TRAINING MODULE FOR LEGAL SERVICES LAWYERS

PART - 2

NATIONAL LEGAL SERVICES AUTHORITY

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FOR
LEGAL SERVICES LAWYERS

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National Legal Services Authority
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M E S S A G E

The core activity of National Legal Services Authority and of Legal Services Institutions is providing legal aid to the poor and marginalized sections. NALSA has been striving to make Access to Justice a reality, but, Access to Justice would be meaningful only when it is coupled with quality legal aid to those deserving such aid. This requires improvement in the quality of panel lawyers, which, in turn, requires training such lawyers to help them perform better.

In order to build capacity of the lawyers on the panel of Legal Services Authorities, NALSA had taken the initiative of preparing Training Module for Legal Services Lawyers, Part-I whereof was released last year.

NALSA has now come out with Training Module for Legal Services Lawyers Part-II which covers substantive laws such as Rights of Prisoners, Motor Accident Claims, Domestic Violence, Law of Evidence etc.

I am sure that training of panel of lawyers as per the NALSA's Training Modules would greatly enhance the knowledge of the lawyers and their ability to discharge their duties as legal services lawyers. The Training Module would be of use not only to the lawyers but also to the litigants.

I congratulate Justice Anil R. Dave, Executive Chairman, NALSA, Justice Manju Goel, Members of the Committee for Developing the Training Module for Legal Services Lawyers and others who have contributed to the making of the module and wish them the best for the future.

[T.S.Thakur]

Anil R. Dave
Judge
Supreme Court of India
&
Executive Chairman
National Legal Services Authority

7, Krishna Menon Marg
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September 24th, 2016

FOREWORD

National Legal Services Authority is committed to the cause of ensuring "Access to Justice to the most disadvantaged sections of the society". One of the core functions of the NALSA is to provide legal aid to those who are not aware about their rights and cannot afford fees of lawyers.

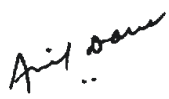
Access to Justice will become meaningful only if the legal services provided are of the highest standards in terms of competence and skill. The lawyers who are on the panel of the NALSA are normally young and are keen to render their services to those who are needy. So as to see that the said lawyers are properly groomed,the NALSA also imparts training to them so that they can extend still better professional services to the persons belonging to weaker sections of the society.

For the above purpose, it was thought necessary to develop a Training Module for the lawyers,who render their services to needy persons through the NALSA.

A Committee had prepared a "Module for Training of Lawyers".Part 1 of the Module was released in March 2015. It was the first of its kind and it focused on development of professional skills of the lawyers. The Committee also trained the persons who were to train the lawyers and the officers. In three batches, more than 100 officers and lawyers were trained in 2015 itself.

The Committee has now prepared 'Part 2' of the Module. It deals with the subjects with which the lawyers and the officers are concerned and which are important to learn for rendering effective professional services to the needy persons through the NALSA.

I really appreciate the efforts made by the team concerned and especially of Justice Manju Goel. I am sure that if the Modules are used properly by the lawyers and other officers, the efforts made in preparation of the Modules would become really fruitful. I am sure that the young lawyers and the officers will take due advantage of both the Modules so as to be more effective in rendering their services.



(ANIL R. DAVE)

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PREFACE

The Committee for Developing a Module for Training of Lawyers of National Legal Services Authority (NALSA) was entrusted with the work of framing modules for training of Legal Services Lawyers, who at times were perceived to be untrained and raw practitioners. Part 1 of the module, focussing mainly on lawyering skills was released in March 2015 with subjects that included basic knowledge in civil remedies like injunction, criminal jurisprudence on bail, drafting skill in civil and criminal matters, etc. The book in your hand is Part 2 of the module. Although this part has been delayed for reasons beyond our control, we assure that there has been no compromise on quality. This part deals with the core subjects namely, law for persons with disabilities, law of evidence, rights of prisoners, law on motor accidents claims, protection of women from domestic violence, juvenile justice, child sexual abuse, child marriage, labour law and sexual harassment of women at workplace.

Part 1, when put to use, proved to be very effective for giving the initial training to the young lawyers who join the legal services. The modules are so framed that any resource person with the necessary experience can deliver them to the participants in a training course without needing long hours of prior preparation. The success of Part 1 has given us the strength to go ahead with our work for Part 2 which we hope to release in November 2016. We also assure that we will not keep you waiting for long for Part 3 of the module which is in the pipeline.

The process of learning that will last for three days is designed keeping in view the principles of adult learning. The four basic principles of andragogy are:

1. Adults need to be involved in planning and evaluation of their instructions.
2. Experience including mistakes provides the basis for learning activities.
3. Adults are most interested in learning subjects that have immediate relevance and impact on their job or personal lives.
4. Adult learning is problem centred rather than content oriented.

One of the basic assumptions of adult learning is that they are themselves growing reservoirs of experience and information and can themselves be a source of learning. Hence the process will be learning by sharing, learning through activities and learning by brain storming.

Simply gathering of information is not learning. Our aim is not only to fill the young minds with data. Our endeavour is to impart knowledge, skill and attitude. Knowledge is assimilation of data that can be obtained from library and internet. However, programmes like the present one are rare opportunities to develop skill and attitude. Studies have shown that different processes of learning lead to different impacts. We retain 5% of what we learn by hearing but more of what we learn by seeing. We retain 80% of what we learn by doing and 95% of what we learn by teaching. Hence we have included in the modules plenty of "doing". The activities are expected to help the participants assimilate information and gather skill and the appropriate attitude.

Hence, as in the previous part we have included in the module activities like group discussion, presentation, role play and more. The activities not only take away the monotony of a lecture but also leave a permanent impression of the subject learned.

We gratefully acknowledge the patronage to the work provided by Hon'ble Mr. Justice T. S. Thakur, Chief Justice of the Supreme Court of India and Patron-in-chief of NALSA. Hon'ble Mr. Justice Anil R. Dave, Executive Chairperson NALSA, gave us encouragement and support throughout

the work. We also acknowledge the contributions made by Ms. Asha Menon, former Member Secretary, NALSA and Shri Alok Aggarwal, Member Secretary, NALSA for providing all logistic support and for co-ordinating between the authors and by Ms. Geetanjli Goel, Director NALSA and Shri Kumdilong Kessen in putting together the Module.

We look forward to the critical appreciation of the work and all suggestions for improvement in future projects.

15. 09. 2016

Committee for Developing a Module for Training of Lawyers

Justice Manju Goel,
Former Judge, High Court of Delhi
Justice Rekha Sharma
Former Judge, High Court of Delhi
Justice Kailash Gambhir
Former Judge, High Court of Delhi
Shri P.Vishwanatha Shetty
Sr. Advocate, Supreme Court of India,
Prof. P. S. Jaswal
Vice Chancellor, Rajiv Gandhi National University of Law

For the Coordinators and Resources Persons

— Justice Manju Goel (Retd.)[1]

Part I of the module was released in March 2015. This is the Part II of the module dealing with certain core subjects. Part III is in the pipeline and will soon see the light of the day.

Who is the resource person

Although, the work is produced entirely in Delhi, the actual training sessions are expected to be held at different centres of the country, wherever the legal services lawyers are to be trained. Actual training should preferably be conducted by an expert living in the same area or place where the training is to be done.

The resource person should ideally be an experienced Judge or a competent Advocate with good exposure at the Bench/Bar and who is capable of imparting the lawyering skills and expertise in the concerned areas.

After Part I was released under the instructions of the then Executive Chairman Mr. Justice T. S. Thakur, Judge Supreme Court of India, we proceeded to hold courses for Training of Trainers (ToT). In three batches we trained more than 100 lawyers, legal services personnel in training methodologies including how to make a power point and communication skill necessary for the resource person. The idea behind the ToT was that they can be invited to deliver the sessions not only forming part of Part I but also of the subsequent parts.

How to use the modules

Adult learners are different from the school students in as much as they already have some knowledge and information on the subject of training. The adult learners like to build on their already existing knowledge. It is also recognized that learning is faster by doing i.e. by applying the information imparted. Accordingly, in the modules we have included activities that make the participants work with their colleagues and use as well as challenge their existing knowledge. The modules are designed with a view to make the training process efficient and interesting. Each Module has two parts. The first part is the exercise/task for the live sessions of training. The second part consists of the necessary information to deal with the exercise/task. For best results, the information part given in 'short notes' should be used by the resource person for his/her preparation before conducting the actual live sessions and should be used also for validation, only after the participants have actually performed the part assigned to them viz. quiz or group discussion etc. For every session the organiser/coordinator shall do well to photocopy the first set of pages containing the Module including the programme, exercises like group discussion, role play, experience sharing etc. The "short notes" provided for each Module should not be handed over till the exercises are over. The resource person can refer to the short notes preferably before the actual session and shall share those at the end for the participants to read for themselves.

Time management

We have given a time management plan in each module. At times it may not be possible to strictly follow the plan as the actual time spent on each part of the module will vary depending upon participation of the groups. However, in case the time allotted turns out to be too short, the resource person may reorganize the time plan to cover the module. We are aware that the training sessions will throw up more questions than what can be dealt with within the given time, but the unanswered questions lead to a quest to be pursued beyond the sessions as well and, hence, would be welcome.

[1]Former Judge, High Court of Delhi and Chairperson, Committee for Developing a Module for Training of Lawyers

It is often found that the participants are keen for photographs while the sessions are on and thereafter in group and amongst themselves and with visiting dignitaries. While taking the photographs may take only a couple of seconds, organising the group takes much longer and at times the time taken for these photoshoots disturbs the schedule. The co-ordinator shall do well if appropriate arrangements and announcements are made in advance so that time for these activities can be squeezed into the format of time management.

Physical environment

The number of participants for a session should ideally be around 30. It will be greatly appreciated if the participants are not seated in any hierarchical manner. The seats, as far as possible should not be fixed to the floor so that they may be moved to make small groups. A thought should be given in advance to facilitate breaking the whole group into four or five small groups as such breakout groups may need separate rooms/ spaces where they can carry out their discussion. The coordinator may form the groups in advance so that time is not lost during the session in dividing the whole group into smaller groups.

Ice breaking

A short ice breaking session is extremely useful to motivate the participants in any training session to open up, share and contribute to the discussions in the actual sessions. These ice breaking sessions ensure associative and active rather than passive participation. They are often interactive meaningful fun sessions before a full and focused programme is run. Two small examples are given below by way of suggestions:

1. Each participant is asked to introduce himself/herself by giving the usual information of name and work, adding thereto some interesting fact little known to others e.g. I am Rakesh practicing on the Criminal side in the District Courts of Rohini. Now, I may look obese but I played football and was the captain of the school football team.
2. Each participant is asked to introduce himself/herself with his/her name and work and say in one sentence what he/she expects to gain from the training. No one is allowed to repeat what a participant has already said.

TRAINING METHODOLOGY USED

a) Group discussion and presentation:

Group discussions are meant to provide participants an opportunity to find answers to specific questions given to them with the help of their existing knowledge and experience. In the process they feel to be important contributors in the process of training. They also learn by doing and such learning lasts longer. At the end of the presentation of the views by each group, the resource person may fill the gap in information with his/her own rich experience and learning and can refer to information on the subject given in the book.

b) Quiz:

The quiz given in the modules is not meant to be used as a contest. It is meant to show to the participants that although the topics are familiar, there is still scope to learn about them. The resource person can open a discussion on questions that call for elaborate answers.

c) PowerPoint presentation:

No one can ignore the importance of traditional teaching method of lecturing. PowerPoint presentations provided here are meant to structure the lectures in a time efficient manner. Further,

the PowerPoint presentation makes the lectures more effective with audio-visual impact which in turn makes a lasting impression on the mental horizons of the participants. PowerPoint presentation, if not prepared with sufficient acumen can be very distracting. We subscribe to presentations in which the slides show only a few words at a time so that the participants do not have to engage in reading the slides. In case a long sentence is required to be shown in the slide, the speaker should allow the participants to read the same by pausing his own lecture for a while. It is not a good idea to have long scripts on the power point slide which is not being read by the speaker but the participants are trying to read the slide and hear the speaker at the same time, not getting anything out of any of the two.

The slides of the PowerPoint should not have long sentences. Paragraphs are entirely to be discarded. Only the point should appear on the slide so that the focus of the facilitator as well as the audience is retained. If the PowerPoint has reading material the attention of the participants gets divided between the words spoken by the resource person and the writing on the PowerPoint. Such PowerPoint affects the quality of the lecture and so should be avoided.

d) Experience Sharing:

The lawyers participating in the programme are already into legal practice and have some experience in the topics they are being trained in. Experience sharing is the way of extracting from the participants themselves information on the subject for the session. The resource person may supply the information which is not provided by the participants in experience sharing. This method saves the participants of the monotony of hearing what they already know. At the same time, this makes the learning participatory since one person's experience informs the rest of the group. The resource person may supplement the information obtained by experience sharing so that the participants can receive full information.

e) Brainstorming:

Brainstorming is thinking together. The participants are expected to discuss in whole group but before actual discussion, they are made to think on each sub-topic with the help of one of their fellow participants.

f) Role-Play:

Role-Play is one of the best modes of learning by performing. For this exercise the whole group has to be divided in small groups of say 5. While some participants perform the given role, the others watch and give their feedback. In the process, everyone learns what is intended to be imparted.

