amount to a confession. If*

6. Pakala Narayana Swami v. Emperor (1939 SCC Online PC 1)
7. (1998) 3 SCC 410

it amounts to a confession, it will be inadmissible, but if it does not amount to a confession, it will be admissible under Section 21 of the Act as an admission, provided that it suggests an inference as to a fact which is in issue in, or relevant to, the case and was not made to a Police Officer in the course of an investigation under Chapter XIV of the Code of Criminal Procedure. Secondly, a statement made by an accused person is admissible against others who are being jointly tried with him only if the statement amounts to a confession. Where the statement falls short of a confession, it is admissible only against its maker as an admission and not against those who are being jointly tried with him. Therefore, from the point of view of Section 30 of the Evidence Act also the distinction between an admission and a confession is of fundamental importance."[8]

CONFESSION CONTAINING INCULPATORY & EXCULPATORY STATEMENTS:

The next question that arises is with respect to confession of an accused containing inculpatory as well as exculpatory statements that is when such confessional statement carries remarks which partly makes accused guilty and partly makes him innocent. In **Pakala Narayana Swami v. Emperor**[9] the Privy Council observed that no statement which contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed, and that confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence.[9]

The Hon'ble Supreme Court in **Palvinder Kaur v. State of Punjab**[10] relied upon the said observation of the Privy Council and stated as follows:

"The statement not being a confession and being of an exculpatory nature in which the guilt had been denied by the prisoner, it could not be used as evidence in the case to prove her guilt. Not only was the High Court in error in treating the alleged confession of Palvinder as evidence in the case but it was further in error in accepting a part of it after finding that the rest of it was false. It said that the statement that the deceased took poison by mistake should be ruled out of consideration for the simple reason that if the deceased had taken poison by mistake the conduct of the parties would have been completely different, and that she would have then run to his side and raised a hue and cry and would have sent immediately for medical aid, that it was incredible that if the deceased had taken poison by mistake, his wife would have stood idly by and allowed him to die. The court thus accepted the inculpatory part of that statement and rejected the exculpatory part. In doing so it contravened the well

8. Central Bureau of Investigation v. V. C. Shukla & Others (1998) 3 SCC 410
9. Pakala Narayana Swami v. Emperor (1939 SCC Online PC 1)
10. 1953 SCR 94

accepted rule regarding the use of confession and admission that these must either be accepted as a whole or rejected as a whole and that the court is not competent to accept only the inculpatory part while rejecting the exculpatory part as inherently incredible. Reference in this connection may be made to the observations of the Full Bench of the Allahabad High Court in ***Emperor v. Balmakund [ILR 52 All 1011]*** *with which observations we fully concur. The confession there comprised of two elements, (a) an account of how the accused killed the women, and (b) an account of his reasons for doing so, the former element being inculpatory and the latter exculpatory and the question referred to the Full Bench was: Can the court, if it is of opinion that the inculpatory part commends belief and the exculpatory part is inherently incredible, act upon the former and refuse to act upon the latter? The answer to the reference was that where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible."*[11]

However, in the case of **Nishi Kant Jha v. State of Bihar**[12] the Hon'ble Supreme Court rejected the exculpatory part of the statement and accepted the inculpatory part as the former was not only inherently improbable but was also contradicted by other evidence, thereby making it wholly unacceptable, and thus held that when other incriminating circumstances were considered along with the statement of accused, it rightly pointed that accused was responsible for commission of crime. The Hon'ble Apex Court while deciding the case relied upon and cited the English authorities, some of which are reproduced here:

"It was contended before us by learned Counsel for the appellant that if the statement is to be considered at all, it must be taken as a whole and the court could not act upon one portion of it while rejecting the other. Counsel sought to rely on three judgments of this court in aid of his contention that a statement which contains any admission or confession must be considered as a whole and the court is not free to accept one part while rejecting the rest. In our view, the proposition stated so widely cannot be accepted. As Taylor puts it in his Law of Evidence (11th Edn.) Article 725, at p. 502 that with regard to the general law of admissions, the first important rule is that: "The whole statement containing the admissions must be taken together; for though some part of it may be favourable to the party, and the object is only to ascertain what he has conceded against himself, and what may therefore be presumed to be true, yet, unless the whole is received, the true meaning of the part, which is evidence against him, cannot be ascertained. But though the whole of what he said at the same time, and relating to the same subject, must be given in evidence, it does not follow that all the parts of the statement should be regarded as equally deserving of credit; but the jury must consider,

11. Palvinder Kaur v. State of Punjab (1953 SCR 94)

12. (1969) 1 SCC 347

under the circumstances, how much of the entire statement they deem worthy of belief, including as well the facts asserted by the party in his own favour as those making against him."

With regard to criminal cases, Taylor states:

"In the proof of confessions ... as in the case of admissions in civil causes ... the whole of what the prisoner said on the subject at the time of making the confession should be taken together ... But if, after the entire statement of the prisoner has been given in evidence, the prosecutor can contradict any part of it, he is at liberty to do so; and then the whole testimony is left to the jury for their consideration, precisely as in other cases where one part of the evidence is contradictory to another. Even without such contradiction it is not to be supposed that all the parts of a confession are entitled to equal credit. The jury may believe that part which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing. If what he said in his own favour is not contradicted by evidence offered by the prosecutor, nor is improbable in itself, it will be naturally believed by the jury; but they are not bound to give weight to it on that account, being at liberty to judge it, like other evidence, by all the circumstances of the case."[13]

Subsequently, the aforesaid observation in Nishi Kant Jha case was followed by the Hon'ble Supreme Court in Keshoram Bora v. State of Assam[14].

PROVISIONS RELATING TO CONFESSION UNDER THE INDIAN EVIDENCE ACT 1872:

*According to **Section 24** of the Indian Evidence Act 1872, "A confession made by an accused person is irrelevant in a criminal proceeding, 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 supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.*[15]*" Further, according to Section 28 "If such a confession as is referred to in Section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant."*[16]

Thus, a conjoint reading of the aforesaid sections shows that a confession in order to be

13. Nishi Kant Jha v. State of Bihar (1969) 1 SCC 347
14. (1978) 2 SCC 407
15. Section 24, The Indian Evidence Act 1872
16. Section 28, The Indian Evidence Act 1872

relevant should be made freely and voluntarily by the accused person without any promise, threat or inducement by a person in authority.

Similarly, **Section 25** of the Act prescribes that a confession made by an accused to police officer shall not be proved against him. Further, Section 26 lays down that when accused makes a confession while he is in custody of police, it shall not be proved against him unless made in the immediate presence of a Magistrate.

Thus, as per the said sections when an accused makes a confession to a police officer or while he is in custody of police, such confession cannot be proved against him unless provided otherwise in the Act, that is, such a confession cannot be proved in evidence against accused. This is so as to do away with the torture of accused and use of force against him in the hands of police.

Apart from the immediate presence of a Magistrate prescribed under section 26, Section 27 provides another situation when confession made to police is admitted in evidence. According to this section, when a statement made by accused (amounting to confession or not) leads to discovery of a fact in relation to offence, then it may be proved.

In **Kanda Padayachi v. State of T.N.**[17] the Hon'ble Supreme Court observed as follows: *"Sections 24 to 26 form a trio containing safeguards against accused persons being coerced or induced to confess guilt. Towards that end Section 24 makes a confession irrelevant in a criminal proceeding if it is made as a result of inducement, threat or promise from a person in authority, and is sufficient to give an accused person grounds to suppose that by making it he would gain any advantage or avoid any evil in reference to the proceedings against him. Under Section 25, a confession made to a police officer under any circumstances is not admissible in the evidence against him. Section 26 provides next that no confession made by a prisoner in custody even to a person other than a police officer is admissible unless made in the immediate presence of a Magistrate."*[18]

In **Pulukuri Kottaya v. Emperor**[19] the ambit and scope of Section 27 was stated by the Privy Council as follows:

> *"[I]t is fallacious to treat the "fact discovered? within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the*

17. (1971) 2 SCC 641

18. Kanda Padayachi v. State of T.N., (1971) 2 SCC 641

19. AIR 1947 PC 67

house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."[20]

In **Anter Singh v. State of Rajasthan**[21] the Hon'ble Supreme Court observed as follows:

"The expression "provided that" together with the phrase "whether it amounts to a confession or not" shows that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to any extent, Section 24, also. It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly" relates "to the fact thereby discovered" and is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered."[22]

Recently in the case of **Kusal Toppo v. State of Jharkhand**[23] the Hon'ble Apex stated as follows: "The law under Section 27 of the Evidence Act is well settled now, wherein this Court in **Geejaganda Somaiah v. State of Karnataka**[24]**,** has observed as under: (SCC p. 324, para 22)

"22. As the section is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It does not, however,

20. ibid

21. (2004) 10 SCC 657

22. Anter Singh v. State of Rajasthan (2004) 10 SCC 657

23. (2019) 13 SCC 676

24. (2007) 9 SCC 315

mean that any statement made in terms of the aforesaid section should be seen with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The court has to be cautious that no effort is made by the prosecution to make out a statement of the accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 of the Evidence Act."[25]

Section 29 of the Act provides that a confession is relevant even if it is made under a promise of secrecy or by deception or in state of intoxication, or without warning accused of the consequences of confessing. However, the Magistrate recording confession needs to observe the provision of Section 164 of Criminal Procedure Code.

In **Shankaria v. State of Rajasthan**[26] the Hon'ble Supreme Court observed as follows: "It is well settled that a confession, if voluntarily and truthfully made, is an efficacious proof of guilt. Therefore, when in a capital case the prosecution demands a conviction of the accused, primarily on the basis of his confession recorded under Section 164 CrPC, the court must apply a double test:

(1) Whether the confession was perfectly voluntary?

(2) If so, whether it is true and trustworthy?

Satisfaction of the first test is a sine qua non for its admissibility in evidence. If the confession appears to the court to have been caused by any inducement, threat or promise such as is mentioned in Section 24 of the Evidence Act, it must be excluded and rejected brevi manu. In such a case, the question of proceeding further to apply the second test, does not arise. If the first test is satisfied, the court must, before acting upon the confession reach the finding that what is stated therein is true and reliable. For judging the reliability of such a confession, or for that matter of any substantive piece of evidence, there is no rigid canon of universal application. Even so, one broad method which may be useful in most cases for evaluating a confession may be indicated. The court should carefully examine the confession and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case. If on such examination and comparison, the confession appears to be a probable catalogue of events and naturally fits in with the rest of the evidence and the surrounding circumstances, it may be taken to have satisfied the second test."[27]

CONFESSION OF CO-ACCUSED:

Section 30 of the Act provides as follows: *"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such*

25. Kusal Toppo v. State of Jharkhand (2019) 13 SCC 676

26. (1978) 3 SCC 435

27. Shankaria v. State of Rajasthan (1978) 3 SCC 435

confession as against such other person as well as against the person who makes such confession."[28]

Thus, according to this section if more than one accused persons are tried together and when one of the accused persons makes a confession, then his confessional statement can be used against non-confessing accused as well and is thus relevant against him/them.

The Privy Council in **Bhuboni Sahu v. The King**[29] observed as follows: *"Section 30 seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of "evidence" contained in s. 3 of the 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 a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities. Section 30, however, provides that the court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence."*[30]

In **Haricharan Kurmi v. State of Bihar**[31] the Hon'ble Supreme Court in detail analysed the scope of Section 30 and observed as follows: *"The question about the part which a confession made by a co-accused person can play in a criminal trial, has to be determined in the light of the provisions of Section 30 of the Act. Section 30 provides that when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. The basis on which this provision is found is that if a person makes a confession implicating himself, that may suggest that the maker of the confession is speaking the truth. Normally, if a statement made by an accused person is found to be voluntary and it amounts a confession in the sense that it implicates the maker, it is not likely that the maker would implicate himself untruly, and so Section 30 provides that such a confession may be taken into consideration even against a co- accused who is being tried along with the maker of the confession. There is no doubt that a confession made voluntarily by an accused person can be used against the maker of the confession,*

28. Section 30, The Indian Evidence Act 1872

29. (1949) SCC Online PC 12

30. Bhuboni Sahu v. The King (1949) SCC Online PC 12

31. (1964) 6 SCR 623

though as a matter of prudence criminal courts generally require some corroboration to the said confession particularly if it has been retracted. With that aspect of the problem, however, we are not concerned in the present appeals. When Section 30 provides that the confession of a co-accused may be taken into consideration, what exactly is the scope and effect of such taking into consideration, is precisely the problem which has been raised in the present appeals. It is clear that the confession mentioned in Section 30 is not evidence under Section 3 of the Act. Section 3 defines "evidence" as meaning and including—

(1) all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) all documents produced for the inspection of the court; such documents are called documents are called documentary evidence.