Needless to say that the ingenuity of the resource persons should not be curbed by the modules that we have designed. We shall gratefully welcome all suggestions which may come from the resource persons and the participants so that our work serves the cause better.

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SCHEDULE OF THE TRAINING PROGRAMME

Duration	Details
DAY - I	
9.45 AM to 10.30 AM	Inaugural Session
10.30 AM to 11.00 AM 11.00 AM to 11.30 AM	Tea Ice Breaking
Session-I (11.30 AM to 1.30 PM)	Law of Evidence (Part – I)
1.30 PM to 2.15 PM	**Lunch Break**
Session-II (2.15 PM to 3.45 PM)	Law of Evidence (Part – II)
3.45 PM to 4.00 PM	Tea
Session-III (4.00 PM to 5.15 PM)	Law for Persons with Disabilities
DAY - II	
Session – IV (9.30 AM to 11.00 AM)	Motor Accident Claims
11.00 AM to 11.15 AM	Tea
Session –V(11.15 AM to 1.15 PM)	Protection of Women from Domestic Violence Act, 2005
1.15 PM to 2.00 PM	**Lunch Break**
Session –VI (2.00 PM to 3.30 PM)	Rights of Prisoners and Legal Services
3.30 PM to 3.45 PM	Tea
Session –VII (3.45 PM to 5.15 PM)	Sexual Harassment of Women at Workplace (Prevention, Prohibition And Redressal) Act, 2013
DAY - III	
Session –VIII (9.30 AM to 11.00 AM)	Child Sexual Abuse and Child Marriage
11.00 AM to 11.15 AM	Tea
Session –IX (11.15 AM to 1.15 PM)	Juvenile Justice (Care and Protection of Children) Act, 2015 with reference to children in conflict with law
1.15 PM to 2.00 PM	**Lunch**
Session –X (2.00 PM to 3.30 PM)	Labour Law & Industrial Disputes Act
3.30 PM to 3.45 PM	Tea
3.45 PM to 4.30 PM 4.30 PM to 5.15 PM	Feedback Valedictory Session

Session I
11.30 AM - 1.30 PM
Total Time: 2 Hours

MODULE FOR TRAINING OF PANEL LAWYERS ON LAW OF EVIDENCE (PART - I)

Topic 1: Common Issues before the Civil Courts

— Justice Manju Goel (Retd.)[1]

Topic 2: Competency of Witnesses and Privileged Communications

— Geetanjli Goel[2]

Topic 3: Electronic Evidence– Mode of Proof

— Pavan Duggal[3]

SESSION PLAN

Objective

1. To inform participants the legal services lawyers of the common issues relating to the law of evidence arising in everyday work in Civil Courts.
2. To inform the participants of various sections of law governing those issues.
3. To inform the participants about the competence of witnesses who maybe produced to prove certain facts.

Expected learning outcome

1. The participants would become equipped with the method of proving documents and facts.
2. The participants will be able to prevent inadmissible evidence regarding facts or documents which maybe attempted by the other side.

Programme

Topic– 1

1. **Introduction** 10 minutes

   The resource person will introduce to the participants the subject of law of evidence in civil matters drawing the attention of the parties to the benefits of preparing the case keeping in view the provisions of the Indian Evidence Act and pointing out how a mistake made in the law of evidence may lead to adverse consequences for the client.

2. **Group Discussion/Individual Exercise** 20 minutes

   The participants can be divided into groups of 5-6 to discuss the questionnaire on the subject and to find the answers. In the alternative, the participants can be given the questionnaire for introspection and be asked to write their own answer in brief.

3. **Whole Group Discussion based on the questionnaire led by the resource person** 20 minutes

[1] Former Judge, Delhi High Court
[2] Director, NALSA and Officer of Delhi Higher Judicial Service
[3] Advocate, Cyber law expert and an author

Topic– 2

1. **Introduction** 5 minutes

   The resource person will introduce the topic to the participants by bringing out how the question of competence of witness is fundamental to production of a witness.

2. **Group Discussion** 10 minutes

   The participants will be regrouped and will be asked to find answers to the questionnaire on the subject, competence of witness.

3. **Whole Group Discussion based on the questionnaire led by the resource person** 20 minutes

Topic– 3

1. **Introduction** 5 minutes

   The resource person will introduce the new provisions dealing with electronic evidence and will draw the attention of the participants to Section 65 B of the Indian Evidence Act, 1872

2. **Questionnaire** 10 minutes

   The participants will individually answer the questions in the questionnaire to be provided by the course coordinator and keep the answers with themselves.

3. **Whole group discussion** 15 minutes

4. **Concluding remarks** 5 minutes

Training method

1. Lecture
2. Group Discussion
3. Individual introspection
4. Quiz

Tools required

1. Facility for power point presentation
2. Flip chart
3. Pens
4. Blue tack

*****

Time: 20 minutes

LAW OF EVIDENCE

TOPIC 1: COMMON ISSUES BEFORE THE CIVIL COURTS

QUESTIONNAIRE FOR INTROSPECTION/GROUP DISCUSSION

Q1. What is the mode of proving?

a. Will
b. Public Document
c. Agreement to Sell
d. Sale deed
e. Decree passed by a court
f. Entries in the Bank Account

Q2. Of what facts can the court take judicial notice?

Q3. a. Does a sale deed need registration?
b. Does a deed of tenancy of 1 year and a deed of tenancy of 11 months need registration?

Q4. Will an oral agreement that the interest payable was only half of what is written in the agreement of loan be admissible in evidence?

Q5. Will it be true to say that a tenancy agreement required by law to be registered has no evidentiary value unless it is registered?

Q6. Can a document not sufficiently stamped be admitted in evidence?

Q7. Is the standard of proof required in civil matters and criminal matters the same?

Q8. Is newspaper admissible in evidence? What is its evidentiary value?

Q9. What is the evidentiary value of a copy of a ledger?

Q10. What is the presumption of the legitimacy of a child born 200 days after dissolution of the marriage of the husband and wife? What course of action would you suggest to H who disputes the legitimacy of the child?

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LAW OF EVIDENCE
TOPIC 1: COMMON ISSUES BEFORE THE CIVIL COURTS
QUESTIONNAIRE FOR INTROSPECTION/GROUP DISCUSSION
SHORT NOTE AND DISCUSSION BASED ON THE QUESTIONNAIRE

– Justice Manju Goel (Retd.)[1]

Q1. What is the mode of proving?

a. Will

Section 63 of the Indian Succession Act provides how a will is made. The Section is as under:

> *"63. Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:—*
>
> *(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.*
>
> *(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.*
>
> *(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary".*

Generally speaking, it follows from the above Section that the will has to be signed by the testator and has to be attested by two or more witnesses. Both the witnesses should have witnessed the actual execution of the deed although all the witnesses need not sign at the same time. It is essential that the witnesses also sign in presence of the testator.

Section 68 of the Indian Evidence Act requires that a document required by law to be attested shall not be used as evidence until one attesting witness has been called for proving its execution. In case no attesting witness is found, attestation of one witness at least has to be proved along with the signature of the testator. This can be done by producing a witness who is conversant with the signature of the testator and that of the witness to the will.

b. Public Document

Section 77 of *the Indian Evidence Act 1872* mentions that public documents may be proved by proving the certified copy of such document issued as per the provisions of *Section 76* of the Act.

c. Agreement to Sell

An agreement to sell has to be proved by production of the document and execution of the same by the vendor. If the vendor denies the signature, the vendee may prove the signature by a statement on oath or by offering comparison with some admitted signature of the vendor.

An agreement to sell is not required to be registered under *Section 17* of *the Registration Act, 1908*. The registration of such a document is optional by virtue of *Section 18* of *the Registration Act, 1908*. However, there is a word of caution. By an amendment to *Section 17* in 2001, *clause*

[1]Former Judge, High Court of Delhi

1(A) has been included which says that unless an agreement to sale has been registered the vendee will not get the benefit of *Section 53A* of the *Transfer of Property Act, 1882*.

d. Sale deed

Sale deed is a document which is valid only when it is duly stamped and registered (*Section 54* of *the Transfer of Property Act, 1882* and *Section 17* of *the Registration Act, 1908*). The document can be presented to the Court only when these conditions are met.

Once the document is presented, the execution of the document has to be proved either by the executants or the witness in whose presence the document is executed or by a witness who is conversant with the signature of the executant/vendor.

e. Decree passed by a court

As per *Section 74(1)(iii)* the documents forming the acts, or records of the acts of judicial bodies are considered to be public documents. Therefore a decree of the court, being a record of an act of a judicial body should be proved the way a public document is proved, i.e. in accordance with the provisions of Section 77, by a certified copy of the judgment. This was also reiterated by the Supreme Court in *Jaswant Singh v. Gurdev Singh, (2012) 1 SCC 425.*

f. Entries in the books kept by a bank

Books of accounts can be proved by the person who writes the books in the usual course of business. Books of accounts have to be produced in original unless there are special circumstances when the Court may dispense with the production of the original. However in the case of the books maintained by the banks a special privilege is created by *the Bankers' Book Evidence Act, 1891*. The entries in the books maintained by a bank can be proved by a copy duly certified by the principal accountant or the manager of the bank with his name and official title.

The contents of the certificate are available in *Section 2(8)* of *the Bankers' Books Evidence Act*. In case the books are maintained in electronic form a further certificate is required by the person in charge of the computer system of the bank. The relevant provision is contained in *Section 2A* of the said Act.

Q2. Of what facts can the Court take judicial notice?

The Courts can take notice without any formal proof by evidence in respect of all matters of public history, science or art as well as facts which are notorious and are widely known. Judicial Notice in a sense is superior to formal means of proof. *Sections 56 and 57 of the Indian Evidence Act 1872* speak of judicial notice. *Section 57* also appends a list of matters in which judicial notice can be taken. The list however is not exhaustive. In various cases, Indian Courts have taken notice of facts for enhancing the cause of justice.

In *Onkar Nath & Ors vs The Delhi Administration*, *1977 AIR 1108, 1977 SCR (2) 991, 1977 SCC (2) 611*, the Hon'ble Supreme Court took notice of the fact that when the appellants made incriminating speeches, a railway strike was imminent and the strike did take place a couple of days later. The Supreme Court in this case state:

> *"Section 56 of the Evidence Act provides that no fact of which the Court will take judicial notice need be proved. Section 57 enumerates facts of which the Court "shall" take judicial notice and states that on all matters of public history, literature, science or art the Court may resort for its aid to appropriate books or documents of reference. The list of facts mentioned in Section 57 of which the Court can take judicial notice is not*

exhaustive and indeed the purpose of the section is to provide that the .Court shall take judicial notice of certain facts rather than exhaust the category of facts of which the Court may in appropriate cases take judicial notice. Recognition of facts without formal proof is a matter of expediency and no one has ever questioned the need and wisdom of accepting the existence of matters which are unquestionably within public knowledge. (see Taylor 11th edn. pp 3-12; Wigmore sec 2571 foot-note; Stephen's Digest, notes to Art, 58; Whitley Stokes' Anglo-Indian Codes Vol. II p. 887). Shutting the judicial eye to the existence of such facts and matters is in a sense an insult to common sense and would tend to reduce the judicial process to a meaningless and wasteful ritual. No Court therefore insists on formal proof, by evidence, of notorious facts of history, past or present. The date of poll, the passing away of a man of eminence and events that have rocked the nation need no proof and are judicially noticed. Judicial notice, in such matters, takes the place of proof and is of equal force. In fact, as a means of establishing notorious and widely known facts it is superior to formal means of proof. Accordingly, the Courts below were justified in assuming, without formal evidence, that the Railway strike was imminent on May 5, 1974 and that a strike intended to paralyse the civic life of the Nation was undertaken by a section of workers on May 8, 1974".

Halsbury laws of England, 4th edition paragraph 108 has the following to say on judicial notice:

"108. Notorious fact. The court takes judicial notice of matters with which men of ordinary intelligence are acquainted, whether in human affairs, including the way in which business is carried on, or human nature, or in relation to natural phenomena. In order to equip himself to take judicial notice of a fact, the judge may consult appropriate sources, or he may hear evidence. He may also act upon his general knowledge of local affairs, but he may not import into a case his own private knowledge of particular facts, even if those facts have been proved in previous proceedings."

The Delhi High Court in several cases has taken judicial notice of the fact that at the given time rentals in the city were on the rise. The Delhi High Court further took judicial notice of the market rate of rent at the relevant time. Reference can be made to the following judgments:

National Radio And Electronic Co. vs Motion Pictures Association on 31 May, 2005 Equivalent citations: 122 (2005) DLT 629, M.R. Sahni vs. Doris Randhawa 2008 (104) DRJ 246,National Radio & Electronic Co. Ltd. vs. Motion Pictures Association 122 (2005) DLT 629 (DB), State Bank of Bikaner and Jaipur vs. I.S. Ratta&Ors. 120 (2005) DLT 407 (DB), Anant Raj Agencies Properties vs. State Bank of Patiala 2002 IV AD (Delhi) 733 (DB), Motor & General Finance Ltd. vs. M/s. Nirulas&Ors. 92 (2001) DLT 97, Vinod Khanna and Ors. vs. BakshiSachdev (Deceased) Through LRs and Ors. AIR 1996 (Delhi) 32 (DB) and BakshiSachdev (D) by LRs vs. Concord (I) 1993 Rajdhani LR.

The Hon'ble Supreme Court in the case of *D.C. Oswal v. V.K. Subbiah, AIR 1992 SC 184,* took notice of the universal escalations of rentals and accordingly made appropriate directions of *mesne profits*.

In *S. Nagarajan, Asst. Collector vs VasanthakumarAnd Anr. 1988 CriLJ1217, it was held* that a notification issued *under Section 11(b) of the Customs Act* need not be proved by production of a certified copy and that the Court can take judicial notice of the name as it falls under the category of legislation.

Q3. a. Does a sale deed need registration?

Sale deed falls in the category of documents mentioned in S*ection 17(1)(b)* of *the Registration Act, 1908*. *Section 17 (1) (b)* requires non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs.100 and upwards, to or in immovable property to be registered. Hence a sale deed requires to be registered.

b. Does a deed of tenancy of 1 year and a deed of tenancy of 11 months need registration?

How a lease has to be made is given under *Section 107* of *the Transfer of Property Act, 1882*. It says the following:

"Section 107:

1. *A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.*
2. *All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.*
3. *Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee: Provided that the Government may, from time to time, by notification in the official Gazette, direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession."*

As per sub-section (1) of *Section 107*, a lease of immovable property from year to year can be made only by a registered instrument. Sub-section (2) of *Section 107* says that all other leases of immovable property maybe made either by a registered instrument or by an oral agreement accompanied by delivery of possession. A tenancy agreement of 11 months will fall under sub-section (2) of *Section 107* of *theTransfer of Property Act*. As such a tenancy can be created orally along with delivery of possession. However if any document is required to be executed it can only be a registered instrument. *The Transfer of Property Act* does not acknowledge creation of tenancy by an unregistered document.

In *Chemical Sales Agencies Vs Naraini Mewar, AIR 2005 Del 76*, it was held that if a lease agreement is neither a registered document nor an oral agreement accompanied by possession it cannot create lessor and lessee relationship. Therefore, an 11 months lease requires registration.

Section 17(1)(d) of the Registration Act, 1908, does not require registration for a lease agreement for a period of less than 1 year. However, since the tenancy is created under *the Transfer of Property Act, 1882*, one has to refer to *the Transfer of Property Act* for the purpose of ascertaining whether a tenancy is validly created. *The Transfer of Property Act* requires a lease agreement irrespective of its tenure, to be registered. Hence a lease agreement for one year as well as a lease agreement for 11 months requires registration.

Q4. Will an oral agreement that the interest payable was only half of what is written in the agreement of loan be admissible in evidence?

Section 91 of *the Indian Evidence Act, 1872*, permits only evidence of any grant of disposition, if required by law to be reduced in the form of a document and if so reduced to a form of a document, it is to be proved by production of that document. *Section 92* complements *Section 91* by further adding that the terms of such document cannot be contradicted, varied by any oral agreement.

There are some exceptions to the general rule which have been provided in the Section itself by provisos 1 to 6. Further some illustrations have been provided in the Act to illustrate the rule. Illustration (b) is as under:

> *"A agrees absolutely in writing to pay B Rs. 1,000 on the 1st March, 1873. The fact that, at the same time, an oral agreement was made that the money should not be paid till the thirty-first March, cannot be proved".*

The problem posed matches this illustration. This illustration bars an oral agreement to contradict the term in respect of the last date of payment. In the present problem the oral agreement contradicts the term in respect of the rate of interest. This oral agreement cannot be proved by virtue of the general rule of *Section 92* read with illustration (b) of *the Indian Evidence Act 1872*.

Q5. Will it be true to say that a tenancy agreement required by law to be registered has no evidentiary value unless it is registered?

The effect of non-registration of a document required by law to be registered is available in *Section 49* in *The Registration Act, 1908*. It is stated as under:

> *"Effect of non-registration of documents required to be registered.—No document required by section 17 (1) [or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall—*
>
> *(a) affect any immovable property comprised therein, or*
> *(b) confer any power to adopt, or*
> *(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:*
>
> *[Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877),or as evidence of any collateral transaction not required to be effected by registered instrument.]".*

"*Collateral purpose*" is not defined in *the Registration Act of 1908*. In *Webster's Seventh New Collegiate Dictionary*, expression 'collateral', has been given meaning as "accompanying as secondary or subordinate". To the same effect is the meaning given in *Black's Law Dictionary*, Ninth Edition. The meaning according to this Dictionary is "supplementary; accompanying, but secondary and subordinate". The *Jowitt's Dictionary of English Law*, published by Sweet & Maxwell Limited, 1977, Second Edition defines '*collateral*' as something which is by the side of or distinct from, a certain thing. In brief, it can be said that collateral purpose is only a *"secondary purpose"*.

In view of the proviso an unregistered document can be admitted in evidence for proving some fact of collateral transaction. In *M/s. K.B. Saha & Sons Pvt. Ltd. Vs. M/s. Development Consultant Ltd.(2008) 8 SCC 564,* the lease deed set up by the appellant was unregistered. It was contended on his behalf that the unregistered lease deed could be looked into for collateral purposes including for the clause that specifically said that the purpose of the lease was to provide accommodation to the named officer of the respondent company. The contention was rejected by the Supreme Court on the ground that this was one of the main conditions of the contract and could not be termed a "collateral purpose". The Hon'ble Supreme Court culled out five principles for identifying evidentiary value of an unregistered document and to understand the concept of collateral transaction. They are:

"a. A document required to be registered is not admissible into evidence under Section 49 of the Registration Act.

b. Such unregistered document can however be used as an evidence of collateral purpose as provided in the Proviso to Section 49 of the Registration Act.

c. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.

d. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immoveable property of the value of one hundred rupees and upwards.

e. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose".

In *Padma Vithoba Chakkayya v. Mohd. Multani AIR 1963 SC 70*, the Court said that if the document was not registered, it is not admissible in evidence but it can be used to show the character of possession of vendee. The unregistered document, thus, can be taken into consideration for a limited purpose and not otherwise.

In the case of *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66,* an unregistered and unstamped deed of lease for a period of 30 years was relied upon by the appellant. The document inter alia had a clause that the disputes if any arising between the parties would be resolved through arbitration under *the Arbitration and Conciliation Act 1996*. The lease deed was required to be registered under *Section 107* of *the Transfer of Property Act* and *Section 17(1) (d)* of *the Registration Act*. It was also required to be stamped as per *the Indian Stamp Act, 1899*.

The Hon'ble Supreme Court held that the clause regarding arbitration was a collateral transaction and an independent contract which did not call for stamp duty under the *Indian Stamp Act, 1899* or registration under *the Registration Act, 1908*, and hence the unstamped document could be admitted in evidence as proof of the arbitration clause. However, the Hon'ble Supreme Court said that on account of absence of Stamp Duty being paid, the document could not be taken in evidence in view of *Section 35* of *the Indian Stamp Act*. The defect could be cured by payment of stamp duty as per procedure prescribed in *the Indian Stamp Act, 1899*. The Court therefore prescribed the following procedure for a document which is not registered (but compulsorily registrable) and which is not duly stamped:

"(i) The court should, before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registrable.

(ii) If the document is found to be not duly stamped, Section 35 of Stamp Act bars the said document being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document under section 33 of the Stamp Act and follow the procedure under sections 35 and 38 of the Stamp Act.

(iii) If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the Court or before the Collector (as contemplated in section 35 or 40 of the Stamp Act), and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped.

(iv) Once the document is found to be duly stamped, the court shall proceed to consider whether the document is compulsorily registrable. If the document is found to be not compulsorily registrable, the court can act upon the arbitration agreement, without any impediment.

(v) If the document is not registered, but is compulsorily registrable, having regard to section 16(1)(a) of the Act, the court can de-link the arbitration agreement from the main document, as an agreement independent of the other terms of the document, even if the document itself cannot in any way affect the property or cannot be received as evidence of any transaction affecting such property. The only exception is where the respondent in the application demonstrates that the arbitration agreement is also void and unenforceable, as pointed out in para 8 above. If the respondent raises any objection that the arbitration agreement was invalid, the court will consider the said objection before proceeding to appoint an arbitrator.

(vi) Where the document is compulsorily registrable, but is not registered, but the arbitration agreement is valid and separable, what is required to be borne in mind is that the Arbitrator appointed in such a matter cannot rely upon the unregistered instrument except for two purposes, that is (a) as evidence of contract in a claim for specific performance and (b) as evidence of any collateral transaction which does not require registration."

Q6. Can a document not sufficiently stamped be admitted in evidence?

Refer to the discussion of question no. 5.

Q7. Is the standard of proof required in civil matters and criminal matters the same?

Standard of proof in a Criminal matter is higher since in a criminal trial the evidence regarding guilt of the accused has to be proved beyond reasonable doubt. In civil cases facts in issue are proved by preponderance of probability. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which a party relies.

Q8. Is newspaper admissible in evidence? What is its evidentiary value?

Section 81 of the Evidence Act allows the Court to presume the genuineness of a newspaper. Hence, when a newspaper is produced it does not call for any further proof and it can be admitted in evidence as such.

So far as evidentiary value is concerned, the newspaper cannot be proof of the event or fact reported therein. The reporter collects information from various sources and informs the reader of the same by the report published in the newspaper. As such newspaper is only a hearsay evidence of the facts or events reported.

Nonetheless the newspaper will be primary evidence of the reports published themselves. In other words the newspaper will be evidence of the report and as such it can be presented to the Court to show that on a given date the newspaper published a particular report. The newspapers can be produced to show that a particular advertisement, photograph or information actually appeared in that newspaper. However, the genuineness regarding the facts of the report cannot be proved by the production of the newspaper.

Q9. What is the evidentiary value of a copy of a ledger?

Section 34 of the *Indian Evidence Act, 1972*, specifically provides that the books of accounts are relevant. But such books, including those maintained in electronic form must have been regularly kept in the course of business.

However, as provided by Section 34 the entries in the books are themselves not enough to charge any person with liability. Hence entries in books of account are relevant only as corroborative evidence and it is to be shown further by some independent evidence that the entries represent honest and real transactions and that transactions were made in accordance with those entries.

Ledger is one such book of account. But if the ledger is not supported by any day book or Roznama containing entries of transaction as they take place, the ledger loses its evidentiary value.

Q10. What is the presumption of the legitimacy of a child born 200 days after dissolution of the marriage of the husband and wife? What course of action would you suggest to H who disputes the legitimacy of the child?

As per *Section 112* of the *Indian Evidence Act 1872*, if a child is born within 280 days of the dissolution of a valid marriage, it is a conclusive proof of the fact that the child is the legitimate son of the man with whom the mother was in a valid marriage.

Section 112 of the *Indian Evidence Act, 1872* is a rule of presumption so strong as to make it conclusive proof. The conclusive proof of Section 112 of the Indian Evidence Act is a legal fiction. The section however gives the scope for rebuttal. If it can be shown that the husband had no access to wife when the child could have been begotten the presumption will not work. In *Dipanwita Roy vs Ronobroto Roy (2015) 1 SCC 36,*Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and another, (2010) 8 SCC 633 and Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and another*, (2014) 2 SCC 576,* it has been held that DNA examination can be ordered to test the validity of allegations which constitute one of the grounds on which the concerned party would either win or lose. There is however ample precaution that such a test should not be casually ordered as it may adversely affect the innocent child. In the case of *Dipanwita Roy vs Ronobroto Roy* (supra) the Court left it to the wife to offer her sample for the DNA test and suggested that in case of wife's refusal to give the sample the Court may take recourse to presumption under *Section 114* of *the IndianEvidence Act, 1872*.

LAW OF EVIDENCE

TOPIC 2: ISSUES RELATED TO COMPETENCY OF WITNESSES AND PRIVILEGED COMMUNICATIONS

Questionnaire for introspection/group discussion

1. An accused states that he wants to lead his own evidence in defence and moves an application under Section 315 Cr.P.C. which is allowed. During cross-examination the APP puts questions to him as to his conduct and where he was present which are relevant to the matter in issue in the criminal proceedings. He raises the objection that he is not liable to answer the same as such a question will criminate him and is violative of Article 20(3). Is the objection valid?

2. A person who is a habitual drunkard witnesses a robbery taking place. He is joined as a prosecution witness. However an objection is raised by the accused that he is an incompetent witness due to his drunkardness. Is the objection valid?

3. Trial of a case under Section 498A/406 IPC is going on. Suddenly the accused husband takes out a sharp object and slashes his wife who is deposing as a witness. A criminal case is registered against the husband. Can the judge be examined as to what happened?

4. The Investigating Officer (IO) of a case is being examined as a witness. He states that the accused was arrested on the basis of secret information and at the instance of the secret informer. The defence counsel asks him questions as to the identity of the informer, his address and what the informer had told the IO and submits that the same are material to prove the falsity of the case of prosecution. Can he do so?

5. A client says to an attorney – "I wish to obtain possession of property by the use of forged deed on which I request you to sue." Is the said communication privileged?

6. Is a salaried employee who advises his employer on legal matters entitled to the same protection as other advisors like a barrister, attorney or pleader?