Technically construed, this definition will not apply to a confession. Part (1) of the definition refers to oral statements which the court permits or requires to be made before it; and clearly, a confession made by an accused person is not such a statement; it is not made or permitted to be made before the court that tries the criminal case. Part (2) of the definition refers to documents produced for the inspection of the court; and a confession cannot be said to fall even under this part. Even so, Section 30 provides that a confession may not be evidence as strictly defined by Section 3 of the Act, it is an element which may be taken into consideration by the criminal court and in that sense, it may be described as evidence in a non-technical way. But it is significant that like other evidence which is produced before the court, it is not obligatory on the court to take the confession into account. When evidence as defined by the Act is produced before the court, it is the duty of the court to consider that evidence. What weight should be attached to such evidence, is a matter in the discretion of the court. But a court cannot say in respect of such evidence that it will just not take that evidence into account. Such an approach can, however, be adopted by the court in dealing with a confession, because Section 30 merely enables the court to take the confession into account. As we have already indicated, this question has been considered on several occasions by judicial decisions and it has been consistently held that a confession cannot be treated as evidence which is substantive evidence against a co-accused person. In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right. In cases where such confessions are relied upon by the prosecution against an accused person, the court cannot begin with the examination of the said

statements. The stage to consider the said confessional statements arrives only after the other evidence is considered and found to be satisfactory."[32]

RETRACTED CONFESSION:

Retracted Confession means a confession which was made previously by the accused and is subsequently taken away or retracted by him as being never made (denied) as confession or as being recorded wrongly.

In the case of **Kalawati v. State of HP**[33]. it was contended that an accused when retracts his confession, it should not be used against him at all as it results in contravention of Article 20(3) of the Constitution, and the Hon'ble Apex Court observed as follows: *"A confession has to be voluntary before it can be used against a person making it, and a Magistrate is bound to satisfy himself that it is being made without any inducement, threat or promise. No person accused of a crime is bound to make a confession, and if there is any compulsion or threat, it has to be ruled out as irrelevant and inadmissible. Sub-section (3) of Article 20 does not apply at all to a case where the confession is made without any inducement, threat or promise. It is true that a retracted confession has only little value as the basis for a conviction, and that the confession of one accused is not evidence against a co-accused tried jointly for the same offence, but can only be taken into consideration against him. This deals with its probative value and has nothing to do with any repugnancy to the Constitution."*[34]

Subsequently, in **Pyare Lal Bhargava v. State of Rajasthan**[35] the Hon'ble Supreme Court stated as follows: *"A retracted confession may form the legal basis of a conviction if the court is satisfied that it was true and was voluntarily made. But it has been held that a court shall not base a conviction on such a confession without corroboration. It is not a rule of law, but is only a rule of prudence. It cannot even be laid down as an inflexible rule of practice or prudence that under no circumstances such a conviction can be made without corroboration, for a court may, in a particular case, be convinced of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less on a retracted confession, unless the court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars."*[36]

Further, the Hon'ble Supreme Court in **Aloke Nath Dutta v. State of W.B.**[37] stated as

32. Haricharan Kurmi v. State of Bihar (1964) 6 SCR 623
33. 1953 SCR 546
34. Kalawati v. State of H.P., 1953 SCR 546
35. 1963 Supp (1) SCR 689
36. Pyarelal Bhargava v. State of Rajasthan 1963 Supp (1) SCR 689
37. (2007) 12 SCC 230

follows: *"In a case where confession is made in the presence of a Magistrate conforming the requirements of Section 164, if it is retracted at a later stage, the court in our opinion, should probe deeper into the matter. Despite procedural safeguards contained in the said provision, in our opinion, the learned Magistrate should satisfy himself whether the confession was of voluntary nature. It has to be appreciated that there can be times where despite such procedural safeguards, confessions are made for unknown reasons and in fact made out of fear of police. Judicial confession must be recorded in strict compliance with the provisions of Section 164 of the Code of Criminal Procedure. While doing so, the court shall not go by the black letter of law as contained in the aforementioned provision; but must make further probe so as to satisfy itself that the confession is truly voluntary and had not been by reason of any inducement, threat or torture. The fact that the accused was produced from the police custody is accepted. But it was considered in a routine manner. The learned Magistrate in his evidence could not even state as to whether the appellant had any injury on his person or whether there had been any tainted marks therefore. The courts while applying the law must give due regard to its past experience. The past experience of the courts as also the decisions rendered by the superior courts should be taken as a wholesome guide. We must remind ourselves that despite the fact that procedural safeguards contained in Section 164 CrPC may be satisfied, the courts must look for truthfulness and voluntariness thereof. It must, however, be remembered that it may be retracted subsequently. The court must, thus, take adequate precaution. Affirmative indication of external pressure will render the retracted confession nugatory in effect. The court must play a proactive role in unearthing objective evidence forming the backdrop of retraction and later the examination of such evidence of retraction. However, in cases where none exists, the court must give the benefit of doubt to the accused. Where there is no objective material available for verifying the conditions in which the confession was retracted, the spirit of Section 24 of the Evidence Act (irrelevance of confession caused by inducement) may be extended to retracted confession. An inverse presumption must be drawn from absence of materials. In a case of retracted confession, the courts while arriving at a finding of guilt would not ordinarily rely solely thereupon and would look forward for corroboration of material particulars. Such corroboration must not be referable in nature. Such corroboration must be independent and conclusive in nature. Whatever be the terminology used, one rule is almost certain that no judgment of conviction shall be passed on an uncorroborated retracted confession. The court shall consider the materials on record objectively in regard to the reasons for retraction. It must arrive at a finding that the confession was truthful and voluntary. Merit of the confession being the voluntariness and truthfulness, the same, in no circumstances, should be compromised. We are not oblivious of some of the decisions of this Court which proceeded on the basis that conviction of an accused on the basis of a retracted confession is permissible but only if it is found that retraction made by the accused was wholly on a false premise. (See Balbir Singh [AIR 1957 SC 216: 1957 Cri LJ 481]) There cannot,*

however, be any doubt or dispute that although retracted confession is admissible, the same should be looked at with some amount of suspicion — a stronger suspicion than that which is attached to the confession of an approver who leads evidence in the court."[38]

EXTRA-JUDICIAL CONFESSION:

A confession can be made in two forms: (1) Judicial Confession, wherein accused makes confessional statement before the Court (2) Extra-Judicial Confession, wherein accused makes it outside the Court to anyone.

In case of **Sahoo v. State of UP**[39]. the Hon'ble Supreme Court observed as follows: *"Sections 24 to 30 of the Evidence Act deal with the admissibility of confessions by accused persons in criminal cases. But the expression "confession" is not defined. The Judicial Committee in Pakala Narayana v. R. [LR 66 IA 66] has defined the said expression thus, "A confession is a statement made by an accused which must either admit in terms the offence or at any rate substantially all the facts which constitute the offence." A scrutiny of the provisions of Sections 17 to 30 of the Evidence Act discloses, as one learned author puts it, that statement is a genus, admission is the species and confession is the sub-species. Shortly stated, a confession is a statement made by an accused admitting his guilt. What does the expression "statement" mean? The dictionary meaning of the word "statement" is "the act of stating, reciting or presenting verbally or on paper". The term "statement" therefore, includes both oral and written statements. Is it also a necessary ingredient of the term that it shall be communicated to another? The dictionary meaning of the term does not warrant any such extension; nor the reason of the rule underlying the doctrine of admission or confession demands it. Admissions and confessions are exceptions to the hearsay rule. The Evidence Act places them in the category of relevant evidence, presumably on the ground that, as they are declarations against the interest of the person making them, they are probably true. The probative value of an admission or a confession does not depend upon its communication to another, though, just like any other piece of evidence, it can be admitted in evidence only on proof. This proof in the case of oral admission or confession can be offered only by witnesses who heard the admission or confession, as the case may be. The following illustration pertaining to a written confession brings out the said idea: A kills B; enters in his diary that he had killed him, puts it in his drawer and absconds. When he places his act on record, he does not communicate to another; indeed, he does not have any intention of communicating it to a third party. Even so, at the trial the said statement of the accused can certainly be proved as a confession made by him. If that be so in the case of a statement in writing, there cannot be any difference in principle in the case of an oral statement. Both must stand on the same footing. This aspect of the doctrine of confession*

38. Aloke Nath Dutta v. State of W.B. (2007) 12 SCC 230

39. (1965) 3 SCR 86

received some treatment from well-known authors on evidence, like Taylor, Best and Phipson."[40]

In **Ajay Singh v. State of Maharashtra**[41] the Hon'ble Apex Court observed as follows: *"We shall first deal with the question regarding claim of extra-judicial confession. Though it is not necessary that the witness should speak the exact words but there cannot be vital and material difference. While dealing with a stand of extra-judicial confession, court has to satisfy that the same was voluntary and without any coercion and undue influence. Extra-judicial confession can form the basis of conviction if persons before whom it is stated to be made appear to be unbiased and not even remotely inimical to the accused. Where there is material to show animosity, court has to proceed cautiously. Confession just like any other evidence depends on veracity of witness to whom it is made. It is not invariable that the court should not accept such evidence if actual words as claimed to have been spoken are not reproduced and the substance is given. It will depend on circumstance of the case. If substance itself is sufficient to prove culpability and there is no ambiguity about import of the statement made by the accused, evidence can be acted upon even though substance and not actual words have been stated. Human mind is not a tape recorder which records what has been spoken word by word. The witness should be able to say as nearly as possible actual words spoken by the accused. That would rule out possibility of erroneous interpretation of any ambiguous statement. If word by word repetition of statement of the case is insisted upon, more often than not evidentiary value of extra-judicial confession has to be thrown out as unreliable and not useful. That cannot be a requirement in law. There can be some persons who have a good memory and may be able to repost exact words and there may be many who are possessed of normal memory and not do so. It is for the court to judge credibility of the witness' capacity and thereafter to decide whether his or her evidence has to be accepted or not. If court believes witnesses before whom confession is made and is satisfied confession was voluntary basing on such evidence, conviction can be founded. Such confession should be clear, specific and unambiguous."*[42]

In **Velayuda Pulavar v. State**[43] extra-judicial confession was made before the Village Administrative who wasn't a stranger to the accused and was recorded before many persons in Panchayat Office. The Hon'ble Apex Court held as follows: *"So far as plea relating to corroboration is concerned, if the court looks for such corroboration of a judicial confession or an extra-judicial confession, same need not be in material particulars. It can be and will have to be only corroboration in general. Each and every piece of information mentioned in the extra-judicial confession need not be corroborated by independent evidence. It is well*

40. Sahoo v. State of U.P. (1965) 3 SCR 86

41. (2007) 12 SCC 341

42. Ajay Singh v. State of Maharashtra (2007) 12 SCC 341

43. (2009) 14 SCC 436

settled that conviction can be recorded solely on the basis of the extra-judicial confession if it is found to be credible and worthy of acceptance."[44]

The Hon'ble Supreme Court in **Sahadevan & Another v. State of Tamil Nadu**[45] held as follows: *"It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra-judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration."*[46]

The Hon'ble Court after examining some of the judgments stated the following principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction:

> *"(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.*
>
> *(ii) It should be made voluntarily and should be truthful.*
>
> *(iii) It should inspire confidence.*
>
> *(iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.*
>
> *(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.*
>
> *(vi) Such statement essentially has to be proved like any other fact and in accordance with law."*[47]

In **Jagroop Singh v. State of Punjab**[48] the Hon'ble Supreme Court held as follows: *"The issue that emanates for appreciation is whether such confessional statement should be given any credence or thrown overboard. In this context, we may refer with profit to the authority in Gura Singh v. State of Rajasthan [(2001) 2 SCC 205: 2001 SCC (Cri) 323] (SCC p. 212, para 6) wherein, after referring to the decisions in Rao Shiv Bahadur Singh v. State of Vindhya Pradesh [AIR 1954 SC 322: 1954 Cri LJ 910], Maghar Singh v. State of*

44. Velayuda Pulavar v. State, (2009) 14 SCC 436
45. (2012) 6 SCC 403
46. Sahadevan & Another v. State of Tamil Nadu (2012) 6 SCC 403
47. Sahadevan & Another v. State of Tamil Nadu (2012) 6 SCC 403
48. (2012) 11 SCC 768

Punjab [(1975) 4 SCC 234: 1975 SCC (Cri) 479: AIR 1975 SC 1320], Narayan Singh v. State of M.P. [(1985) 4 SCC 26: 1985 SCC (Cri) 460: AIR 1985 SC 1678] Kishore Chand v. State of H.P. [(1991) 1 SCC 286: 1991 SCC (Cri) 172] and Baldev Raj v. State of Haryana [1991 Supp (1) SCC 14: 1991 SCC (Cri) 659: AIR 1991 SC 37], it has been opined that it is the settled position of law that extra-judicial confession, if true and voluntary, can be relied upon by the court to convict the accused for the commission of the crime alleged. Despite inherent weakness of extra-judicial confession as an item of evidence, it cannot be ignored when shown that such confession was made before a person who has no reason to state falsely and his evidence is credible. The evidence in the form of extra-judicial confession made by the accused before the witness cannot be always termed to be a tainted evidence. Corroboration of such evidence is required only by way of abundant caution. If the court believes the witness before whom the confession is made and is satisfied that it was true and voluntarily made, then the conviction can be founded on such evidence alone. The aspects which have to be taken care of are the nature of the circumstances, the time when the confession is made and the credibility of the witnesses who speak for such a confession. That apart, before relying on the confession, the court has to be satisfied that it is voluntary and it is not the result of inducement, threat or promise as envisaged under Section 24 of the Act or brought about in suspicious circumstances to circumvent Sections 25 and 26."[49]

Recently, in **Kusal Toppo & another v. State of Jharkhand**[50] the Hon'ble Apex Court has held that: *"The proposition that extra-judicial confessions are a weak type of evidence and should not be relied upon in the absence of corroborative evidence has also been affirmed by this Court in several other decisions, such as Pakkirisamy v. State of T.N., (1997) 8 SCC 158: 1997 SCC (Cri) 1249], Makhan Singh v. State of Punjab, 1988 Supp SCC 526: 1988 SCC (Cri) 916], Baldev Singh v. State of Punjab, (2009) 6 SCC 564: (2009) 3 SCC (Cri) 66], and even recently in Satish v. State of Haryana, (2018) 11 SCC 300: (2018) 2 SCC (Cri) 652]. Taking into consideration all the facts and position of law, discussed supra, we are of the opinion that the appellants herein cannot be convicted on the basis of only two extra-judicial confessional statements of the co-accused which were not corroborated by any cogent or reliable evidence."*[51]

In another recent case of **Vinod @ Manoj v. State of Haryana**[52] the Hon'ble Supreme Court while acquitting the accused of the charges levelled against him, held that: *"merely because extra-judicial confession is proved which is a weak type of circumstance, the accused cannot be convicted for the offence of rape and murder. The prosecution has failed to prove other circumstances relied upon by it beyond reasonable doubt."*[53]

49. Jagroop Singh v. State of Punjab, (2012) 11 SCC 768

50. (2019) 13 SCC 676

51. Kusal Toppo & another v. State of Jharkhand (2019) 13 SCC 676

52. Cr. Appeal No. 1822 of 2011

53. Vinod @ Manoj v. State of Haryana (Cr. Appeal No. 1822 of 2011)

Recently, in the case of **Ram Lal v. State of Himachal Pradesh**[54] the Hon?ble Supreme Court held as follows: "13. Extra-judicial confession is a weak piece of evidence and the court must ensure that the same inspires confidence and is corroborated by other prosecution evidence. In order to accept extra-judicial confession, it must be voluntary and must inspire confidence. If the court is satisfied that the extra-judicial confession is voluntary, it can be acted upon to base the conviction. Considering the admissibility and evidentiary value of extra-judicial confession, after referring to various judgments, in Sahadevan and Another v. State of Tamil Nadu (2012) 6 SCC 403, this court held as under:

"15.1. In **Balwinder Singh v. State of Punjab**[55] this Court stated the principle that:

"10. An extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extra-judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance." 15.4.

While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in **State of Rajasthan v. Raja Ram**[55] stated the principle that: *"19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made."*[56] *The Court further expressed the view that: "19. … Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused.…" 15.6.*

Accepting the admissibility of the extra-judicial confession, the Court in **Sansar Chand v. State of Rajasthan**[57] held that: *"29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material.* ***[Vide Thimma and Thimma Raju v. State of Mysore (1970) 2 SCC 105, Mulk Raj v. State of U.P. AIR 1959 SC 902, Sivakumar v. State by Inspector of Police (2006) 1 SCC 714 (SCC paras 40 and 41: AIR paras 41 and 42), Shiva Karam Payaswami Tewari v. State of Maharashtra (2009) 11 SCC 262 and Mohd. Azad alias Shamin v. State of W.B. (2008) 15 SCC 449]"****. It is well settled that conviction can be based on a voluntarily confession but the rule of prudence*

54. Criminal Appeal No. 576 of 2010

55. 1995 Supp (4) SCC 259

56. (2003) 8 SCC 180

57. (2010) 10 SCC 604

requires that wherever possible it should be corroborated by independent evidence. Extra-judicial confession of accused need not in all cases be corroborated. In ***Madan Gopal Kakkad v. Naval Dubey and Another***[58]***,*** *this court after referring to* ***Piara Singh and Others v. State of Punjab***[59] *held that the law does not require that the evidence of an extra-judicial confession should in all cases be corroborated. The rule of prudence does not require that each and every circumstance mentioned in the confession must be separately and independently corroborated. As discussed above, if the court is satisfied that if the confession is voluntary, the conviction can be based upon the same. Rule of Prudence does not require that each and every circumstance mentioned in the confession with regard to the participation of the accused must be separately and independently corroborated."*[60]

CONCLUSION

Indian Evidence Act seems to have made a full proof arrangement to ensure that confessional statement must be voluntary and if at all it has to be acted upon, then it is supposed to be acted upon in certain circumstances subject to some exceptions.

However practically it has been experienced while working in different Courts that in most of the cases pertaining to theft and robbery, particularly theft of motorcycles and robbery by unknown and unidentified accused persons, which are lodged in State of Bihar, prosecution launches prosecution solely on the basis of confessional statement of accused made before police. In very few of those cases there is recovery pursuant to such confessional statements whereas in most of those cases the confessional statement does not lead to any recovery.

There has been growing trend of remanding the accused persons in cases pertaining to theft and robbery lodged initially against unknown persons solely on the basis of confessional statement made before the police.

So there is need to check such growing tendency while observing the norms and principles of laws relating to confession and confessional statement and keeping in the view its admissibility and relevancy in given facts of the case.

It has been seen that the sacrosanct measures provided in the Act and also having been given shape by judicial pronouncement is being flagrantly violated by the all stakeholders.

There have been number of cases which arises solely on the basis of confessional statements of accused or co-accused, which is devoid of any sort of recovery. Sadly, in cases of such nature bail matters travel up to the higher Courts despite in most of such cases no further prayer for custodial interrogation is made by police and no effort is made for any recovery pursuant to

58. (1992) 3 SCC 204

59. (1977) 4 SCC 452

60. Ram Lal v. The State of Himachal Pradesh (Criminal Appeal No. 576 of 2010) available at https://indiankanoon.org/doc/123334260/

remand as such. The investigation literally comes at standstill once the accused is remanded by Courts. The whole thrust of prosecuting agency is confined to ensuring remand of accused solely on basis of confessional statement of accused before police.

Therefore, all possible efforts should be made to nip such growing tendencies in the bud itself and Presiding officers should act sensibly in such cases to strike balance between conflicting interest of social order and protection of fundamental rights of accused, so that an innocent may be prevented from being harassed and he may be given opportunity to reform himself keeping in the view the tenets of Reformative system in mind instead of remanding him in number of cases of similar nature solely on the basis of confessional statements before police devoid of any recovery as such.

There is need for serious introspection by the all stakeholders of the criminal justice system so that a healthy atmosphere may be created in which things should be initiated or done by the all stakeholders in the manner provided under the Act or in the manners as laid down by the Hon'ble Apex Court and the Hon'ble High Courts through series of judicial pronouncements as far as the issues and cases related with confessional statements are concerned.

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Topic No. – 15

Challenges in dealing with dying declaration & its evidentiary value with reference to multiple dying declarations, dying declaration as the sole basis of conviction without corroboration, and certification by doctors, whether essential. Oral dying declaration - not recorded in actual words of the deceased but recorded by some other person. Whether the statement recorded by the police, carrying thumb impression or signature of the deceased, falls within the ambit of dying declaration.

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Challenges in dealing with a dying declaration and its evidentiary value, Dying declaration as the sole basis for conviction without corroboration, with special reference to multiple declarations, and certification by the doctor whether essential, Oral dying declaration not recorded in actual words of deceased but recorded by some other person, Whether the statement recorded by police carrying thumb impression or signature of the deceased fall within the ambit of dying declaration.

Introduction, Scope, and Feature of Dying Declaration

We can trace the admissibility of the dying declaration under sections 6, 7, and 32 of the Evidence Act, 1872, which originated from **R v. Wood Cock,168 All.ER352** as it considered to be the most important case law on dying declaration. In this case, the declaration of the deceased (Silvia) was the only evidence as to what happened. The court therein categorically justified usage and importance of dying declaration to be," made in extremity, when the party, is at the point of death, and when every hope of his word is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful consideration to speak the truth."

The court further held that "a situation so solemn, and so awful, is considered by the law as creating obligation equal to that which is imposed by a positive oath administered in a court of Justice."

The realities of life indeed have to be kept in mind while appreciating the evidence for arriving at the truth. The courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favor of the accused. The traditional dogmatic hyper technical approach has to be replaced by a rational, realistic and genuine approach for administering justice in a criminal trial. Criminal jurisprudence cannot be considered as part and parcel of human civilization and the realities of life. The court cannot ignore the erosion in values of life which is a common feature of the present system. Such erosions cannot be given a bonus in favor of those who are guilty of polluting society and mankind.

The general ground of admissibility of the evidence mentioned in this section is that in the matter in question, no better evidence is to be had. As a general rule, oral evidence must be direct (S.60 of the Evidence Act). The eighth clause of S.32 may be regarded as an exception to the general rule. The purpose and reason of hearsay rules in the key are exceptions to it, which are mainly based on considerations that the necessity for the evidence and circumstantial guarantee of trustworthiness. Hearsay excluded because it is considered not sufficiently trustworthy as it cannot

be tested on oath and cross-examination, as everything is just heard. But where there are special circumstances that give a guarantee of trustworthiness to the testimony, it is admitted even though it comes from a second-hand source.

The prime and onerous function of the justice delivery system is to adjudicate the dispute and find out the truth and the same ultimately resulted in punishment of guilty or enforcement of the right of the deprived litigant. To this end the facts have to be scrutinized, analyzed and evidence has to be adduced to substantiate the narrated story.

The dying declaration being a statement of a man who is no more to assist the judge to ascertain the facts which commutatively or in isolation constituted a crime of which he has been the victim. More so the significance and weight of such a version happen to be crucial in concluding the evidence fixing the criminal liability. It invites dichotomy in relation to the application of judicial mind as the same statement should either be considered or may invite doubt for punishing the criminal.

Evidence in the career of truth and proof in the eye to which truth can be perceived. Basic rules around which the entire process rotate are three:

(a) Evidence may be given in a suit proceeding only of the relevant facts and of no others.

(b) Best evidence in all cases should be given;

(c) Hearsay evidence should be excluded.