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LAW OF EVIDENCE

TOPIC 2: ISSUES RELATED TO COMPETENCY OF WITNESSES AND PRIVILEGED COMMUNICATIONS

QUESTIONNAIRE FOR INTROSPECTION/GROUP DISCUSSION

– *Geetanjli Goel*[1]

Discussions based on the questionnaire

1. An accused states that he wants to lead his own evidence in defence and moves an application under Section 315 Cr.P.C. which is allowed. During cross-examination the APP puts questions to him as to his conduct and where he was present which are relevant to the matter in issue in the criminal proceedings. He raises the objection that he is not liable to answer the same as such a question will criminate him and is violative of Article 20(3). Is the objection valid?

The objection is not valid as the accused himself appeared as a witness under *Section 315 Cr.P.C.* and of his free will availed himself of the option of testifying for the defence, thus he subjected himself to the same rules as applicable to other witnesses. Under *Section 132* of *the Indian Evidence Act*, no witness is excused from answering any question on any relevant matter on the ground that the answer will criminate him. When the accused examines himself as a witness, he can be cross-examined as well.

2. A person who is a habitual drunkard witnesses a robbery taking place. He is joined as a prosecution witness. However an objection is raised by the accused that he is an incompetent witness due to his drunkardness. Is the objection valid?

The objection is not valid as the return of sobriety renders a drunkard competent, and intoxication, even habitual, does not in itself incapacitate a witness offered as a witness.

3. Trial of a case under Section 498A/406 IPC is going on. Suddenly the accused husband takes out a sharp object and slashes his wife who is deposing as a witness. A criminal case is registered against the husband. Can the judge be examined as to what happened?

Section 121 of the *Indian Evidence Act* refers to the privilege of persons connected with the administration of justice. It is against public policy or expediency to allow disclosure of matters in which judges or magistrates have been judicially engaged. Under this section, a judge or a magistrate cannot be compelled to answer questions:

> *"As to his own conduct in court as judicial officer; and*
>
> *As to anything which came to his knowledge in court as such judicial officer unless ordered by a superior court. However he may be examined as to other matters which occurred in his presence whilst he was so acting."*

The privilege given by this provision is the privilege of the witness i.e. the judge or magistrate and it does not lie in the mouth of any other person to assert the privilege. A judge may waive the privilege and testify to facts which transpired before him at a former trial. In this case the judge can be examined as the incident occurred in his presence.

4. The Investigating Officer (IO) of a case is being examined as a witness. He states that the accused was arrested on the basis of secret information and at the instance of the secret

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informer. The defence counsel asks him questions as to the identity of the informer, his address and what the informer had told the IO and submits that the same are material to prove the falsity of the case of prosecution. Can he do so?

No Magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue Officer shall be compelled to say whence he got any information of any offence against public revenue (Section 125). However, there is nothing to prohibit him from saying if he be so willing.

This is also based on grounds of public policy that the source of information of offence against the laws should not be divulged. This privilege is necessary for creating confidence and offering encouragement to informants. Thus no adverse inference can be drawn against the prosecution for withholding an information from the witness box.

The privilege is however, subject to certain limitations:

i) It applies only to the identity of the informant, not to the contents of his statement as such or to the custody of any document or other material objects that might have been seized and tendered in evidence.

ii) It applies to communications to such officers only as have a responsibility or duty to investigate or to prevent public wrongs, and not to officials in general.

iii) Even where the privilege is strictly applicable, the trial court may compel disclosure, if it appears necessary in order to avoid the risk of false testimony or to secure useful testimony.

Thus questions as to the identity of the informer and his address cannot be put but the question as to what was told by the secret informer can be put.

5. A client says to an attorney – "I wish to obtain possession of property by the use of forged deed on which I request you to sue." Is the said communication privileged?

This communication would not be protected as privileged communication as it is made in furtherance of a criminal purpose.

6. Is a salaried employee who advises his employer on legal matters entitled to the same protection as other advisors like a barrister, attorney or pleader?

The Bombay High Court in *Municipal Corporation of Greater Bombay v. Vijay Metal Works AIR 1982 Bom 6,* has held that he would be entitled to the same protection under *Sections 126* and *129* of the *Indian Evidence Act* and any communication made in confidence to him by his employer seeking his legal advice would be protected, provided that such communication is not made in furtherance of any illegal purpose. However, in one case, the European Court of Justice had denied legal professional privilege to in-house legal counsel even though the counsel was enrolled as an advocate.

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LAW OF EVIDENCE
SHORT NOTE ON ISSUES RELATED TO COMPETENCY OF WITNESSES AND PRIVILEGED COMMUNICATIONS

– *Geetanjli Goel*[1]

1. Civil and criminal trials are based on evidence. The chief sources of evidence are:

-documents

- witnesses

1.1 Witness is a person who gives testimony or evidence before any court. Bentham has called witnesses the eyes and ears of justice. Oral evidence is needed to clarify or help determine the rights and liabilities of the parties in a legal proceeding.

1.2 It is now a settled principle that for a witness to be able to depose before a court, he must be a 'competent' witness. 'Competence' is used in two different senses in the rules of evidence:

- While modifying the noun 'evidence' as in 'competent evidence', the word competent means 'admissible' and not hearsay.
- While modifying the noun 'witness', it means 'legally capable of being' a witness.

1.3 In early common law a large number of rules were designed to ensure that perjury would not be committed, including those related to competency of witnesses. These rules excluded:

- a person as a witness if he had an interest in the case and consequently, a motive to lie.
- children were generally ruled incapable of testifying because of their inability to understand the significance of the oath administered.

1.4 Gradually there was a change to a system which permitted those with the most knowledge about the facts of a case to testify. In America all persons are competent witnesses except as provided. Notably:

- a judge is incompetent as a witness in a case where the judge presides
- jurors cannot be witnesses in cases where they serve as jurors
- further in view of rules of professional responsibility, an attorney is not permitted to testify in a case he or she is trying unless the proposed testimony relates to the chain of custody of a document or thing to be placed into evidence, though this rarely happens.

1.5 Under the common law, in a criminal case, the defendant spouse has the right to preclude the prosecution from calling the spouse as a witness, except where the crime alleged involves an intra-family dispute. In America however the spouse may be called as a witness though the witness would have the privilege of not testifying, but if the witness consents to testify, then the defendant cannot prevent the spouse from testifying.

1.6 In America while the rules do not explicitly exclude but the courts have the power to exclude entirely as incompetent a witness under the influence of drugs at the time of testifying.

2. Dead Man Statutes

2.1 A person is prohibited from testifying about a conversation with the deceased or an act of the deceased, in a suit brought by or against the estate. Though they have been abandoned mostly, yet corroboration of the testimony of the survivor is required. Further they apply only in civil litigation.

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3. Competence and Credibility of a witness

3.1 Credibility of a witness is entirely different from competency of a witness. A credible witness is an individual whose statements are reasonable and believable. However, it is for the court to decide how much credit should be given to the testimony of a witness.

3.2 Similarly **admissibility of evidence** is not solely dependent on competency of witnesses. Thus a witness may be competent, yet his evidence may be inadmissible if he states his opinion or belief instead of facts within his knowledge.

4. Competence and Compellability of a Witness

4.1 A witness is said to be competent when there is nothing in law to prevent him from appearing in court and giving evidence.Generally all witnesses competent to depose are compellable to give evidence but there are exceptions:

-Under section 5 of the Bankers' Books Evidence Act no officer of the Bank shall in any proceeding to which the bank is not a party be compellable to produce any banker's book or to appear as a witness, unless by order of the court for a special cause.

- In divorce and matrimonial proceedings the parties are competent witnesses but not compellable – Divorce Act, Sections 51 and 52.

- The witnesses may not be subject to the authority of the court i.e. the court cannot compel them to attend and depose before it such as foreign ambassadors and sovereigns cannot be compelled by a court to appear before it to give evidence.

4.2 Again a witness is competent and also may be compellable, yet the law may not force him to answer certain questions – this is called restricted compellability or privilege. The witness is thus protected or privileged from answering certain questions (sections 122, 124, 125, 129 of the Indian Evidence Act)

4.3 Even if a witness is willing to depose about certain things, the court will not allow disclosure in some cases (sections 123, 126, 127 of the Indian Evidence Act)

4.4 No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property, or any document which he holds as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims. (Section130 of the Indian Evidence Act) It would not apply to persons called as witnesses in criminal cases.

4.5 A book of accounts cannot be withheld on the ground that it tends to incriminate a witness. The mere circumstance that the production of a document may render the witness liable to a civil action does not come within the provision.

4.6 No one shall be compelled to produce documents in his possession or electronic records under his control, which any other person would be entitled to refuse to produce if they were in his possession or control, unless such last mentioned person consents to their production. (Section131 of the Indian Evidence Act) It extends to the agent i.e. the possessor of the document the same privilege which is enjoyed by the person whose property it is. The reason for the rule is protection from mischief and inconvenience that might result from compulsory disclosure. While the court cannot compel production but the witness may be permitted to produce, if he chooses to do so.

4.7 A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceedings, upon the ground that the answer to

such question will criminate him, or tend to directly or indirectly criminate such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture, of any kind. Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except for giving a false answer by such answer. (Section132 of the Indian Evidence Act)

4.8 The protection is afforded to encourage the witnesses to come forward and help in the administration of justice.

4.9 This section remains unaffected by Article 20(3) of the Constitution as the protection against self-incrimination contained therein applies only to a person accused of an offence and has not been extended to witnesses. The privilege of protection against self-incrimination was withdrawn as the legislature thought that the existence of the privilege in some cases tended to bring about a failure of justice, for the allowance of the excuse when the matter to which the question related was in the knowledge solely of the witness, deprived the court of the information which was essential to its arriving at a right decision. However, the rigour of the rule was mitigated by the addition of the proviso. Thus, all criminating questions do not come within the scope of the section but only those questions as to any matter relevant to the matter in issue, which the witness shall not be excused from answering.

4.10 If an accused appears as a witness under Section 315 Cr.P.C. and of his free will avails himself of the option of testifying for the defense, he subjects himself to the same rules applicable to other witnesses and he can be cross-examined. Under Section132 of the Indian Evidence Act, no witness is excused from answering any question on any relevant matter on the ground that the answer will criminate him.

4.11 Section 313 Cr.P.C. empowers the court to put to the accused such questions as maybe necessary with a view to enabling him to explain anything in evidence against him and the answers given by him may be taken into consideration in weighing the evidence. This however does not infringe Article 20(3) of the Constitution as the accused is not bound to answer any question by the court and it is a voluntary act. Protection under Article 20(3) is available to a person who must have stood in the character of an accused at the time he made the statement.

5. Position under the Indian Evidence Act, 1872

5.1 Section 118 of the Indian Evidence Act, 1872 lays down who may testify. Under this section, all persons shall be competent to testify unless the Court considers that they are prevented:

- from understanding the questions put to them; or
- from giving rational answers to those questions, by reason of:

i) tender years
ii) extreme old age
iii) disease, whether of body or mind; or
iv) any other cause of the same kind.

5.2 Thus it is for the court to test the capacity of a witness to depose. Now competency of witnesses is the rule and their incompetency is the exception. The only incompetency recognized is incompetency from immature or defective intellect.

6. Disease of mind

6.1 This covers cases of idiocy and lunacy. An idiot is one who was born irrational; he can never become rational.

6.2 A lunatic is one who has understanding or was born rational but by disease, grief, or other accident has lost the use of his reason. As long as the suspension of intelligence continues, the lunatic is incompetent to testify, but his competency is restored during lucid intervals or he may entirely recover. Thus a lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them. (Explanation to section 118)

6.3 Insanity may appear in several ways:

1. The general behavior of the person, while in court and before taking the stand, may be such as to exhibit the derangement to the judge;
2. The person may be questioned on the '*voir dire*', so that his condition appears at once;
3. Other witnesses to the derangement may be offered before the person's testimony is commenced; and
4. The examination or cross-examination may disclose clearly the incapacity, in which the preceding part of testimony may be struck out, or may disclose grounds of doubt.

6.4 Similarly the return of sobriety renders a drunkard competent, and intoxication, even habitual, does not in itself incapacitate a witness offered as a witness.

7. Disease of body

7.1 A witness may be in such extreme pain as to be unable to understand, or, if to understand, to answer questions; or he may be unconscious, as if in a fainting fit.

7.2 A witness is not to be excluded as incompetent by reason of the fact that his memory is somewhat defective, or because his means of knowledge may not be equal to that of other persons who might have been called as witnesses.

7.3 A **dumb witness** is not incompetent to testify and he may give his evidence in other manner in which he can make it intelligible, as by writing or by signs made in open court and such evidence shall be deemed to be oral evidence.

7.4 Similarly in case of a **deaf-mute witness**, if the court is satisfied that he possesses requisite amount of intelligence and understands the nature of an oath, he may be sworn and he would give his evidence by means of an interpreter or through writing. In such cases there must be a record of signs and not the interpretation of signs. He should be examined only with the help of an expert or a person familiar with his mode of conveyancing ideas to others in day to day life.

7.5 A written statement is admissible when the court is sure on the criminal standard of proof that the witness was not able to speak because of fear as a consequence of the material offence or of something said or done subsequently in relation to that offence and in relation to the possibility of the witness testifying as to it.

7.6 If a man is under a vow of silence, his evidence may be had in writing without forcing him to break his religious vow.

8. Other witnesses

8.1 Position of spouses as witnesses: Section120 reiterates that competency is the rule. Under this section, in all civil proceedings, the parties to the suit, and the husband and wife of any party to the suit, shall be competent witnesses. Earlier parties to the suit were incompetent witnesses on the ground of interest as also husbands and wives on the presumption that the person testifying was too strongly interested in the outcome of the proceedings to testify truthfully.