Needless to delve at this juncture on the explanatory note of these rules as the compass of the theme hardly suggests so. The law of evidence in India mandates says that the evidence may be given of relevant facts only and no others. Accordingly, the relevancy denotes connectivity of facts in such a manner that logically suggests the happening of a particular matter which is in issue. Indian legal system of evidence largely coincided with the English model which classified connectivity in two ways i.e. legal and logical. Even though a fact is logically connected with the other but if the same has not been declared legally relevant under the provisions of Act will never qualify relevancy clause. Thus the act envisages events, statements, entries, judgment of courts, experts opinion, and the character of the parties to the suit or proceedings as relevant for which evidence is admissible before the court of law. Although, it has been conceived by a scholar of the subject that whatever has been declared legally relevant are logically relevant and the facts declared relevant are the result of extreme foresight and innovation.

Now section 32 (1) of Act which runs as: -

"Statement written or verbal of relevant facts made by a person who is dead, or where cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstance of the case appears to the court unreasonable, or themselves relevant facts in following cases-

(1) When it relates to cause of death when the statement is made by a person as to cause of his death or as to any of the circumstances of the transaction which resulted in his death in cases in which the case of that person death comes into questions.

Such statement is relevant whether the person who made them was or was not, at the time when they were made, under the expectation of death and whether maybe the nature of a proceeding in which the cause of his death comes into question.

Hence clause 1 clearly speaks that when a statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death in a case in which the cause of death of the person comes into question such statement is relevant whether the person who made them was or was not at the time when they were made under the expectation of death and whatever may be the nature of the proceeding in which cause of death comes into question.

Lord Atkin in **Pakala Narain Swamy V. Emperor, (1939) 41 BOMLR 428** held that

> "Circumstances of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than 'res gestae'. Circumstances must have some proximate relation to the actual occurrence and must be of the transaction which resulted in the death of the declarant. There doesn't need to be a known transaction other than that the death of the declarant has ultimately been caused for the condition of the admissibility of the evidence is that the cause of (the declarant's) death comes into question. General expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly resulted in the occasion of the death will not be admissible. But the statement made by deceased that he was proceeding to the spot where in fact he was killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be the circumstances of the transaction and would be so whether the person was unknown or was not the person accused.

Although, under English Law, a person making a statement must be under the anticipation of death or impending death whereas under the Indian law it is not necessary for the admissibility of dying declaration that the deceased at the time of making the statement should have been under the expectation of death.

Secondly under English Law, a dying declaration is admissible only in a criminal charge of homicide or manslaughter whereas in India it is admissible in civil or criminal proceedings both wherever the question of death comes into question. Thirdly in **English law,** it is admissible only when death has ensued while under Indian Law such statement may be used even if the declarant survives. In such cases, the statement is relevant under section 157 of the Indian Evidence Act to corroborate the fact and under section 32 of Indian Evidence Act as a dying declaration. Fourthly, in Indian Law such statements are admissible in cases of suicide whereas in English Law it is inadmissible in such cases.

B. Dying declaration as the sole basis for conviction without corroboration

Section 32(1) quite explicitly states that dying declarations made by a person as to the cause of his death or as to any circumstances of the transaction which resulted in his death, and this, in cases in which the cause of that person's death comes into question. In other words, the declaration must either deal with any cause of his or her death or as to any of the circumstances of the transaction which resulted in death. The evidence with regard to a dying declaration must be very carefully and critically scrutinized as the accused has no opportunity to challenge such statement by way of cross-examination. Now the following cases need to assess to find out the answer to the query raised above.

Ram Nath Madhoprasad vs State of MP, AIR 1953 SC 420, it is settled law that it is not safe to convict an accused merely on the evidence furnished by a dying declaration without further corroboration because such a statement is not made on oath and is not subject to cross-examination and because the maker of it might be mentally and physically in a state of confusion. It is in this light that the different dying declarations made by the deceased and sought to be proved in the case have to be considered.

Although the view of the legislature that test is supplied by the solemn occasion when it was made, namely, at a time when the person making the statement was in danger of losing his life. At such, a serious and solemn moment, that person is not expected to tell lies; and secondly, the test of cross-examination would not be available. In such a case, the necessity of oath also has been dispensed with for the same reasons.

Initially, the Hon'ble courts are of the opinion that dying declaration evidence solely cannot be acted upon and made the basis of conviction. To be acted upon by a court, it must be corroborated by independent evidence. Although this decision is no more in effect as the same is now overruled.

The controversy relating to corroboration of dying declaration has been set at rest by the decision of the supreme court in **Khusal Rao vs State of Bombay, AIR 1958 SC 22,** the Hon'ble court observed several decisions of different high courts at length, it finds that,

The judicial committee of the privy council had to consider in the case of **Chandrasekara alias Alisandiri vs King, AIR 1937 PC 24,** the question whether mere signs made by the victim of a murderous attack which had resulted in the cutting of throat, thus, disabling her from speaking out, could come within the meaning of section 32 of Ceylon Evidence Ordinance, which was analogous to s.32 (1) of the Indian Evidence Act. The privy council affirmed the decision of the supreme court of Ceylon, and made the following observation in the course of their judgment, which would say that a dying declaration, if found reliable by a jury , may, by itself sustain a conviction.

The court further held that sometimes attempts have been made to equate a dying declaration

with the evidence of an accomplice or the evidence furnished by a confession as against the maker, if it is retracted, and as against others, even though not retracted. But in our opinion, it is not right in principle to do so. Though under s 133 of the Evidence Act, it is not illegal to convict a person on the uncorroborated testimony of an accomplice. Illus. (b) to S114 of the Act, lays down as a rule of prudence based on experience, that an accomplice is unworthy of credit unless his evidence is corroborated in material particulars and this has now been accepted as a rule of law. The same cannot be said of a dying declaration because a dying declaration may not, unlike a confession, or the testimony of an approver, come from a tainted source. If a dying declaration has been made by a person whose antecedents are as doubtful as an in the other cases, there may be a ground for looking upon it with suspicion, but generally speaking, the maker of dying declaration cannot be tarnished with the same brush as the maker of confession or approver.

The court comes to conclusion, in conjurations of the opinion of the Madras High court

That it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;

That each case must be determined on its facts keeping in view the circumstances in which the dying declaration was made;

That it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence;

That a dying declaration stands on the same footing as any other piece of evidence and has to be judged in light of surrounding circumstances and with reference to the principles governing the weighing of the evidence;

That a dying declaration which has been recorded by a competent magistrate properly, that is to say, in the form of question and answer, and, as far as practicable, in the word of the maker of the declaration; stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character; and

That to test the reliability of dying declaration, the court has to keep in views, the circumstances lie that opportunity of dying may for observations, for example, whether there sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he has several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

It means that once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and assailants of the victim, there is no question of further corroboration. On the other hand, the court after examining the dying declaration in all its

aspects come to the conclusion that it is not reliable by itself and that it suffers from an infirmity, then without corroboration, it cannot form the basis of conviction.

Kusha vs. State of Orissa, (1980) 2 SCC207, The apex court held in this case that "the legislature in its wisdom has erected in section 32(1) of the Indian Evidence Act when the statement is made by a person as to cause of his death, or as to any circumstance of the transaction which resulted in his death, in cases in which the cause of that person death comes into question" such statement written or verbal made by a person who is dead (omitting the unnecessary words) is itself a relevant fact. This provision has been made by the legislature, advisedly, as a matter of sheer necessity by way of an exception to the general rule that necessary is no evidence and that evidence which has not been tested by cross-examination is not admissible. The purpose of the cross-examination is to test the veracity of the statements made by the witness. In the view of legislature, that tests is supplied by the solemn occasion when it was made, namely, at a time when the person making the statement was in danger of losing his life. At such a serious and solemn moment, that person is not expected to tell lies; and secondly, the test of cross-examination would not be available. In such a case, the necessity of oath also has been dispensed with for the same reasons. Thus, a statement made by a dying person as to the cause of death has been accorded by the legislature a special sanctity which should, on the first principle be respected.

But in our opinion, there is no absolute rule of law, or even rule of prudence which has ripened into rule of law, that a dying declaration unless corroborated by other independent evidence, is not fit to be acted upon, and made the basis of conviction."

It is thus manifest that a person on the verge of death is most unlikely to make an untrue statement unless prompted or tutored by his friends or relatives. The shadow of immediate death is the best guarantee of the truth of the statement made by a dying person regarding the cause or circumstances leading to his death which is fresh in his mind and is untainted or discolored by any other consideration except speaking the truth. It is for those reasons the statute attaches special sanctity to the dying declaration. Thus, if the statement of a dying person possesses the test of scrutiny applied by the courts, it becomes a most reliable piece of evidence which does not require any corroboration suffice to say that it now well established by a long course of decisions of this court that although a dying declaration should be carefully scrutinized if after perusal of the same, the court is satisfied that the dying declaration is true and is free from any effort to prompt the deceased to make a statement and is coherent and consistent, there is no legal impediment in founding the conviction of such dying declaration even if there is no corroboration.

Panneer Selvam vs. state of Tamilnadu (2008) 17 SCC190, A decision of full bench, This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on his death bed being exceedingly solemn, serve and grave, is the reason in the law to accept the veracity of his statement. It for reason that the requirement 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 sessions crime, the exclusion of the statement would leave the court without a scrape of evidence. Though a dying declaration could be applied even in absence of cross-examination but court insists that the dying declaration should be of such 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 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 satisfied that the declaration was true and voluntary, then the court can base its judgment of conviction without any further corroboration

In **Gopal vs State of Karnatka,(2011) 14 SCC 396,**The court said that in the present circumstances of the cases the dying declaration can be made the sole basis for the conviction of the accused. It is true that the witness, who carried the deceased to the hospital, turned hostile during examination but that may not be an escape route for the accused because men may lie but the circumstance does not. The circumstances, in this case, clinch the proof that it is the accused and accused alone who has committed this offence.

The court further laid that the presence of kerosene residue on the inner and outer garments provides strong corroboration of the version in the dying declaration. Although the court said that it would have been better if the investigating officer had attempted to get recorded the second dying declaration of the deceased by the magistrate. But in the opinion of the court, the dying declaration recorded by PW 13 and supported by PW5 Dr Noor Ahmad and the endorsement made by him to the effect that the deceased was in a fit mental condition to depose before the police convince as that the dying declaration itself was a good dying declaration and could have been acted upon.

C. Multiple dying declaration: -

If there is more than one dying declaration then the court will look into all the dying declarations to ascertain the truth. A dying declaration should satisfy the entire necessary test and one such important test in that if there is more than one dying declaration they should be consistent particularly in material particulars. The truth should be judged with reference to all dying declarations made by him.

It is not the number of dying declaration which will weigh in the court. A singular dying declaration not suffering from any infirmity and found worthy of being relied on may form the basis of conviction. On the other hand, if every individual dying declaration consisting of plurality is found to be infirm, the court would not be persuaded to act thereon merely because the dying declaration is more than one and apparently inconsistent. It is not the plurality of dying declarations that adds weight to prosecution cases but their qualitative worth.

Sudhakar vs. State of M.P. AIR 2012 SC 3265. ,It has been held by the Supreme Court

in cases involving multiple dying declarations made by the deceased for determining which of the various dying declaration should be believed by court, the test of common prudence would be to first examine which of the dying declaration is corroborated by other prosecution evidence. Further, the attendant circumstance, the condition of the deceased at the relevant time, the medical evidence, the voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased, and the possibility of the deceased being tutored are some of the factors which would guide the exercise of judicial discrition by the court in such matter. It is further asserted that if there is more than one dying declaration then the court has to consider each one of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs. Minor discrepancies in the two dying declarations are not sufficient to invalidate either of the two dying declarations which were very similar in material particulars. If the two dying declarations made by the victim both can be believed if both have been made in fit condition and are corroborated.

Gaganram Gohani vs. State of Maharastra, (1982) 1 SCC 700, Where there is more than one statements in nature of dying declaration, one first in point of time must be preferred, of course, of the plurality of dying declaration could be held to be trustworthy and reliable, they have to be accepted.

In, **Amol Singh vs. State of M.P., (2008) 5 SCC 468,** Law relating to appreciation of evidence in forms of more than one dying declaration is well settled. Accordingly, it is not the plurality of the dying declaration but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found voluntarily reliable and made in a fit mental condition, it can be relied upon without any corroboration. The statement should be consistent throughout. If the deceased had several opportunities of making such dying declarations, that is to say, if there is more than one dying declaration they should be consistent.

In, **Kundula Bala Subrahmanyam vs. State of A.P., (1993) 2 SCC 184 ,** the court said that, If some inconsistency is noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinizing the contents of various dying declarations, in such a situation, the court has to examine the same in light of various surrounding facts and circumstances.

In **Lakhan vs. State of M.P., (2010) 8 SCC 514,** the first dying declaration before the magistrate, the deceased stated that when she was cooking, kerosene oil had been put behind her back. In the next dying declaration, it was stated that the appellant/ accused brought a metal container but of kerosene and poured it on her body and the fire was lit by him and she was burnt. Now, the court held and concluded that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any torturing/duress/ prompting, it can be the sole basis for recording a conviction. In such eventuality no corroboration is required. In case there are

multiple dying declarations recorded by the higher officer like a magistrate, can be relied upon, provided that there are no circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the court has to scrutinize the facts of the individual case very carefully and make the decision as to which of the declaration in worth reliance.

In, **Sher Sing vs State of Punjab, (2008) 4 SCC 265,** the Hon'ble court held in interpreting the multiple dying declarations that the first dying declaration exonerating the accused persons made immediately after she was admitted in the hospital was under threat and duress that she would be admitted in the hospital only if she would state in favour of the accused person to save her in-laws and husband. The first dying declaration does not appear to be coming from a person with a free mind without there being any threat. The second dying declaration was more probable and looks natural to us. Although it does not contain the certificate of the doctor that she was in a fit state of mind to give the dying declaration but the magistrate who recorded the statement had certified that she was in a conscious state of mind and in a position to make that statement to him. The mere fact that it was contrary to the first declaration would not make it untrue. The oral dying declaration made to the uncle is consistent with the second dying declaration implicating the accused person stating about their involvement in the commission of the crime. The third dying declaration recorded by the SI on the direction of his superior officer is consistent with the second dying declaration and the oral dying declaration made to her uncle though with some minor inconsistencies. The third dying declaration was recorded after the doctor certified that she was in a fit state of mind to give the statement.

The Supreme Court in the case of **Jagbir Singh vs State (NCT Delhi) (2019) 8 SCC 779** [Criminal Appeal No.967 of 2015 decided on 4th September 2019. Summarized the evidentiary value of multiple dying declarations-

a. There may be cases where there is more than one dying declaration. If there is more than one dying declaration, the dying declaration may entirely agree with one another. There may be a dying declaration where inconsistency between the declarations emerges. The extent of the inconsistencies may turn out to be reconcilable by the court e.g. in such cases, where the inconsistencies go to some matter of detail or description but are incriminatory as far as the accused is concerned, the court would look to the material on record to conclude as to which dying declaration is to be relied on unless it is shown that they are unreliable.

b. There are more than one dying declaration and inconsistencies between the declaration are absolute and the dying declarations are irreconcilable being repugnant to one another. In a dying declaration, the accused may not be blamed at all and the cause of death may be placed at the doorstep of an unfortunate accident. This may be followed up by another dying declaration which is opposed to the first dying

declaration. In fact, in that scenario, it may not be a question of an inconsistent dying declaration but a dying declaration which is completely opposed to the dying declaration which is given earlier. There may be more than two.

c. The court concluded that when there is more than one dying declaration, and in the earlier dying declaration the accused is not sought to be roped in but in later dying declaration, a somersault is made by the deceased, the case must be decided on the facts of each case. The court will not be relieved of its duty to carefully examine the entirety of materials as also the circumstances surrounding the making of the different dying declaration. If the court finds that the incriminatory dying declaration brings out the truthful position particularly in conjunction with the capacity of the deceased to make such declaration, the voluntariness with which it was made which involves, no doubt, ruling out tutoring and prompting and also the other evidence which support the contents of the incriminatory dying declaration, worthy or unworthy of acceptance can be considered.

D. Forms of the statement of dying declaration

Dying declarations are not necessarily either written or spoken. Any method of communication between mind and body may be adopted which reflects the truth, i.e., the pressure of the hand, a nod of the head, or a glance of the eye. Any adequate method of communication whether words or by signs or otherwise will suffice provided the indication is positive, definite, and seems too perceived from the intelligence of its meaning. Even nodding of the head is sufficient.

In **Nirbhaya Case,** the Supreme Court clearly said that a dying declaration should not necessarily be by words or in writing and it could be through gesture. Not just words by even gesture can be admissible.

In the case of **Govindappa vs the State of Karnatka, (2010) 6 SCC 533,** the Hon'ble Supreme Court held that Law does not provide as to who can record a dying declaration, nor there is any prescribed form, format, or a procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate from the doctor in respect of such state of mind of the deceased is not essential in every case.

It is equally asserted in several decisions that a dying declaration if possible should be recorded and taken down in exact words which the person who makes it generally uses. Possibly from these words precise could be drawn as to what the person making the declaration, meant to convey, moreover the statement must be **ipsissima verba** (in exact words of the person making declaration) while recording such statement.

In **Daya Singh v. State of Maharashtra, (2007) 12 SCC 452,** the court held that while recording such statements every care and caution needs to be exercised in respect of language,

tone, pause, expression of the body, physical motion, and the pressure on the words. Technical terms are used in local language especially in respect of explaining the surroundings, the reaction of the offence, his conduct as well as the history which culminate the injury which sometimes or always suggests a meaning for the criminal conduct. This is why that recording carries weight and meaning in respect of charges to prove against a culprit. The Tale of a dying man decides the future of not only of an individual but the family of both the parties and more so of a system that is meant for delivering justice to the human being. Dying declaration recorded even in the local speaking language of the declarant acquires added strength and reliability.

In, **State of Karnataka Vs Sharrif, AIR 2003 SC 1074,** the court said that very often the deceased is merely said as to how the incident took place, and the statement is recorded in narrative form. Such a statement is natural and gives a clear version of the incident as has been perceived by the victim.

In, **Ram Bihari Yadav vs State of Bihar, (1998) 4 SCC 517,** in which Apex court has clearly stated that it cannot be said that unless the dying declaration is in the question-answer form it could not be accepted. Having regard to the sanctity attached to a dying declaration as it comes from the mouth of a dying person unlike the principle of english law he needn't we under apprehension of death it should be in actual words or the maker of the declaration. Generally, the dying declaration ought to be recorded in the form of question and answer but if a dying declaration is not elaborated but consists of only a few sentences and is in the actual words of the maker the mere fact that it is not in question answer form cannot be ground against its acceptability or reliability. The mental condition of the maker of the declaration, alertness of mind, memory, and understanding of what he is saying are matters which can be observed by any person. But to lend assurance to those factors having regard to the importance of dying declaration the certificate of medically trained person is insisted upon.

A clear dying declaration is admissible even if it is not recorded in question-answer form. The fact that Magistrate did not record the declaration in question-answer form does not invite its rejection. Dying declaration recorded before the Taluka Magistrate in question and answer form was considered important evidence as it amounted to verba dicta statement of the deceased. The court also opined that it should preferably be in the question-answer form as it would help in arriving at a conclusion as to the extent to which the question raised could elicit the proper answer and thus,it is necessary to provide the exact statement made by the deceased.

E. Oral Dying Declaration and its evidentiary value

The dying declaration may be oral or written. It cannot be rejected on the ground that it was not reduced to writing. It is settled law that there is no legal requirement that a dying declaration must necessarily be recorded in question-answer form. Dying declaration recorded informally and as the narrative is fully admissible and is a relevant piece of evidence. Where the oral dying declaration is found true and gets corroboration from material particulars available on record it can

form the basis of conviction of an accused. Where dying declaration is oral and recorded, and is found true and trustworthy, it can form the basis of conviction.

But to be acted upon, the evidence with regard to an oral dying declaration should be subjected to strictest and closest circumstances. A dying declaration recorded by a magistrate, carries much weight, as it stands on a much higher footing than a dying declaration dependent upon oral testimony, which is fallible to all the infirmities of human memory. Where oral dying declaration gets corroboration from the written dying declaration, it can form the basis of conviction. An oral dying declaration alleged to have been made by the deceased should be scrutinized cautiously. Where the witnesses gave unassailable evidence with regard to the oral dying declaration, mention about oral dying declaration was also found in the first information report, and there was no distortion, infirmity, or embellishment in the evidence of the witnesses. The oral dying declaration was held reliable and the accused was convicted.

Waikhom Yaima Singh Vs State of Manipur, (2011) SCALE 718, The Hon'ble Supreme Court has held that oral dying declaration is a weak kind of evidence, where exact words uttered by the deceased are not available particularly because of failure of memory of witnesses who are said to have heard it. Thus, where the exact words used by the deceased differed from witness to witness and the doctor was not cross-examined about the medical condition of the deceased as to his fitness to make a statement, the dying declaration was held not reliable. Moreover, though the witnesses claimed to have reported to the informant about the dying deceased and the name of the assailant, there is no reflection of the name in the FIR. It is also to be seen in the instant case that the deceased was very seriously injured, so much so that according to witnesses he died immediately after allegedly making the dying declaration.

Balbir vs Wazir, (2014) 12 SCC 81, in a case of murder the deceased made an oral dying declaration before a witness who took the deceased to hospital giving minute particulars about the conspirators. It was held by the Supreme Court that the statement does not inspire confidence because there is no corroboration to lend assurance to the dying declaration. Moreover, the driver of the car in which the deceased was taken to hospital and another person in the car was not examined and the statement of the person to whom the dying declaration was made was examined three days after the incident. An oral dying declaration that creates a doubt is not worthy of credence.

Where an oral dying declaration is corroborated by the testimony of more than one independent witnesses, it cannot be rejected merely on the ground that the ability of the declarant to make an oral dying deceased was not supported by medical evidence.

F. Dying declaration and Certification by Doctor-

Where the evidence regarding the dying deceased is reliable and believable, even an oral dying declaration of the deceased can form the basis of conviction. Where only close relations

arrived on the spot on hearing the shout of the victim and no independent witness arrived on the spot, an oral dying declaration made to the relation witnesses was believed and the accused was convicted. The under-mentioned cases may also be referred to.

Nanhau Ram vs State of M.P. 1988 Supp. SCC 152, It has been stated that normally the court to satisfy whether the deceased was in a fit mental condition to make the dying declaration, looks up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration the medical opinion cannot prevail.

Laxman vs. State of Maharastra (2002) 6 SCC 1710, in para- 5 The constitution bench held that the juristic theory regarding the acceptability of a dying declaration is that such declaration is made in extremity When the party is at the point of death and when every hope of this world gone when every motive of falsehood is silenced, and the mind is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the death bed is so solemn and serene, is the reason in the law to accept the veracity of his statement. It is, for this reason, the requirement of oath and cross-examination case dispensed with. Since the accused has no power of cross-examination the court insists in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore the court to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eye witness state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctors as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite.

Puran Chand vs. State of Haryana (2010) 6 SCC 566, Although, it has been stated that a mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous and the court must examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful made in a conscious state of mind and without being influenced by the presence of relatives or investigating agency who are more interested in the success of investigation or which may be negligent while recording the dying declaration. The court further opined that the law is now well settled that a dying declaration which is found to be voluntary and truthful and free from any doubts can be the sole basis for conviction of the accused.

Prakash and another vs. state of M.P., (1992) 4 SCC 225, In the ordinary course the

members of the family including the father were expected to ask the victim the numbers of the assailants of the first opportunity and if the victim was in a position to communicate, it is reasonably expected that he would give the names of the assailants if he had recognized the assailants. In the instant case there is no occasion to hold that the deceased was not in a position to identify the assailants because it is nobody's case that the deceased did not know the accused persons. It is therefore quite likely that on being asked the deceased would name the assailants. In the facts and circumstances of the case, the dying declaration must be accepted.

It is further appreciated that the evidence of MO (doctor) that the injuries were not so grave or serious and the condition of the patient was not so critical that it was unlikely that he could make any dying declaration. Hence, there is no justification to discard the dying declaration.