8.2 In criminal proceedings against any person, the husband or wife of such person respectively, shall be a competent witness.

9. Child Witness

9.1 Under Section 118, a child is a competent witness. Before admitting or recording the statement of a child, the court must satisfy itself that:

i) The witness understands the questions, and

ii) Ascertain in the best way it can, whether from the extent of his intellectual capacity and understanding he is able to give a rational account of what he has seen, heard or done on a particular occasion (though omission to put questions to satisfy itself will not vitiate the trial).

9.2 Children are the most vulnerable of all witnesses. Several factors influence children's memory capacity, including the child's age, psychological development and intellectual ability, the complexity of the event, their familiarity with the event and the delay between the event and the time at which the event is recalled.

9.3 Courts should record the opinion that child witnesses had understood their duty of telling the truth to lend credibility to any evidence collected thereof.

10. Privilege of Witnesses

10.1 Section 121 of the Indian Evidence Act refers to the privilege of persons connected with the administration of justice. It is against public policy or expediency to allow disclosure of matters in which judges or magistrates have been judicially engaged. Under this section, a judge or a magistrate cannot be compelled to answer questions:

i) As to his own conduct in court as judicial officer; and

ii) As to anything which came to his knowledge in court as such judicial officerunless ordered by a superior court. However he may be examined as to other matters which occurred in his presence whilst he was so acting.

10.2 The privilege given by this provision is the privilege of the witness i.e. the judge or magistrate and it does not lie in the mouth of any other person to assert the privilege. A judge may waive the privilege and testify to facts which transpired before him at a former trial.

10.3 Arbitrators have not been specifically mentioned in the section. An arbitrator is a competent witness in any action brought to enforce his award, or in any other action in which the award or the proceedings in the reference are in question, as to any matters which passed before him. He can be questioned as to what were the matters in difference before him, over what matters he was exercising jurisdiction, as to what claims were put forward, which were admitted and which were rejected, what admissions were made by the parties, what evidence was adduced before him. But he cannot be questioned as to what passed in his own mind when exercising his discretionary powers nor as to the grounds of his award.

10.4 Giving of evidence by a judge does not preclude him from dealing judicially with the evidence of which his own forms a part but it would be most undesirable that a judge should be examined as a witness in a case which he himself is trying.

10.5 No Magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue Officer shall be compelled to say whence he got any information of any offence against public revenue (Section 125). However, there is nothing to prohibit him from saying if he be so willing.

10.6 This is also based on grounds of public policy that the source of information of offence against the laws should not be divulged. This privilege is necessary for creating confidence and offering encouragement to informants. Thus no adverse inference can be drawn against the prosecution for withholding an information from the witness box.

10.7 The privilege is however, subject to certain limitations:

i) It applies only to the identity of the informant, not to the contents of his statement as such or to the custody of any document or other material objects that might have been seized and tendered in evidence.

ii) It applies to communications to such officers only as have a responsibility or duty to investigate or to prevent public wrongs, and not to officials in general.

iii) Even where the privilege is strictly applicable, the trial court may compel disclosure, if it appears necessary in order to avoid the risk of false testimony or to secure useful testimony.

10.8 Questions mentioned in Sections 121, 124 and 125 of the Indian Evidence Act are not barred, only the witness has the privilege of refusing to answer them and the magistrate may warn the witness of his privilege.

11. Privileged Communication

11.1 As a matter of public policy, certain relationships are held to be confidential and certain communications are privileged against disclosure by a witness. Generally certain communications arising between:

-an attorney and client
-a husband and wife
-priest and penitent, and
-physician and patient

are privileged against disclosure by a witness. Indian Evidence Act mentions three kinds of communications as privileged from disclosure:

a) Matrimonial
b) Official
c) Professional

12. Matrimonial Communications

12.1 A person cannot be compelled to disclose any communication made to him or her during marriage by any person to whom he or she is or has been married; nor will such communication be permitted to be disclosed except in the following cases:

a) If the person who made it, or his or her representative in interest, consents; or
b) In suits between married persons; or
c) In proceedings in which one married person is prosecuted for any crime committed against the other.

12.2 Thus section 120 deals with competency and section 122 affects compellability, and contains a rule of privilege. Further:

i) The privilege extends to all communications made to a person during marriage by any person to whom he or she has been married, but not to communications before marriage.
ii) The communication need not be confidential and it applies to communications of every nature.

iii) The rule of privilege applies equally whether or not the witness or his or her spouse is a party to the proceeding i.e. it extends even to cases between strangers and to suits or proceedings in which the husband or wife is a party.

iv) The privilege extends to communication made to a spouse and the privilege is conferred on the witness who made the communication; the witness cannot waive it at his or her will, nor can the court permit disclosure even if he or she is willing to do it.

v) The prohibition continues after the death of one of the parties to the marriage or divorce.

12.3 This provision rests on the ground, that admission of such testimony would have a powerful tendency to disturb the peace of families. However third persons are allowed to give evidence of communications between married persons made in their presence or overheard by them.

13. Official Communications

13.1 Evidence as to affairs of State – Under section 123 of the Indian Evidence Act, no one can be permitted to give any evidence derived from unpublished official records relating to any affairs of the State, except with the permission of the officer at the head of the department concerned, who may give or withhold such permission as he thinks fit.

13.1 The question whether the production of the document in question would be injurious to public interest is to be determined, not by the judge but by the head of the department having custody of the document. The Court is bound to accept without question the decision of the public officer. However the preliminary question whether the documents from which evidence is sought to be given is an unpublished official record relating to affairs of the State is to be decided by the Court. The person summoned to produce it must actually bring the document into court (section 162) and then claim privilege in the proper way.

13.2 The principle and foundation of the rule is concern for public interest and this privilege must be exercised most sparingly. It is based on the maxim *salus populist supremalex*which means the public welfare is the highest law.

13.3 It is not every official record or register or every official communication which can be regarded as privileged.The test to apply this section would be satisfied either:

a) By having regard to the contents of the particular document, or

b) By the fact that the document belongs to a class which, on ground of public interest, must as a class be withheld from production.

13.4 Unpublished records of State would include:

i) Document exchanged between two States;

ii) Document exchanged between the State and its own subjects;

iii) Document exchanged between Heads of Departments of another State;

iv) Document exchanged between Heads of Departments or between Ministers.

13.5 Disclosure of communications made in official confidence: Under section 124 of the Indian Evidence Act, no public officer can be compelled to disclose communications made to him in official confidence, if he considers that the public interest would suffer by the disclosure.

13.6 It is a condition precedent for the privilege to be claimed that the communication was made to the public officer in his official capacity and this question is primarily to be decided by the Court before which the privilege is claimed. The basic principle adopted by the Courts for deciding the same is whether the document produced was under a process of law or not.

13.7 If the document was produced under a process of law it cannot be said to be a communication made in official confidence.

13.8 If the document is produced in a confidential departmental enquiry, not under the process of law, but for gathering of information by the department for guiding them in future action, if any, which they have to take, it would be a case of communication made in official confidence.

13.9 The public officer would be the sole judge of the question whether public interest would suffer by its disclosure.

13.10 The communication may be oral or in writing.

13.11 The Section would cover all officers including clerks of superior officers and might also apply to non-officials to whom such papers were disclosed on the understanding, express or implied that the knowledge should go no further.

14. Professional Communications

14.1 A professional communication means a confidential communication between a professional legal adviser and his client made to the former in the course, and for the purpose, of his employment as such advisor. The privilege attaching to confidential professional disclosures is confined to the case of legal advisors, and does not protect those made to clergymen, doctors etc.

14.2 A professional legal advisor means a barrister, attorney, pleader or vakil

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(According to Immanuel Kant the duty is on philosophers to destroy the illusions, which had their origin in misconceptions, whatever hopes and valued expectations may be ruined by its explanations.- The Critique of Pure Reason)

LAW OF EVIDENCE
SHORT NOTE ON ELECTRONIC EVIDENCE

– *Pavan Duggal*[1]

Introduction

Law has to keep pace with time. The *Indian Evidence Act, 1872* could not have contemplated the scientific and technological developments that have taken place in the recent times. Law on the aspects not covered by the Act has developed either by judicial interpretation or by amendments in law. So far as electronic evidence is concerned the amendments in the law that have taken place include the Act called the *Information Technology Act, 2000*, amendment in the *Bankers' Book Evidence Act, 1891* and introduction of certain provisions in the *Indian Evidence Act, 1872*. If electronic evidence is sought to be produced, the lawyer must take note of the new provisions. In the case of *Anvar P.V. vs. P.K. Basheer and Others, (AIR 2015 SC 180),* the Supreme Court examined the new provisions in the *Indian Evidence Act, 1872*, particularly, *Section 65 B*. The Supreme Court explained the provisions regarding presentation and proof of electronic evidence in the following paragraphs:

"12. In fact, there is a revolution in the way the evidence is produced before the court. Properly guided, it makes the systems function faster and more effective. The guidance relevant to the issue before us is reflected in the statutory provisions extracted above.

13. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, 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 a document only if the conditions mentioned under sub-Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

[1]Advocate, Cyber law expert and an author

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

14. *Under Section 65B (4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:*

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

15. *It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, CompactDisc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.*

16. *Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A – opinion of examiner of electronic evidence.*

17. *The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India.*

18. *It is relevant to note that Section 69 of the Police and Criminal Evidence Act, 1984 (PACE) dealing with evidence on computer records in the United Kingdom was repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999. Computer evidence hence must follow the common law rule, where a presumption exists that the computer producing the evidential output was recording properly at the material time. The presumption can be rebutted if evidence to the contrary is adduced. In the United States of America, under Federal Rule of Evidence, reliability of records normally go to the weight of evidence and not to admissibility.*

19. *Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure*

prescribed under Section 65B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.

20 *To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in* ***Navjot Sandhu case*** *(supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible".*

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LAW OF EVIDENCE
ELECTRONIC EVIDENCE
QUESTIONNAIRE FOR INTROSPECTION/GROUP DISCUSSION

Quiz for group discussion

1. Parties in a commercial transaction corresponded on email such that offer and acceptance is available in the exchange of emails. The plaintiff bases a claim on the basis of a contract entered into through such offer and acceptance and files the print outs of the email correspondence. The defendant denies that he was a party to this correspondence. What steps will you take to prove your client's case?

2. Your client alleges sexual harassment against her boss. Her case is that her boss had been calling her up on her cell phone late in the night and wanted to engage in amorous conversation referring to her beauty and her dress. What steps will you take before making a formal complaint against the boss to allege and prove sexual harassment?

3. Your client in a matrimonial dispute alleges mental cruelty against her husband who took her pictures in nude and sent MMSs to her colleagues and subordinates. Can this be proved in evidence and if so, how?

4. The respondent, a political opponent of the petitioner made some objectionable remark against the petitioner in a TV interview. The petitioner recorded the interview in her own recording device and prepared a CD. Can the CD be produced as evidence of the interview in the TV? If so, what steps must the petitioner take to prove the evidence and make it admissible?

5. A manufacturer of a product in an advertisement on the net has provided fraudulent information about the quality of a product. As a consumer what steps can you take to base your complaint on the evidence available in the net?

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LAW OF EVIDENCE
TOPIC 3: ELECTRONIC EVIDENCE
QUESTIONNAIRE FOR INTROSPECTION/GROUP DISCUSSION

– Pavan Duggal[1]

Discussion based on the questionnaire

1. Parties in a commercial transaction corresponded on email such that offer and acceptance is available in the exchange of emails. The plaintiff bases a claim on the basis of a contract entered into through such offer and acceptance and files the print outs of the email correspondence. The defendant denies that he was a party to this correspondence. What steps will you take to prove your client's case?

Various steps need to be taken by you to prove the client's case. Since you represent the plaintiff and given the fact that offer and acceptance is available in the exchange of emails, it needs to be appreciated that emails have been granted legal sanction and validity by virtue of the Information Technology Act, 2000. You are required to prove the emails by taking the printouts of emails and prove the same as per parameters given under Section 65B of the Indian Evidence Act, 1872. You are required to give a certificate under Section 65B of the Indian Evidence Act, 1872, specifying all the detailed requirements of the law in this regard. Thus, your client is required to prove that the printout containing information was produced by the computer during the relevant period and during the said period, the computer was used regularly to store or process information for the purposes of activities regularly carried out over that period by the person having lawful control over the said computer. The certificate has to also prove that during the relevant period, information of the kind contained in the electronic record was regularly fed into the computer in the ordinary course of business. Further, your client has to certify that for the material part of the period, the computer was working fine. In addition, it has to be certified that the information contained in the printout taken on the electronic record is reproduced right from such information fed into the computer in the course of the said activities. The certificate must be signed by a person occupying a responsible official position in relation to the operation of the plaintiff's computer system. Further, the certificate must be stated to the best of knowledge and belief of the person being the authorized representative of the client.

2. Your client alleges sexual harassment against her boss. Her case is that her boss had been calling her up on her cell phone late in the night and wanted to engage in amorous conversation referring to her beauty and her dress. What steps will you take before making a formal complaint against the boss to allege and prove sexual harassment?