Mooga Subbaiah vs State of A.P., (2002) 6 SCC 399,The Apex court while dealing with the issue whether reliance on the dying declaration made by the deceased to P.W. - 1, 2 and 3 therein could be believed, the court held that we find no reason to disbelieve the dying declaration made by the deceased to the witnesses P.Ws 1, 2 and 3. They are all residents of the same village and are natural witnesses to the dying declaration made by the deceased. No reason is assigned, nor even suggested to any of three witnesses, as to why at all any of them would tell a lie and attribute falsely a dying declaration to the deceased implicating the accused-appellant. Though each of the three witnesses has been cross-examined there is nothing brought out in their statement to shake their veracity.

The wife, the father in law and two other relatives has clearly stated that the deceased had informed them about the names of the assailants. Nothing worth has been elicited in the cross-examination. They have deposed categorically that by the time they arrived at the place of occurrence, the deceased was in a fit state of health to speak and make a statement and he did make a statement as to who assaulted him. Nothing has been suggested to three witnesses about the condition of the deceased. The doctor who had performed postmortem has not been cross-examined. In this backdrop, it can safely be concluded that the deceased was in a conscious state and in a position to speak. Thus, it is difficult to accept that wife, father in law and other close relatives would implicate accused-appellants by attributing the oral dying declaration to the accused. That apart in the absence of any real discrepancy or material contradiction on omission and additionally non-cross examination of the doctor in this regard makes the dying deceased credible and the conviction based on the same really cannot be faulted.

H. Dying Declaration Recorded by a Police Officials

Police are the most important segment of the criminal justice system and their role in preventive measures and prosecution of criminals can never be obviated. But the unfortunate part of the whole story is such an agency has not been put with proper faith but suffers a blemish of distrust in India. As the investigating officers are naturally interested in the success of the

investigation, the apex court already cautioned that the practice of the investigation officer himself recording the dying declaration during the investigation should not be encouraged. Although, it is quite natural that a wounded person has to be attended to quickly by police and to reach over there for the investigation process. So the statement recorded by him should be relied upon.

In the case of **Dalip Singh vs. State of Punjab, (1978) 4 SCC 332** The Supreme Court stated that although the practice of dying declaration ought not to be encouraged, the dying declaration recorded by the police officer during the investigation is admissible in evidence under sec. 32 of the Indian Evidence Act, 1872

In the case of **Ramavati vs. State of Bihar, (1983) 1 SCC 211,** their lordship observed that – a statement, written or oral, made by a person who is dead as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of the person's death comes in to question, becomes admissible under S.32 of the IEA. Such a statement made by the deceased is commonly termed as a dying declaration. There is no requirement of law that such a statement must necessarily be made to the magistrate. What evidentiary value or weight has to be attached to such statement, must necessarily depend on the facts and circumstances of each particular case. In a proper case, it may be permissible to convict a person only based on a dying declaration in the light of the facts and circumstances of the case.

The Supreme Court held that there is no requirement of law that a dying declaration must necessarily be made to a magistrate. What evidentiary value of weight must necessarily be made to a magistrate. What evidentiary value or weight has to be attached to such statement, must necessarily depend on the fact and circumstances of each case. In the instant case, the dying declaration was recorded by the police officer. In the cross-examination of witnesses, no questions were put as to the state of health of the deceased, and no suggestion was made that the deceased was not in a fit state of health to make any such statement. On the other hand, the doctor's evidence indicated that the deceased could make the statement attributed to her in her dying declaration on which her thumb impression had also been affixed. The witnesses deposing about the dying declaration and the police officer who recorded the dying declaration could not be attributed with any kind of feeling against the accused. The dying declaration was held reliable and the accused were convicted.

In **Saikh Rafiq vs State of Maharashtra, (2008) 3 SCC 691,** the court finds that the dying declaration of the deceased was recorded by a police officer and the special executive magistrate, though available was not summoned to record the statement and no certificate from the medical officer as to fitness and consciousness of the declarant was taken, it was held by that the declaration cannot be relied upon.

In **Dayal Singh vs State of Maharashtra,(2007) 12 SCC 452,** the Supreme Court held

that the dying declaration cannot be faulted merely on the ground that it was recorded by a police officer and not a magistrate. it was held by the court that the information had been sent to the magistrate for recording the dying declaration of the victim lady who was admitted in the hospital, but the day of the incident was Holi, and being a day of festivity, it was possible that the Magistrate may not have been present at his residence or the information may not have been conveyed to him personally, thus, where the dying declaration contained the certificate of the doctor who treated the victim, regarding her mental condition, it was held that the dying declaration recorded by the Head Constable cannot be discarded.

I. Evidentiary Value of Dying Declaration:-

The evidentiary value of a dying declaration depends upon the case to case and fact to fact. In **K. R. Reddy v. Public Prosecutor (1976) 3SCC 618** evidentiary value of the dying declaration was observed as under

(i) The dying declaration is undoubtedly admissible under section 32 and not being a statement on oath so that its truth could be tested by cross-examination.

(ii) The court has to apply the scrutiny and the closest circumspection of the statement before acting upon it.

(iii) Great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to connect a case as to implicate, yet the court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination.

(iv) The court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancor.

(v) Once the court is satisfied that the dying declaration is true and voluntary, it can be sufficient to record the conviction even without further corroboration.

The different facet of the evidentiary value of dying declaration is further summarized and elaborated in the decision of Supreme court in **Paniben vs. the State of Gujrat (1992) 2 SCC 474, AIR 1992 SC 1817,** Para's 18-19, is as follows-

(i) There is neither rule of law nor of prudence that a dying declaration cannot be acted without corroboration.

(ii) If the court is satisfied that the dying declaration is true and voluntary it can base a conviction on it, without corroboration.

(iii) The court has to scrutinize the dying declaration and must ensure that the declaration

is not the result of tutoring, prompting, or imagination. The deceased had an opportunity to observe and identify the assailant and in a fit state to make the declaration.

(iv) Where the dying declaration is suspicious it should not be acted upon without corroborative evidence.

(v) Where the deceased was unconscious and could never make any dying declaration. The evidence with regard to it is to be rejected.

(vi) A dying declaration that suffers from infirmity cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain details as to the occurrence, it is not to be rejected.

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.

(ix) Normally, the court to satisfy itself whether the deceased was in a fit mental condition to make the dying declaration looks the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make a dying declaration, the medical opinion cannot prevail.

(x) Where the prosecution version differs from the version as given in the dying declaration the said declaration cannot be acted upon.

(xi) Where there is more than one statement in the nature of dying declaration, the one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable have to be accepted.

Conclusion- The dying declaration is an important piece of evidence that can be relied on if it is true and wither from every motive of the falsehood. As the uttering word of dying person is the last word at the time of saying goodbye to this mortal world as the last truth of life. Of course at this juncture, the deceased mind is influenced by the most powerful consideration to speak the truth. The reasoning behind the acceptance of dying declaration comes with the requirement, experience, and practice of the social life for several decades. But the court has tried to balance the two conflicting interests that is justice to the departed soul and justice to the innocent cuffed culprit the ultimately trapped creature of prosecution. The apex court laid several guidelines to the recording of dying declaration, interpretation of oral dying declaration, multiple dying declarations, need of certification of the doctor, dying declaration recorded by the police, etc. If the dying declaration is clear, clean, and unambiguous, pointed and match or support the prosecution story beyond all ambiguity, the court heavily relied on it. But, the inference as drawn must be pinpointed about the assailant. It must be one and concluded. Then court solely relied on dying declaration without any

corroboration. In other circumstances, the court can scrutinize the other pieces of evidence to reach on just conclusion. The best dying declaration might be in a question-answer form explaining the circumstances of death and its reason recorded by the magistrate. But, oral statement, statement in form of a sign, etc heard and perceived by witnesses, who deposed and tested in court may also be relied on, if it is not doubtful. In case there is more than one dying declaration, then it cannot be dumped just stating it is more than one. Rather all must be appreciated in the particular circumstances in which it was made. It can be appreciated by reconciling all together. If the same is a coherent one, then the same may have relied on. The contradictory dying declarations of the deceased may be concluded otherwise. The apex court held that the dying declaration recorded by police must be discouraged as they only believe in the success of the prosecution case. But if the dying declaration is recorded by police officials in the circumstances which reflect its truth, urgency in particular circumstances and not doubtful. The same may also have relied upon. Hence, it is suggested that whenever a dying declaration is to be recorded it should be recorded very carefully keeping in view the sanctity which the courts attach to this piece of evidence. It retains its full value if it can justify that victim could identify the assailant, the version narrated by the victim is intrinsically sound and accords with probabilities and any material evidence is not proved wrong by any other reliable evidence.

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Topic No. – 16

The relevance of conduct of witness & conduct of accused in a Criminal Trial.

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Topic : The relevance of conduct of witness & conduct of accused in a criminal trial.

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Relevance of conduct of witnesses and accused in the Criminal Trial

In ancient Rome, the adversarial system was created with the view to provide a fair trial, impartial adjudication, to give a chance to parties to argue their case without prejudice, to be argued against (confronted) and to confront any party that is not on their side.

In modern time under all common law countries including Britain, Canada, Australia and India etc., the conduct of witnesses and the accused is considered vital for providing a fair trial. Statutes regulating the Indian criminal justice delivery mechanism specifically provides that conduct of witnesses and accused in a criminal trial are Relevant. Section 8 of the Indian Evidence Act, 1872, (Hereinafter will be referred to as IEA) makes previous and subsequent conduct of an accused relevant. In the same way, Sec 280 of Criminal Procedure Code, 1974 (Hereinafter will be referred to as Cr. P.C) provides for recording the demeanour of a witness when he is deposing in a court.

Historical Background

It has had a long history. In the earlier period of Roman legal development, the witnesses testified orally before the judges, and the practice of having oral testimony heard by the judge prevailed originally in the Roman-canonical procedure.

The principle was evident in subsequent English law, under which a confrontation requirement existed: it was necessary for an accuser to make an "appeal" to the court, at which time he was obliged to recite his grievance. In the early thirteenth century a variation of the "probable cause hearing" required the accuser to supply two complaint witnesses to support his claims before an accused was tried.[1] At such "hearings" the defendant was allowed confrontation in the form of cross-examination of these witnesses.[2]

Gradually, however, through the thirteenth century, this variation and similar forms which afforded an accused some measure of confrontation or cross-examination were subordinated to the developing concept of "trial by jury."

In the 14th century Post glossators- who, as judges or advocates, 'had their eyes fixed upon the practical administration of the law'- maintained that the 'indispensable requisite for the judge to form his opinion on the trustworthiness of witnesses was that they appeared before him.

In 1554, Parliament enacted a law which prescribed, in part, that any adverse witness "shall, if living, and within the Realm, be brought forth in Person before the party arranged if he requires

1. This proviso is a direct result of the canonical rule requiring two witnesses in order to try an accused for a capital crime.
2. James B. Thayer, The Older Modes of Trial, in 2 Select Essays In Angloazmucan Legal History 367 (Association of American Law Schools ed., 1908).

the same, and.., say openly in his Hearing, what they or any of them can against him."[3] The importance of cross-examination for "confounding ... the false accuser"[4] and exposing false demeanour was also recognized by this time: Sir Charles Smith, Queen Elizabeth's Secretary of State, remarked that "[t]he adverse party or his advocates... interrogate sometimes the witnesses and drive them out of countenance."[5]

The personal impressions made upon the judge by the witnesses, their way of answering questions, their reactions and behaviour in Court, where the only means of ascertaining whether their statements were trustworthy or not. It was thought necessary, therefore, that the judge should put on record in the files any specific reactions, e.g., that the witness stammered, hesitated in replying to a specific question, or showed fear during the interrogation… Subsequently, however, written testimony became, in general, the norm in canon and lay continental courts until the 19th century.[6]

In English chancery, it came about that the 'canon law influence prevented the oral examination of witnesses save as an extraordinary measure,' while at English common law emphasized on the oral testimony where witness and accused conduct were relevant in a criminal trial.

Early American jurisprudence followed the English chancery, as prior to 1912 witness testimony came in the form of written deposition in equity litigation.[7'] But Rule 46 the Equity Rules of 1912 changed this position by shifting to the common law practice method of oral testimony. Rule 43 of the Federal Rules of Civil Procedure now articulates the general rule that "in every trial, the testimony of witnesses shall be taken in open court."[8] The present Civil Rules continue that valuable reform. The result of the stress on demeanour is to confer immense discretion on those who, in finding facts, rely on oral testimony.

Meaning of Demeanour

The conduct of witnesses in a trial is known as demeanour. The term demeanour of witness refers to the non-verbal cues given by a witness while testifying, including voice tone, facial expressions, body language and other cues such as the manner of testifying and the witnesses' attitude. In other words, demeanour includes all matters which 'cold print does not preserve.[9] Assessment of demeanour, therefore, depends upon direct observation of the witness.[10]

3. United States ex rel. Laughlin v. Russell, 282 F. Supp 106 (E.D. Pa. 1968) (Sixth Amendment requires that accused be permitted to hear witnesses who testify against him.
4. Coy v. Iowa, 487 U.S. 1012, 1020 (1988).
5. Sir W. Holdsworth, A History of English Law 335 n.2 (Sweet & Maxwell, London, 7th ed., 1956).
6. Henry S. Sham, Demeanor Evidence: Elusive and Intangibles Imponderables, American Bar Association Journal, at 580.Bingham.
7. NLRB v. Dinion Coil Co., 201 F.2d 484, 488 (2d Cir. 1952).
8. Murphy v. Tivoli Enterprises, 953 F.2d 354, 359 (8th Cir. 1992).
9. Broadcast Music, Inc. v. Havana Madrid Restaurant Corp., 175 F.2d 77, 80 (2d Cir. 1949).
10. Weaver v. Department of the Navy, 2 M.S.P.B. 129, 133 (1980), affd, 669 F.2d 613 (9th Cir. 1982).

Lord Bingham describes demeanour as the sum of a witness's 'conduct, manner, bearing, behaviour, delivery and inflexion'. In short, anything which characterises his mode of giving evidence but does not appear in a transcript of what he said.

The object of this Section

The object of this section is to give to the appellate court some aid in estimating the value of evidence recorded by another court. The observation of a trial as regarding the demeanour of witnesses is entitled to great weight. The look or manner of a witness while in the witness box, his hesitation and order or confidence and calmness and similar facts which only the trial judge in a position to and is expected to observe.[11] A judge who sees the witness is better than a court of appeal, which, does not. While a finding that a witness is speaking the truth is of greatest value when it is made by a judge who saw the witness and observed his demeanour, a finding by a judge who never saw him is of very small value.[12] Where the question of fact has to be decided as to which set of witnesses is to be believed, the finding of the trial court should not be lightly regarded on a mere calculation of probabilities by the court of appeal.[13]

Provisions in India

Section 280 of Crpc deals with Remarks respecting the Demeanour of witnesses: -When a Presiding Judge or magistrate has recorded the evidence of witnesses, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

Section 8:-Motive, preparation and previous or subsequent conduct.[14]

Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.[15]

Explanation 1- The word "conduct" in this section does not include statements unless those statements accompany and explain acts other than statements, but this explanation is not to affect the relevancy of statements under any other section of this Act.

11. S venketrama Iyer v State of Andhra Pradesh, AIR 1957 AP at 44.
12. Pearey Lal v Nanak Chand, AIR 1948 PC 109 at 110.
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Explanation 2— when the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct is relevant.

Importance of Demeanour Evidence

The scope of conduct that encompasses demeanour is quite broad. A witness's demeanour includes the tone of voice in which a witness's statement is made, the hesitation or readiness with which his answers are given, the look of the witness, his carriage, his evidence of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaning glances, or his shrugs, the pitch of his voice, his self-possession or embarrassment, his air of candour or seeming levity.[16]

The witness's demeanour may be the determinative factor in appraising trustworthiness and, therefore, can never be ignored.[17] Witnesses' demeanour has long been regarded as a primary "method of ascertaining the truth and accuracy of their narratives.[18] There is judicial precedent holding that the importance of demeanour evidence alone could be enough to decide a particular issue or even a case.[19] Learned Judge Hand articulated the importance of demeanour evidence:

The words used are by no means all that we rely on in making up our minds about the truth of a question.., a jury... may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness.... such evidence may satisfy the tribunal, not only that the witness's testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.[20]

There is, however, substantial opposition to Judge Hand's view.[21] Some argue that determining the credibility of a witness's testimony solely based on demeanour evidence is, at best, unreliable."[22]

Demeanour will never be an infallible method of determining the veracity of a witness. At times liars will inevitably convince juries and judges of their truthfulness, while honest witnesses nervously fail to convince."[23] Irrespective of its potential pitfalls when analysed with other factors, such as consistency and corroboration, demeanour evidence is still one of the best guides to

16. Black's Law Dictionary 430 (6th ed. 1990).

17. Government of the Virgin Islands v. Aquino, 378 F.2d 540, 548 (3d Cir. 1967).

18. Arnstein v. Porter, 154 F.2d 464, 470 (2d Cir. 1946).

19. Stanley v. Review Bd. of the Dep't of Empl. and Training Servs., 528 N.E.2d 811, 813, 815 (Ind. Ct. App. 1988).

20. Dyer v MacDougall, 201 F.2d at 269.

21. Olin Guy Wellborn III, Demeanor, 76 Cornell L. Rev. 1075, 1088 (1991).

22. Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1084-85 (9th Cir. 1977).

23. Ibid.

judging a witness's credibility.[24] Demeanour evidence requires fact-finders to use their "natural and acquired shrewdness" and experience to assess demeanour and credibility.[25]

Credibility and Demeanour

Demeanour evidence is seen as hard to isolate and quantify scientifically but forms a foundation for our legal system. As stated above, to determine the witness's credibility, the fact-finder must observe the witness's posture, whether the witness acts nervous, avoids eye contact, demonstrates pain, sheds tears, fluctuates the tone of his speech, as well as an assortment of other nonverbal communications."[26]

The Supreme Court has noted the significance of face-to-face contact in a variety of contexts. For example, its robust right-of-confrontation jurisprudence reflects the understanding that " it is always more difficult to tell a lie about a person 'to his face' than 'behind his back."[27]

To effectively comprehend the role demeanour evidence plays in a trial, it is necessary to understand its use as a part of the evidence of witness credibility as a whole. At a trial, when witnesses testify about their knowledge of what happened during an event at issue in the litigation, their stories often vary. In such a situation, it is the fact-finder who must decide whom to believe. This decision often involves an evaluation of the evidence presented on the credibility of each witness. Credibility evidence may include the witness's opportunity and capacity to observe and relate to the event, and his demeanour, bias, character, and any prior inconsistent statements. Besides, the contradiction of, or support for, a witness's version of events by other evidence, and the plausibility of the witness's version fall within the scope of credible evidence.[28]

In the case of **Broadcast Music v. Havana Madrid Restaurant Corp,**[29] Judge Jerome Frank held that "For the demeanour of an orally-testifying witness is always assumed to be in evidence." It is 'wordless language.' The liar's story may seem un-contradicted to one who merely reads it, yet it may be 'contradicted' in the trial court by his manner, his intonations, his grimaces, his features, and the like- all matters which 'cold print does not preserve' and which constitute 'lost evidence' so far as an upper court is concerned. For such a court, it has been said, even if it were called a 'rehearing court,' is not a 'reseeing court.' Only were we to have 'talking movies' of trials could it be otherwise. A 'stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify.

24. NLRB v. Dinion Coil Co., 201 F.2d 484, 488 (2d Cir. 1952).
25. Ibid at 489.
26. Penasquitos Village, Inc. v. N.L.R.B, 565 F.2d 1074.
27. Coy v. Iowa, 487 U.S. 1012, 1019 (1988).
28. Hillen v. Department of the Army, 35 M.S.P.B. 453, 458 (1987).
29. 175 F. 2d 77, 80 (2d. Cir., 1949).

In the case of **R v. Lifchus,**[30] Cory J. observed that jurors should be able to rely on witnesses' demeanour to conclude whether they are credible or not even if they are unable to "point to a precise aspect" of the demeanour and further that they should not feel that the "overall, perhaps intangible, effect of a witness's demeanour cannot be taken into consideration in the assessment of credibility.[31]

Relevancy of demeanour of the witness

Recording of remarks about the demeanour of the witness, not recorded during the course of, or at the close of examination of the witness, can't be left out of the account. The remarks made in the judgement will be given due weight by the appellate court in the appraisal of the evidence of the witness.

Even when the remarks are made only in the judgement, an appellate court is bound to attach some weight to the appraisal of oral evidence by the trial court. This weight is attached due to the undeniable fact that the trial court is in a better position to judge the veracity of witnesses who have deposed before it than the appellate court and does not depend upon whether the trial court has complied with the provisions of the section or not.

The demeanour of a witness affects the evidentiary value of the deposition made by a witness and his credibility. Under this section, the judge or the magistrate is authorised to record not only the evidence of a witness but also such remarks as he thinks material regarding the demeanour of such witness while under the examination. The Allahabad High Court has held that any observation about the demeanour of witnesses should be known to the counsel of the parties so that they may make suggestions about the inference drawn by the judge/ magistrate from such demeanour[32]. It also helps the appellate court too in the appraisal of the evidence given by such a witness[33]. The high court would be right in not attaching too much importance to such remarks[34].

In civil and criminal cases when the judge finds that the answers given by the witness are evasive and not straight forward, he has to record the evidence of that witness in the form of questions and answers to bring on record sufficient material for the appellate court to form its own opinion as to the demeanour of the witness whilst under examination.

Where a session judge of experience in the most emphatic manner stated that the demeanour of the eye witness was evasive, that they inspired him with no confidence and that no man could be convicted on their testimony, the appellate court, before accepting their testimony, must be assured that there was no ground for the sessions judge's conclusion. If it tried the accused as a court of

30. [1997] SCJ 77, 9 CR 5th 1[C.R.]

31. Ibid.

32. Zafar Hussain v Sate of U.P, (1956) 2 All 736.

33. Ganeshbhai v State, AIR 1972 SC 1618.

34. Ibid.

original jurisdiction is immaterial. The indications of mistake must be obvious or the evidence too strong to be rejected before the court should interfere.

Conduct of accused in Criminal Trial

Section 8 of the Indian Evidence Act provides that the conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1. The word conduct in this section does not include statements unless those statements accompany and explain acts other than statements, but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2. When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct is relevant.

The conduct of an accused is relevant under Section 8. The immediate reaction of the accused had some bearing on the issue is relevant.[35] Where the accused took the police and pointed out the article it was admissible as the conduct of the accused.[36] Relevancy of conduct depends on its proximity to the fact in issue, and how close is "close enough" depends on whether the impact could be considered to have been caused by the physical or psychological link between the two.

The conduct relevant under the section must be with reference to:

(17) Such Civil suit or criminal proceeding, or

(18) Any fact in issue therein

(19) Or fact relevant thereto; and

(20) Such conduct influences or is influenced by any fact in issue or relevant fact.

Thus, the conduct to be relevant must be referable to the fact in issue or relevant fact. Preparation and previous attempts are themselves examples of conduct of the accused which give rise to presumptive proof of his guilt.

Definition of Conduct

Conduct can be defined as expression in outward behaviour of the quality or condition operating to produce those effect. It is a conscious attitude adjusted for doing an Act or series of Acts. The second paragraph of Section 8 makes the conduct of a person relevant when such person is a party to a suit or proceeding or such conduct is referred to the facts in issue. A man's

35. Maha Singh v State of Delhi, AIR 1976 SC 449.

36. Prakash Chand v State of Delhi, AIR 1979 SC 400.

conduct includes what he does and what he omits to do. The conduct of the accused on being questioned immediately after taking a bribe is relevant.

- *About the fact in issue or relevant facts:* - when evidence of conduct itself is a fact in issue the Supreme Court held that his conduct would be relevant to support or rebut his case. In this case, the wife was pregnant at the time of her marriage and the husband alleged that she had concealed it from him. The conduct of a man is admissible only against him. The conduct of one accused is not relevant against a co-accused. When the conduct of a person is in question, the statements, oral or written, made to him or in his presence or hearing which affect such conduct are relevant. Example – Illustrations (f), (g), (h).
- *That the conduct is such as influences or is influenced by the facts in issue or the relevant facts:*- Secondly, conduct influences or is influenced by the fact in issue. In **Queen Empress v. Abdullah,**[37] the question was whether the signs made by the deceased could be admitted as the conduct and a dying declaration. It was decided that the signs made by the deceased can be taken into consideration along with the questions put to her. The signs alone cannot be admitted by way of conduct under sections 8 and 9 of the Act. Thus the conduct of the injured person is not always relevant. According to Wigmore a man's conduct is always influenced by what he has been doing before or after the act. The accused is charged with strangulating the victim; his conduct is producing a watch of the victim before the police from his house is admissible.