Before making a formal complaint against the boss to allege and prove sexual harassment, it will be imperative that you must take steps to protect and preserve the relevant incriminating electronic evidence. In the present case, the relevant incriminating electronic evidence would be the calls received by your client on her cell phone late in the night. Your client can ask for a detailed call statement from the service provider. Alternatively, the mobile phone which has proofs of the various calls, can also be connected to the computer and relevant printouts can be taken. Of course, the printouts will have to be accompanied by a certificate under Section 65B of the Indian Evidence Act, 1872. Further, it will also be nice if the said electronic records obtained from the cell phone, could be saved electronically. The said electronic evidence can tomorrow be relied upon by your client to substantiate her charge for proving sexual harassment.

3. Your client in a matrimonial dispute alleges mental cruelty against her husband who took her pictures in nude and sent MMSs to her colleagues and subordinates. Can this be proved in evidence and if so, how?

[1] Advocate, Cyber law expert and an author

The claim of your client can be proved in evidence. If your client has access to the relevant camera or mobile phone where her husband has taken her pictures in nude and sent MMSs to her colleagues and subordinates, the relevant electronic evidence could be taken there from, and produced to prove the charges. Alternatively, the colleagues and subordinates of your client who have received the MMSs showing the pictures in nude from the husband of your client, can also provide the said emails or copies of MMSs or forward the same to your client's phone or email them and thereafter the client can use the same as relevant incriminating electronic evidence. Of course, the same evidence will have to be proved by producing the certificate under Section 65B of the Indian Evidence Act, 1872. Your client also has to ensure that all the mandatory conditions given under Section 65B(2) of the Indian Evidence Act, 1872 are duly fulfilled, before the relevant incriminating electronic evidence can be proved in Court.

4. The respondent, a political opponent of the petitioner made some objectionable remark against the petitioner in a TV interview. The petitioner recorded the interview in her own recording device and prepared a CD. Can the CD be produced as evidence of the interview in the TV? If so, what steps must the petitioner take to prove the evidence and make it admissible?

In the present case, the CD can be produced as evidence of the TV interview. Since the petitioner had recorded her own interview on her recording device, she needs to connect her recording device to computer, transfer the recorded material onto the computer and make a CD. The CD will have to be duly accompanied by Certificate under Section 65B of the Indian Evidence Act, 1872. The CD will have to be certified by the petitioner that she had recorded the interview on her own recording device and prepared the CD and the CD has not been tampered, altered or manipulated in any manner whatsoever. All the conditions of Section 65B of the Indian Evidence Act, 1872 have to be duly complied with. Once, it is so done, the petitioner would be able to prove the said CD as evidence of the respondent having made objectionable remarks against the petitioner in a TV interview. Once the said certificate under Section 65B of the Indian Evidence Act, 1872 is given, the said electronic evidence would become admissible.

5. A manufacturer of a product in an advertisement in the net has provided fraudulent information about the quality of a product. As a consumer what steps can you take to base your complaint on the evidence available in the net?

As a consumer, you can take steps to base your complaint on the basis of electronic evidence available on the Internet. Whatever the manufacturer of the product has stated in advertisement on the Internet, which has provided fraudulent information about the quality of the product becomes electronic record. The said record can either be taken in printout or it can be saved electronically on a CD or on a pen drive. The CD/pen-drive/printout constitutes computer output within the meaning of the law. Along with the said CD/pen-drive/printout, an appropriate certificate under Section 65B of the Indian Evidence Act, 1872 needs to be given. In fact, all the conditions detailed under Section 65(2) of the Indian Evidence Act, 1872 have to be complied with. Once the said certificate is accompanying the said CD/pen-drive/printout, the said evidence becomes admissible electronic evidence on the basis of which you can base your complaint.

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Session II
2.15 PM - 3.45 PM
Total Time: 1 Hour 30 Minutes

MODULE FOR TRAINING OF PANEL LAWYERS ON LAW OF EVIDENCE (PART - II)

Topic 4: Probative Value– Extra-judicial Confession and Circumstantial Evidence

– Justice Manju Goel (Retd.)[1]

Topic 5: Appraisal of Dying Declaration

– Pradeep Kumar Singh II[2]

SESSION PLAN

Objectives

1. To inform the participants the different aspects of the evidence of dying declaration, extra-judicial confession and circumstantial evidence.
2. To provide the young lawyers the skill to evaluate the evidence of a dying declaration, extra-judicial confession and circumstantial evidence.

Expected learning outcomes

1. The young lawyers will know how to challenge prosecution evidence in respect of a dying declaration, extra-judicial confession and circumstantial evidence.
2. The legal service lawyer will learn to prosecute as well as defend cases in which the victim has made or is alleged to have made a dying declaration or the accused is alleged to have made a confessional statement.
3. On the whole the young lawyers will be better equipped to handle criminal cases particularly for the defence.

Programme

Topic- 4

1. **Introduction** 5 minutes

   The resource person will introduce the subject by telling how the appreciation of evidence is important in criminal matters and why the principles of appreciation of evidence should be kept in mind even before the trial has begun.

2. **Small group discussion** 15 minutes

   The whole group will be divided into small groups of 6. Each group will be given the same questionnaire. They will have to answer the questions and find a consensus on each question.

3. **Whole group discussion** 20 minutes

   The small groups will make their presentations on one question or the other and the whole group will discuss the issue. The resource person will provide the ultimate answer unless the same is already provided by the group.

[1] Former Judge, Delhi High Court
[2] H.J.S. Add. Director (Admin.), JTRI, Lucknow

4. **Concluding remarks** 10 minutes

Concluding remark will be given by the resource person/one of the participants/the visiting dignitary.

Topic- 5

1. **Introduction** 5 minutes

The resource person will introduce the subject by giving instances where dying declarations are produced by the prosecution and why a dying declaration is often the most important piece of evidence in a case of culpable homicide of various natures including section 304(B) of the Indian Penal Code.

2. **Quiz** 15 minutes

The quiz sheet will be distributed to individual participants. They will answer the quiz themselves by ticking or crossing the choice given in the sheet. This is a self assessment quiz and not a competition and the quiz will be answered in that spirit.

3. **Whole group discussion** 15 minutes

The resource person will take up each question from the quiz and discuss the answer with the help of case laws given in the short note.

4. **Concluding remarks** 5 minutes

Concluding remarks will be given by the resource person/one of the participants/the visiting dignitary.

Training Method

1. Lecture
2. Group Discussion
3. Quiz

Tools Required

1. Flip Chart
2. White board with white board pens
3. Facility for making a power point presentation.

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LAW OF EVIDENCE

PROBATIVE VALUE– EXTRA-JUDICIAL CONFESSION AND CIRCUMSTANTIAL EVIDENCE

– Justice Manju Goel (Retd.)[1]

Reading for group discussion

You receive the file of a case with the following evidence on record.

Place of occurrence: Mundia Pistor Village, Bajpur, District Udham Singh Nagar, Uttaranchal.

PW1 Mr. Nayeem Ahmad reported on 06.02.1998 that his daughter was missing since evening of 05.02.1998.

PW2 Kabir Ahmad, brother of PW1 reported on 08.02.1998 that dead body of Yasmeen was seen at 6.00 am lying on the road in front of a neighbouring house.

PW3 Naseem Ahmad, deposed that while going towards the jungle to relieve himself at around 4.30 am in the morning on 08.02.1998 he saw Aftab Ahmad running away from the spot where the dead body was later found towards the house of his sister and brother-in- law, Bilkis and Kabir Ahmad. PW3 in cross-examination revealed that he is related to the family of the victim.

PW4 Rais Ahmad, is the witness to the recovery of the clothes of the victim with stains of blood of group A.

PW5 Anand Swaroop, a former village pradhan deposed that on 23.02.1998 accused Aftab Ahmad made a confessional statement to him saying that he raped the child and, although the child wore her clothes, she did not stop yelling and being afraid of being detected he strangulated her with the help of a cord lying nearby. PW5 further deposed that the accused was full of remorse but wanted to be saved from punishment. PW5 met Aftab in the court premises where the accused was being produced for a remand. PW5 stated in the cross-examination that the accused was not particularly close although being a village pradhan he knew Aftab who often visited his sister in that village.

PW6 is the doctor who conducted post-mortem examination and opined that the cause of death was strangulation and that the victim had been raped before she was killed. Post-mortem report was not challenged in cross-examination.

PW7 Praveen Kumar Tyagi, the investigating officer apart from proving the evidence found during investigation also stated that in a subsequent statement under Section 161 of CrPC the witness PW3 had disclosed the name of Mumtaz the other accused who was also with Altaf in the morning when PW3 saw them running away and entering the house of Kabir Ahmad.

The underwear of Aftab and Mumtaz on forensic examination were found to contain blood and semen stains. Blood group of the stains in the underwear and that on the bed sheet were not identified. Sniffer dogs were used as per the defence but the investigating officer did not mention the use of sniffer dogs in the report.

The clothes of the victim had stains of blood group 'A' but there was no evidence of the type of blood group of the victim.

DW1 Bilkis , the sister of Aftab deposed that the frocks and the underwear collected by the police from the house of Mumtaz were actually clothes belonging to her daughter. This is denied by the investigating officer.

[1] Former Judge, Delhi High Court

DW2 Lakhinder Singh though a witness to the recovery of the clothes of the victim was not examined by the prosecution. Recovery memo is also signed by both the accused.

DW2 a witness to the recovery, disclosed that he signed the recovery memo not at the spot but at the police station. But he did not deny the factum of recovery of the clothes of the victim.

Activity for probative value– extra-judicial confession and Circumstantial evidence

Find answers to the following questions in a group discussion:

1. What are the weaknesses in prosecution's case?
2. Can the prosecution have sufficient argument to overcome these weaknesses?
3. Are the accused liable to be convicted for rape and murder?

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LAW OF EVIDENCE

PROBATIVE VALUE– EXTRA-JUDICIAL CONFESSION AND CIRCUMSTANTIAL EVIDENCE

SHORT NOTE AND DISCUSSION ON THE PROBLEM FOR GROUP DISCUSSION

– Justice Manju Goel (Retd.)[1]

1. The facts of the case have been taken from *Aftab Ahmad Ansari and another versus State of Uttaranchal 2005(2) UC 789 (Manupatra)*. The judgement of the High Court was confirmed by the Supreme Court reported in *(2010) 2 SCC 583*. The undisputed facts found by the High Court were that:

1. Yasmeen suffered homicidal death and the cause of death was strangulation.
2. Yasmeen was reportedly missing from the evening of 05.02.1998.
3. The opinion of the post mortem doctor was that the child had been raped.
4. Aftab who lived in the nearby village was present at the place of occurrence i.e. Bajpur as he was visiting his sister and was living there for a few days.
5. That the dead body was found at around 6.00 am on 08.02.1998 was also not disputed.

1.1 The defence did not challenge in cross-examination that witness PW3 Naseem Ahmad was accustomed to go towards the jungle to answer call of nature so early in the morning.

1.2 On behalf of the defence the following weaknesses were observed:

1.2.1 The witness PW2 who reported the discovery of the dead body did not say that the body was naked, making it likely that the body had clothes on and thus the prosecution case that the clothes of the child were recovered on the direction of the accused was doubtful.

1.2.2 PW3 who claims to have seen accused Aftab and Mumtaz getting away from the spot where the dead body was recovered was a relative of the victim's family and therefore was an interested witness who should not be believed.

1.2.3 Mumtaz was not mentioned by PW3 in his first statement u/S 161CrPC but disclosed his name only in the second statement.

1.2.4 Mumtaz did not make any confessional statement to Anand Swaroop.

1.2.5 PW5 Anand Swaroop was not a close acquaintance of the accused and it is unlikely that the accused Aftab would have made confession to Anand Swaroop when he had already been arrested by the police.

1.2.6 Non-examination of DW2 Lakhvinder Singh as well as Zakir who accompanied PW3 are major omissions in the prosecution evidence.

1.2.7 The prosecution did not mention anything about sniffer dogs who were responsible for tracing the accused.

1.2.8 Disclosure statement to the effect that the clothes could be recovered was made by Aftab and not by Mumtaz and therefore recoveries could not be attributed to Mumtaz although the recovery was made in his presence and he signed the recovery memo prepared by the investigation officer

[1]Former Judge, Delhi High Court

1.2.9 There is no evidence that blood group of the deceased was A and hence blood group on the clothes of the deceased had not been proved to be that of the deceased.

1.2.10 Extra judicial confession is a weak type of evidence and no reliance could be put on the same.

Each of these issues was dealt with by the High Court.

2. Credibility of PW 3

2.1 PW 3 is a relative of the victim's family. At 4.30 am in the morning when he was leaving for the jungle he noticed the accused but did not mention about the dead body lying on the road. There was nothing unusual in the statement of PW3 because it was early in the dawn and the dead body was small and so while PW3 could see the accused Aftab, who was an adult he could naturally have missed the child's dead body on the road. That PW3 was accustomed to rise early and go to the jungle at that hour has not been challenged. Thus apparently there is nothing to cast any doubt on the veracity of PW3.

2.2 PW3 was the relative of the victim but that itself cannot be a reason to doubt his credibility particularly because there was no reason for PW3 to falsely implicate the accused.

2.3 The witness proved to be straight forward in not claiming to have seen the dead body being thrown on the road.

2.4 It maybe added here that in several judgements, the Supreme Court has directed that the evidence of a relative cannot be discarded only because of the relationship. It can be added that in the case of *State of Uttar Pradesh versus SobhaNath1985 AIR 416, 1985 SCR (2) 621*, theSupreme Court relied on a dying declaration made to a close relative on the ground that the relative could not have any motive to implicate an innocent.