The conduct of any person an offence against whom is the subject of any proceeding:-

Section 8 provides that the term 'party' includes anyone an offence against whom is the subject of any proceeding. The reason why the legislature said this was probably the fact that by pure legal technicality the state occupies in criminal matters a position analogous to that of a plaintiff in a civil suit.[38] Technically speaking a person against whom an offence is committed is not a party to a criminal proceeding. If this clause would not have been inserted in the section, there would have been a good deal of controversy as to whether the conduct of a person against whom an offence has been committed was relevant. The gesture of the deceased in reply to questions put to him together with gesture in reply to them are admissible.[39]

The conduct of a party only admissible:-it must be borne in mind that the conduct of a party alone is admissible. The conduct of a person who is not a party to the suit or proceeding is not admissible. The conduct of a conspirator who was dead and so not an accused at the trial was held inadmissible.[40]

37. ILR (1885) 7 All 385.
38. Ibid.
39. Emperor v Moti Ram Rai Singh, AIR 1937 Bom 372.
40. Sardul Singh v State of Bombay, AIR 1957 SC 747.

At what time.

The conduct of the parties is relevant under Section 8 "if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto. Thus section 8 covers:

- The conduct relating to the fact in issue or relevant fact of the parties to any
  1. Suit, or
  2. Proceeding, or of
  3. An accused person
- Whether the conduct is
  1. Contemporaneous to the fact in issue or relevant fact
  2. Previous, or
  3. Subsequent thereto.

Though Section 8 says that the conduct is relevant "whether it was previous or subsequent thereto", it is obvious that the conduct to be relevant under section 8 must fall within a certain time frame of proximity as the conduct must either influence or be influenced by any fact in issue or relevant fact.[41]

Previous or subsequent conduct

Conduct to be relevant under section 8 need not be contemporaneous. It may be antecedent or after the fact in issue or relevant fact. In an adoption case deed of adoption found not to be clinching but as evidence of subsequent conduct of the parties is relevant.[42] Complainants of the deceased of the police expressing apprehension of death made two months before death are admissible.[43]

Previous conduct:

Conduct to be relevant need not be only previous or subsequent. Both are relevant. Under section 8 previous declaration of intention, threat or attempts to commit an offence are instances of previous or antecedent Conduct and are relevant. In antecedent conduct, there is a declaration of intention or threat. Such type of conduct may influence or is likely to influence the fact in issue or any relevant fact.

A woman and her paramour were accused of murdering her husband. She had been heard to say of her husband. "I live a most unhappy life with him. I wish his death. If he cannot die I will kill myself." It is relevant.

41. Rameshwar, son of Kalyan Singh v State of Rajasthan, AIR 1952 SC 54.

42. Bishwanatha v Dhapu Devi, AIR 1960 Cal 494.

43. Alijan Munshi v State, AIR 1960 Bombay 290.

Preparation for crime and previous threats and attempts to commit crime obviously come under the previous conduct of the accused.[44] The previous threats are pointers to motive and also amount to conduct.[45]

Last seen together: - The theory of 'last seen together is one where two persons are 'seen together' alive and after some time, one of them is found alive and the other dead. If the period between the two is short, the presumption as to the person alive being the author of death of the other can be drawn. The time gap should be such as to rule out the possibility of somebody else committing the crime. The last seen together principle is one of the latest principles which is taken into consideration in establishing the guilt of the accused. In the absence of eye-witnesses and tangible evidence, it is the last resort of the prosecution in a murder case – the person last seen with the victim is presumed to be the murderer, thus, shifting the onus onto the accused to prove otherwise or come up with an alibi. The foundation of the theory is based on principles of probability and cause and connection. Where a fact has occurred with a series of acts, preceding or accompanying it, it can safely be presumed that the fact was possible as a direct cause of the preceding or accompanying acts, unless there exists a fact which breaks the chain upon which the inference depends.

The circumstance of 'last seen together does not by itself and necessarily leads to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime! There may be cases where on account of the proximity of place and time between the event of the accused having been 'last seen with the deceased and the factum of death a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide.

In **Nizam v. State of Rajasthan,**[46] Hon'ble Supreme Court held that if the person is last seen with the deceased he must explain as to how and when he parted company. He must furnish an explanation that appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation based on facts within his special knowledge, he fails to discharge the burden cast upon him by sec 106 of the Evidence Act.

In **State of Rajasthan v. Kashi Ram,**[47] the Supreme Court held that if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation that appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the

44. M C Sarkar, Sarkar's Law of Evidence, Vol 1, New Delhi, 2003, Pg 141.

45. Worth v R Co, 51 Fed 173.

46. AIR 2015 SC 3430.

47. 2006 (11) TMI 660.

Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation to discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link, which completes the chain.

Subsequent conduct:

The subsequent conduct of a party or person or his agent is relevant under the section. The sudden change of life, silence on part of the accused, false statement, suppression of evidence, running away after the occurrence is an instance of subsequent conduct. Illustrations (f), (h) and (i) explain the same. The presence of the accused at a place where ransom demanded was to be fulfilled and then the action of fleeing on spotting the police party is a relevant circumstance and is admissible under this section.

Current conduct:

Besides previous and subsequent conduct, the current or contemporaneous conduct is also relevant under section 8. The conduct of a party interested in a proceeding at the time when the facts occurred, out of which the proceeding arises is relevant. In a terrorist attack in parliament, the accused has purchased ingredients from a shop that used IEDs and found in possession of deceased terrorists. The name of the shop and address were already known to the police as the name and address of the shop was already mentioned on packets seized. It was held that the conduct of the accused in pointing the shop and its properties was relevant under this section.

A statement explaining conduct:

A mere statement is not admissible according to Explanation 1 to Section 8. It lays down that the conduct does not include statements. But the explanation is an exception to this rule. "The statement and the Act which are explained and accompanied by such a statement both are relevant as a composite whole." Those statements which accompany and explain acts, other than statements can be regarded as conduct.

For example, a girl was raped and she made a complaint about it to her mother. The circumstances under which and the terms in which the complaint was made are relevant. It is not necessary that a complaint to be relevant should have been made only to a police station. But a false explanation of the accused is also conduct and relevant.

Similarly, the accused was charged with gross indecency with a boy of fifteen. Shortly after the offence, a complaint was made by the boy to his parents. The particulars of the complaint were held to be relevant.

A distinction can be drawn between the complaint and a statement. The evidence of complaint is always allowed, but a statement is allowed in special circumstances, particularly when it is part of res gestae.

Act amounting to conduct under Section 8 of the Indian Evidence Act.

F. I. R. by accused conduct: - if the first information is given by the accused himself, the fact of his giving the information is admissible against him as evidence of his conduct.[48]

If the first information report is a non-confessional statement, then the contents of it are relevant. The fact of giving information by the accused is relevant against him as his conduct under section 8 of the Act. Confessional Part of the F.I.R. of the accused is not admissible except to the extent permissible under section 27 of the Evidence Act. But non-confessional part of the F.I.R. can be used against the accused as evidence of conduct under section 8 of the Act.

Statements of third-person affecting the conduct of a party to a proceeding. Explanation 2 states that the statement of third-person made to the accused, whose conduct is relevant, in his presence and before the court is admissible if it affects his conduct. Illustrations (f), (g), and (h) appended to Section 8 are relevant to the Explanation. The statement of the investigating officer revealed that the accused had been taken to 'G' who pointed out the accused. The statement of G' to that extent was relevant.

Absconding:- The conduct of the parties after the occurrence is relevant if it is influenced by the fact in the issue. The filing of an F.I.R by the accused to divert the attention of the police from himself is relevant under section 8 of the Act.

In the case of **Kartarey v. Sate of UP,**[49] the Supreme Court pointed out that to be an absconder in the eye of the law, it is not necessary that a person should have run away from his home; it is sufficient if he hides himself to evade the process of law, even if the place of hiding be in his own home.

The fact that the accused is trying to flee from justice or abscond is also relevant as an inculpatory fact but the fact that he was unaware of the charges against him at the time of disappearance might explain away the guilt significance of the conduct.

The running away of an accused just after the occurrence is evidence against him.[50] Mere absconding of the accused cannot form the fulcrum of a guilty mind in a murder case but it is a relevant piece of evidence to be considered along with other evidence. Its value will always depend on the circumstances of each case.[51]

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48. Aghnoo Nagesia v State of Bihar, AIR 1966 SC 119.
49. AIR 1976 SC 76.
50. Darbari Kumar v State, AIR 1970 Orissa 54.
51. Bipin Kumar Mandal v State of W.B, (2010) 12 SCC 91.

A threat by accused: - A threat to a criminal act is relevant. A woman and her paramour were charged for murdering her husband. Her statement, she lived a most unhappy life with her husband and she wished him dead or if that would not be she wished herself dead, made before the murder, were held relevant.

Accused's conduct under section 8 and statement under Section 162 of Cr. P.C:- Under section 162 of Crpc, 1973 any statement made by any person to the police during the course of an investigation cannot, as a rule, be used at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. The fact that the accused made such a statement is a kind of conduct of the accused within the meaning of section 8. However, there is a clear distinction between the conduct of an accused under section 8 and the statement of the accused barred under section 162. What is excluded by section 162 Cr P C, 1973 is the statement made to a police officer in the course of the investigation, and not the evidence relating to the conduct of the accused, not amounting to a statement when questioned by the police during the investigation. For example, the evidence that the accused led the police officer to the place where the stolen goods or weapons which had been used in the commission of the crime were hidden, would be admissible as conduct under section 8, irrespective of whether any statement made by the accused before, during or after such conduct was admissible under section 27of the Evidence Act.

In the case of **Maha Singh v. the State of Delhi,**[52] the Supreme Court while confirming the conviction by both trial court and high court, held that any statement made by the accused in answer to question put by the inspector is inadmissible under Section 162 CrPC and neither the prosecution nor the accused can take advantage of these answers. These are, therefore, excluded from consideration from this case by us. But all the same, the conduct of the accused would be relevant under Section 8 of the Evidence Act if his immediate reaction to the illegal overture of the complainant or his action in inserting unwanted something in his pocket were revealed in the form acts accompanied then and there or immediately thereafter by words or gestures reliably established.

Previous attempt: - Previous attempt to commit the crime is relevant.[53]

Cases on Conduct of accused

In the case of **Mistri v. King-Emperor,**[54] A person was charged for the murder of a girl. During the investigation, the accused took the police to a place and pointed out and produced some ornaments which the deceased was wearing at the time of the incident took place. In the trial of the accused the facts that he took the police to locate the place where the ornaments were kept hidden and that the accused given the ornaments to the police were allowed to be proved under section 8 of the Act as these facts showed the subsequent relevant conduct of the accused.

52. AIR 1976 1 SC 644.

53. Appu v State, AIR 1971 Mad 194.

54. AIR 1938 (6) ALJ 839.

In the case of **Bhamara v. State of M.P,**[55] In this case, person X was cultivating his land. Another person Y was passing by the land. He called X to chat with him. During the interaction, some hot words were exchanged and an altercation ensued. X battered in the head to Y. Two bystanders namely A & B rushed to that place. Seeing other people coming to that spot X tried to escape but was caught by C. The conduct of escaping of the accused was held a very relevant subsequent conduct.

In the case of **Emperor v. Moti Ram,**[56] In this case, one Moti Ram and Rai Singh were tried for the murder of a lady called Sita. The witness soon after the incident found that the lady was lying on the floor with her throat cut and she was bleeding greatly. When the witnesses asked her as to who did this she tried to utter the word Moti. When she was again asked by Moti whether she meant Motiram or not, she positively nodded her head. She was later transferred to the hospital and when the magistrate asked, she explained the incident and pointed the accusation towards Motiram. All these facts were held to be admissible as the conduct of the person an offence against whom an inquiry was going on under section 8 of the Act.

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