3. Non examination of Zakir

3.1 Non-examination of Zakir who accompanied PW3 to the jungle does not make any difference for the defence. It is important for the prosecution to prove the case and if one or the other witness is not necessary to be examined, he may not be produced in the witness box. In the decision in the matter of *State of Madhya Pradesh versus Dharkole alias Govind Singh and others; 2004 A.I.R. S.C.W. 6241*, the Supreme Court said that it is not necessary for prosecution to examine somebody as a witness who was not likely to support the prosecution version. Non-examination of some persons per se does not corrode vitality of prosecution version, particularly when the witnesses examined have withstood incisive cross-examination and pointed to the respondents as the perpetrators of the crime.

3.2 Evidence has to be weighed and not counted and no particular number of witnesses shall in any case be required for proof of any fact.

3.3 Considering the reliability of evidence of PW3 no importance can be attached to the absence of Zakir in the witness box.

4. Non-examination of DW2

4.1 The investigation officer was wise enough to join witnesses from the public in the recovery of the articles following the disclosure by Aftab. PW4 is one such public witness who proved the recovery of articles at the instance of the accused. On the same principles mentioned in the earlier part, it was not necessary to examine DW2 Lakhvinder Singh the other witness to recovery. However even when Lakhvinder Singh was produced as DW2 he did not cast any doubt on the recovery. All that he said was that the seized articles, in view of the crowd having gathered there, were taken to the police station

where they were sealed and signed by the witnesses. Thus neither non-examination of DW2 by prosecution nor examination of DW2 by the defence makes any improvement in the case of defence.

5. Non-mentioning of sniffer dogs

5.1 The defence case is that the police employed sniffer dogs and the accused were arrested on the lead provided by the sniffer dogs and entire evidence is cooked to implicate the accused Aftab and Mumtaz. The prosecution has not mentioned the sniffer dogs at all. The High Court held that non mentioning of sniffer dogs was merely a case of irregularity in the investigation which should not be treated as a ground to reject the prosecution case as a whole. The Apex Court in the matter of *Lila Ram (D) versus State of Haryana and another, A.I.R. 1999 S.C. 3117* held that any irregularity or even an illegality during investigation should not be treated as a ground to reject the prosecution case. The other case mentioned by the High Court on this point is *State of Rajasthan Vs Kishore, A.I.R. 1996 S.C. 3035.*

6. Blood Group on the clothes of the deceased not proved to be that of the deceased

6.1 The blood group on the clothes of the deceased was found to be group 'A'. There is no evidence that the deceased herself happened to be of group 'A'. The High Court however said that the presence of human blood itself is a material circumstance and incriminating evidence even in the absence of determination of the blood group. The frock, the underwear and the bed sheet were all recovered at the instance of the appellant Aftab and no explanation for presence of human blood or these items was given by him. Even when in answer to a question u/S 313 CrPC Aftab said that the clothes belonged to his niece (daughter of Bilkis) he did not provide any reasonable explanation for the clothes to have the blood stains. Therefore, the absence of determination of blood gauge of the deceased Yasmeen could not have any telling effect on the veracity of the incriminating circumstance established from it against appellant Aftab. The High Court referred to the Supreme Court cases. In *Surendera Tiwari versus State of Madhya Pradesh; (1991) 3 SCC 627* the incriminating circumstance of finding of human blood on weapon and clothes of the accused even in absence of determination of blood group and in the absence of explanation for the presence of human blood by the accused was taken to be of consequence pointing to the guilt of the accused.

7. Non-mention of the dead body being naked by the informant

7.1 The recovery of the clothes at the instance of Aftab is not disputed by DW2. The recovery has been sufficiently proved by the prosecution evidence. The High Court opined that mere omission to mention that the dead body was naked would not discredit the evidence of the prosecution in regard to recovery at the instance of Aftab.

7.2 The girl in any case was just a child and it was not a great omission if the informer had not mentioned that the dead body was naked. The credibility of PW2 the informer has not been challenged at all since no question was put to him in cross-examination. The two things taken together remove all doubts from the prosecution case that the dead body was naked and that the clothes were actually recovered on the pointing out of Aftab.

8. The probability of the accused wearing the underwear with stains till they were seized by the police

8.1 The Hon'ble High Court disbelieved this part of the story of the prosecution namely that the deceased continued to wear the same underwear with blood and semen i.e. from 05.02.1998 to 09.02.1998. The Court held that it was highly improbable that the appellant would be wearing the same underwear. The Court disbelieved that the underwears were seized by the investigation officer in the manner alleged by the prosecution.

9. The extra judicial confession being weak evidence

9.1 The extra judicial confession was made by Aftab and not by Mumtaz. Therefore the same could not be used against Mumtaz.

9.2 Anand Swaroop being the earlier Pradhan was a person of status and influence. Aftab being in a critical state, being in custody, found a ray of hope when he met AnandSwaroop who was known to him although not intimately. It is not unlikely that Aftab would confess his guilt hoping to get some help. There is no evidence that Anand Swaroop would have had any reason to falsely implicate Aftab to come forward as a witness before whom the confession had been made. It cannot be said that Aftab had no reason to confess or that AnandSwaroop had some reason to lie before the Court.

9.3 Although generally said, confession is a weak type of evidence, the Court cannot start the appreciation of evidence with the proposition that such evidence is weak. The High Court referred to the case of *Narain Singh Versus State of Madhya Pradesh 1985 (4) SCC 26* in which the Supreme Court says that it was not open to any court to start with the presumption that extra judicial confession is a weak type of evidence and that it would depend on the nature of the circumstances, the time when confession was made and the credibility of the witness to speak about such confession. The High Court observed that although Aftab was in judicial custody the investigation was still on and charge sheet had not been filed and therefore there maybe some scope for Anand Swaroop to help him out of the situation.

9.4 In the case of *State of Rajasthan versus Rajram 2003 AIR SCW 4097,* the Supreme Court observed that an extra judicial confession, if voluntary and true and made in a fit state of mind can be relied upon by the Court.

9.5 It goes without saying that an extra judicial confession has to be proved like any other fact and that the value of the evidence as to confession, like other evidence depends upon the veracity of the witness to whom it had been made. Further it was stated that the requirement of corroboration is a matter of prudence and not an invariable rule of law.

10. Who can be convicted

10.1 All the incriminating evidence points towards Aftab alone. So far as Mumtaz is concerned he was not named in the first statement of PW3. His name came out only later. Secondly the discovery of clothes of the victim could only be attributed to Aftab. It cannot be said that both simultaneously made disclosure statement and both got the clothes recovered. On the basis of evidence on record the Court held that it was on the instance of Aftab that clothes were recovered. Mumtaz being present his signature was taken.

10.2 The extra judicial confession is an important link in the case which was not made by Mumtaz and therefore could not be read against Mumtaz. As stated above, the recovery of the underwear with blood and semen stains was disbelieved. Thus there was no sufficient evidence of Mumtaz being involved in the rape and murder.

10.3 Evidence is sufficient for Aftab and hence Aftab can be convicted.

Suggested Reading

** *Aftab Ahmed Ansari Versus State of Uttaranchal (2) SCC 2010 583*

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LAW OF EVIDENCE

QUIZ ON APPRAISAL OF DYING DECLARATION

Tick the correct answer:

1. **Conviction can be recorded on Dying Declaration alone.**

   (a) YES (b) NO

2. **Dying Declaration maybe recorded as**

   (a) Question answer form
   (b) Dictation from other than the deceased
   (c) In style of story writing
   (d) In shape of Letter
   (e) All of the above
   (f) Only (a), (c) and (d)

3. **Is carbon copy of Dying Declaration relevant?**

   (a) YES (b) NO

4. **Is the oral Dying Declaration relevant?**

   (a) YES (b) NO

5. **A Dying Declaration maybe recorded by:**

   (i) Police
   (ii) Magistrate
   (iii) Doctor
   (iv) A member of public

   Ans:

   (a) All of the above (b) Only (ii)
   (c) Only (i), (ii) and (iii) (d) None of the above

6. **Dying Declaration can be relied upon even if not recorded in the language of the declarant**

   (a) YES (b) NO

7. **Dying Declaration recorded in presence of few of the relatives of deceased, would be relevant.**

   (a) YES (b) NO\

8. **The certificate of fitness of mind issued by the doctor is necessary in recording Dying Declaration.**

   (a) YES (b) NO

9. **The cause of death mentioned by the doctor in Bed Head/ History Ticket can be treated as Dying Declaration.**

   (a) YES (b) NO

10. **Examination of the doctor in whose presence the dying declaration was recorded and/ or who endorsed it, is a must.**

(a) YES (b) NO

11. **The veracity of the Dying Declaration is doubtful if the declarant who was a literate person only put the thumb impression and did not sign.**

(a) YES (b) NO

12. **The FIR can be treated as Dying Declaration.**

(a) YES (b) NO

13. **The statement under 161 Cr.P.C. can be treated as Dying Declaration.**

(a) YES (b) NO

14. **The Dying Declaration of deceased can be relevant for ascertaining the cause of death of the other victim in the same incident.**

(a) YES (b) NO

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LAW OF EVIDENCE
QUIZ ON APPRAISAL OF DYING DECLARATION

– Pradeep Kumar Singh II[1]

Answers to the quiz and discussion based thereon

Q1. Conviction can be recorded on Dying Declaration alone.

(a) YES b) NO

Ans: b) Yes.

The dying declaration *does not require any corroboration* as long as it inspires confidence in the mind of the Court that it is free from any form of tutoring. At the same time, dying declaration has to be judged and appreciated in the light of surrounding circumstances. The whole point in giving lot of credence and importance to a piece of dying declaration, deviating from the rule of direct evidence is that such declaration is made by the victim when he/she is on the verge of death. When the victim is impelled to tell the truth and all motives to falsely implicate an innocent has disappeared. *Umakant v. State of Chhatisgarh, 2014 (6) Supreme 655.*

Q2. Dying Declaration maybe recorded as

(a) Question answer form
(b) Dictation from other than the deceased
(c) In style of story writing
(d) In shape of Letter
(e) All of the above
(f) Only (a), (c) and (d)

Ans: f) Only (a), (c) and (d).

There is no format prescribed for recording a dying declaration. Indeed, no such format can be prescribed. Therefore, it is not obligatory that a dying declaration should be recorded in a question-answer form.

i **Dictation of other than Declarant**

Sanctity is attached to a dying declaration because it comes from the mouth of a dying person. If the dying declaration is recorded not directly from the actual words of the maker but as dictated by somebody else the same would not be reliable as a dying declaration.

ii **Narration of the statement without question answer form**

The dying declaration can be recorded in a narrative form although the officer recording may have put questions for eliciting information from the declarant.

Q3. Is carbon copy of Dying Declaration relevant?

a) YES b) NO

Ans: a) YES.

The carbon copy is a secondary evidence. If the original is lost and cannot be traced the secondary evidence be produced as per Sections 63 and 65 of the Indian Evidence Act, 1872.*(Kaliya vs State of Madhya Pradesh (2013) 10 SCC 758).*

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Q4. Is the oral Dying Declaration relevant?

a) YES b) NO

Ans: a) YES

A dying declaration can be oral or in writing or in any adequate method of communication whether by words or by signs or otherwise. (*Laxman Vs. State of Maharashtra, (2002) 6 SCC 710 (Five-Judge Bench)*

Q5. A Dying Declaration may be recorded by:-

i) Police
ii) Magistrate
iii) Doctor
iv) A member of Public

Ans:

a) All of above b) Only (ii)

c) Only (i) (ii) and (iii) d) None of the above

Ans: a) All of above

Neither Section 32 of the Evidence Act nor Section 162(2) of the Cr.P.C., mandates that the dying declaration has to be recorded by a designated or particular person and it is only by virtue of the development of law and the guidelines settled by the judicial pronouncements that it is normally accepted that such declaration would be recorded by a Magistrate or by a doctor to eliminate the chances of any doubt or false implication by the prosecution in the course of investigation. (*Dhan Singh vs. State of Haryana (2010) 12 SCC 277; Rafique vs State of U P (2013) 12 SCC 121; AIR 2013 SC 2272)*

Q6. Dying Declaration can be relied upon even if not recorded in the language of the declarant?

a) YES b) NO

Ans: a) YES.

What is necessary to see is that the dying declaration is the correct reproduction or record of what is stated by the declarant. Although it is beneficial to record the dying declaration in the exact words of the declarant, the declaration does not become invalid merely because it is written in another language by a responsible person without any other infirmity.

Q7. Dying Declaration recorded in presence of few of the relatives of deceased, would be relevant.

a) YES b) NO

Ans: a) YES

The presence of the relatives of the accused may throw doubt on the truth of the dying declaration because there may be an allegation that the dying declaration was tutored or influenced. The same will be the situation if the relatives of the declarant were present at the place where the dying declaration is recorded. If the magistrate has satisfied himself that a dying declaration was not influenced in any way, the dying declaration is relevant and reliable.

***Q*8. The certificate of fitness of mind issued by the doctor is necessary in recording Dying Declaration.**

a) YES b) NO

Ans: b) NO

As a general rule, it is advisable to get fitness of declarant certified by doctor. In appropriate cases, satisfaction of person recording statement regarding state of mind of the deceased would also be sufficient to hold that the deceased was in a position to make a statement. *Ashabai vs State of Maharastra (2013) 2 SCC 224; AIR 2013 SC 341; (2013) 1 SCC (Cri) 943*

In a case where the doctor says that the patient is conscious but does not specifically mention that the patient is in a fit state of mind to make the statement, a question like this may arise. It will depend on the facts of the case as to whether the particular dying declaration was recorded when the patient was in a fit state of mind. The absence of doctor's certificate to that effect will not vitiate the dying declaration.

Q9. The cause of death mentioned by the doctor in Bed Head/ History Ticket can be treated as Dying Declaration?

a) YES b) NO

Ans: b) NO

The cause of death has to be recorded by the doctor as a professional in the field of medicine. Such cause cannot implicate any particular person as being the killer.

However the doctor may have written what the patient told him about the cause of the injury and the name of the person who caused the injury. In that situation the statement in the history ticket, if appropriately proved by the doctor, can be a dying declaration provided all the conditions for making a dying declaration like apprehension of immediate death, etc were present.

In the case of *Ashok Laxman Gaikwad v. State of Maharashtra, 2006 (56) ACC 526 (SC)*where the patient had told the doctor that the burn was accidental and in a later dying declaration implicated the accused, the subsequent dying declaration was relied upon.

Q10. Examination of the doctor in whose presence the dying declaration was recorded and/or who endorsed it, is a must.

a) YES b) NO

Ans: a) NO

Mere fact that Doctor in whose presence the dying declaration was recorded and/or who endorsed it, is not examined, does not affect the evidentiary value of the dying declaration.(*Amar Singh Yadav Versus State Of U.P. (2014) 13 SCC 443; (2014) 5 SCC (Cri) 709; AIR 2014 SC 2486)*

Q11. The veracity of the Dying Declaration is doubtful if the declarant who was literate person only put the thumb impression and did not sign.

a) YES b) NO

Ans: b) NO

Normally a literate would sign the declaration. Absence of his signature will call for an explanation. In case the declarant is not able to hold a pen his thumb impression can be taken. So far as the question of thumb impression is concerned, the same depends upon facts, as regards whether the skin of the thumb that was placed upon the dying declaration was also burnt. Even in case of such

burns in the body, the skin of a small part of the body, i.e. of the thumb, may remain intact. Therefore, it is a question of fact regarding whether the skin of the thumb had in fact been completely burnt, and if not, whether the ridges and curves had remained intact. (*State of Madhya Pradesh v. Dal Singh &Ors. AIR 2013 SC 2059).*

Q12. The FIR can be treated as Dying Declaration.

a) YES b) NO

Ans: a) YES.

Evidence Act (1872) S. 32 - Statement by victim recorded as F.I.R. could be treated as dying declaration. Where after making the statement before the police, the victim succumbs to his injuries the statement can be treated as a dying declaration and is admissible under Section 32 (1) of the Act. (*Munnu Raja & another vs. State of M.P., AIR 1976 SC 2199)*

Q 13. The statement under section 161 Cr. P. C. can be treated as Dying Declaration?

a) YES b) NO

Ans: a) YES.

A statement recorded was Section 161 Cr.P.C. was treated to be a dying declaration (*Sri Bhagwan vs. State of U.P. – 2012 (11) SCALE 734; (2013) 12 SCC 137; 2013 Cr L J 512).*

Q14. The dying declaration of one deceased could be relevant for the death of other in the same incident?

a) YES b) NO

Ans: a) YES.

One's Dying Declaration may be relevant for the death of another in the same incident. This is explained with reference to the definition of "relevant facts" and "facts in issue" in Section 6 of the Evidence Act. The Hon'ble Supreme Court concluded in *Tejram Patil versus State of Maharashtra 2015(2)Supreme743* that such statement may not by itself be admissible to determine the cause of death of anyone other than the person making the statement but when the circumstances of the transaction which resulted in death of the person making the statement as well as death of any other person are part of the same transaction, the same will be relevant also about the cause of death of such other person.

Q15. Which of the following is correct:-

a) Two contradictory dying declarations would not be always reliable.

b) The omission to mention some facts in one or the other dying declarations would render the dying declaration unreliable.

Ans: a) Two contradictory dying declarations would not be always reliable.

There can be two contradictory dying declarations raising issues of reliability of these dying declarations. However not in all cases the contradictory dying declarations should be discarded. Depending upon the facts one dying declaration maybe found to be tutored or influenced and the other true. In that case the dying declaration which is true has to be relied upon.

If the omissions in the dying declarations are not material the dying declaration should not be considered to be contradictory.

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LAW OF EVIDENCE
SHORT NOTE ON APPRAISAL OF DYING DECLARATION

– Pradeep Kumar Singh II[1]

1. Introduction

1.1 The maxim *"Nemo morituruspraesumiturmentire", "a man will not meet his maker with a lie in his mouth"* is the basis for valuing a dying declaration.

1.2 The general rule is that all oral evidence must be direct viz., if it refers to a fact which could be seen it must be the evidence of witness who says he saw it, if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it, if it refers to a fact which could be perceived by any other sense it must be the evidence of a witness who says he perceived it by that sense.

1.3 Section 32 of the *Indian Evidence Act, 1872,* deals with the cases of statements by a person who is dead or cannot be found. Such a statement, when it relates to the cause of death or as to any circumstances or the transaction which resulted in his death is relevant in a case in which the cause of that person's death comes in question. *Section 32* further says that such statements are relevant, whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever maybe the nature of proceeding in which the cause of his death comes into question.

1.4 The situation when a person is at the point of death, when every hope of this world is gone, when every motive of falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth, is considered by law as creating an obligation equal to that created by a positive oath administered in a court of justice. Hence recording of a dying declaration is an important and a responsible job. To retain its full value the dying declaration must be recorded carefully by a proper person, keeping in mind the essential ingredients for the same.

1.3 In *Bhagwan Tukaram Dange v. State of Maharashtra; 2014 (85) ACC 658 ; (2014) 2 SCC (Cri) 302 ; (2014) 4 SCC 270 ; 2014 Cri L J 1875the Hon'ble Supreme Court said:*

> *"Hearsay evidence is not accepted by the law of evidence because the person giving the evidence is not narrating his own experience or story, but rather he is presenting whatever he could gather from the statement of another person. That other person may not be available for cross-examination and, therefore, hearsay evidence is not accepted. Dying declaration is an exception to hearsay because, in many cases, it may be the sole evidence and hence it becomes necessary to accept the same to meet the ends of justice."*

2. Principle

2.1 Dying Declaration in a criminal case plays a vital role in determining the guilt of a person. The Hon'ble Supreme Court held in *Prempal Versus State Of Haryana (2014) 10 SCC 336 ; 2014 Cr L J 4420* that when reliance is placed upon dying declaration, the court must be satisfied that the dying declaration is true, voluntary and 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.

2.2 A Dying Declaration in itself is sufficient to hold conviction. The corroboration of it is not always required. But the rider is that the same must inspire confidence. For attracting confidence of the court the circumstances under which the same is recorded must be blemishless. Any reasonable doubt

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must not prop up. Chance of tutoring, fit mental state of the declarant and chance of external influence are factors which must be examined by the Court before relying on the same.

2.3 The reason behind the aforesaid caution is expressed by the Hon'ble Supreme Court in *State of Madhya Pradesh v. Dal Singh &Ors., (2013) 14 SCC 159* where it was mentioned that the evidentiary value and acceptability of a dying declaration, must be approached with caution for the reason that the maker of such statement cannot be subjected to cross-examination. However, the Court may not look for corroboration of a dying declaration, unless the declaration suffers from any infirmity.

3. Evidentiary value

3.1 During appreciation of evidence in criminal trial, especially where the prosecution relies on a dying declaration, the question of evidentiary value or weight of such declaration may arise. Since admissibility of dying declaration is an exception to the rule of hearsay evidence it should be approached by the Courts very cautiously, in the given facts and surrounding circumstances, especially because it is seldom made in the immediate presence of the accused who also does not have any opportunity to test the veracity of the maker of such a statement through cross-examination.

4. Factors to be considered in appreciation of dying declaration

4.1 On various occasion the factors on which a dying declaration must be appreciated are coded by the Hon'ble Supreme Court. Recently in *Prem Kumar Gulati versus State of Haryana and another, 2014 (14) SCC 646* the Hon'ble Supreme Court again enumerated the factors to be observed, when the case is based on dying declaration, as follows:

(1) 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;

(2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;

(3) 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;

(4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;

(5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony and which may suffer from all the infirmities of human memory and human character, and

(6) that in order to test the reliability of a dying declaration, the court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was 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 had 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.

5. Form / procedure for recording

5.1 The accused may have objection that the dying declaration is not recorded in a particular form namely in question-answer form or narration. No particular format for recording dying declaration is provided in the statute.

5.2 In *Laxman v. State of Maharashtra; 2002 SCC (Cri) 1491,* the Hon'ble Supreme Court stated that a dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary, nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available, for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording.

5.3 Recording of a dying declaration in question-answer form is the more appropriate method which should generally be followed. But in *Satish Chandra & Another vs. State of M.P. (2014) 6 SCC 723; 2014 (85) ACC 915* the Hon'ble Supreme Court specified that it would not mean that if such a statement otherwise meets all requirements of *Section 32(1)* and is found to be worthy of credence, it is to be rejected only on the ground that it was not recorded in the form of questions and answers.

5.4 The sanctity is attached to a dying declaration because it comes from the mouth of a dying person. If the dying declaration is recorded not directly from the actual words of the maker but as dictated by somebody else, this by itself creates a lot of suspicion about credibility of such statement. The view is expressed in *Muralidhar @ Gidda and another v. State of Karnataka (2014) 5 SCC 730.*

6. Who should record

6.1 There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. One may refer to *Ashabai vs State of Maharashtra (2013) 2 SCC 224; AIR 2013 SC 341; (2013) 1 SCC (Cri) 943***.**

6.2 The Hon'ble Supreme Court further elicited in *Surinder Kumar v. State of Punjab; (2013) 3 SCC (Cri) 246 ; (2013) 12 SCC 120* that it is also not obligatory that either an Executive Magistrate or a Judicial Magistrate should be present for recording a dying declaration.

6.3 Dying declaration by Doctor was relied upon in *Jose vs State of Kerala (2013) 14 SCC 172; AIR 2013 SC 2284; 2013 Cri L J 3232.*Further in *Rafique vs State of U P (2013) 12 SCC 121; AIR 2013 SC 2272*the Hon'ble Supreme Court shut the issue by holding that neither Section 32 of the Evidence Act nor Section 162(2) of the Cr. P.C., mandates that dying declaration has to be recorded by a designated or particular person and that it was only by virtue of the development of law and the guidelines settled by the judicial pronouncements that it is normally accepted that such declaration would be recorded by a Magistrate or by a doctor to eliminate the chances of any doubt or false implication by the prosecution in the course of investigation.

7. Language

7.1 Dying declaration recorded in the language of the declarant acquires added strength and reliability. The dying declaration recorded in the exact words stated by the declarant is of great importance. It is always desirable that the dying declaration is recorded in the words of the declarant, but simply because the very words uttered by the injured are not reproduced, it should not be rejected, if the Court is otherwise satisfied that the declaration reproduces what was stated by the dying person. Dying declaration would not be vitiated merely because it was recorded in a different language than one in which it is narrated by the declarant.

7.2 In *Srinivasa v. State (2005) 9 SCC 327,* the deceased made the statement in language not known to the person who recorded the statement as interpreted by another person. Correctness of the interpretation was certified by the doctor present there. The Court held that there was nothing unusual in the recording of the same and the declaration could be relied upon. But in *Kashi Vishwanath vs. State of Karnataka (2013) 3 SCC (Cri) 257; (2013) 7 SCC 162; 2013 Cr L J 3655* the three dying declarations which were originally recorded in Kannada of which the deceased had no knowledge were not relied upon as other facts of the case created doubt as to the truthfulness of the contents of the dying declarations as the possibility of the deceased being influenced by somebody in making the dying declarations could not be ruled out.

8. Presence of relatives

8.1 If a dying declaration is made in presence of or in close proximity of the members of the family of the deceased there may be some reasons to question the truth of the dying declaration. However if the magistrate who recorded the dying declaration had obtained the certificate of the doctor and was fully satisfied that the statement was not influenced by the relatives, the dying declaration can be relied upon. Such a question has been dealt in *Surinder Kumar v. State of Punjab; (2013) 3 SCC (Cri) 246; (2013) 12 SCC 120 and Prempal Versus State Of Haryana (2014) 10 SCC 336; 2014 Cr L J 4420.*

9. Fitness certificate

9.2 First and the foremost essential condition of a dying declaration is the fit state of mind of declarant. As a general rule, it is advisable to get fitness of the declarant certified by the doctor. The certificate by the doctor is, however, only a rule of caution and in appropriate cases the satisfaction of the person who recorded the same would suffice. The Hon'ble Supreme Court expressed the same view in *LaxmanVs. State of Maharashtra, (2002) 6 SCC 710 (Five-Judge Bench)* and in *Ashabai vs State of Maharastra (2013) 2 SCC 224; AIR 2013 SC 341; (2013) 1 SCC (Cri) 943.*

9.3 In *State of Tamil Nadu v. Karuppasamy 2009 Cri.L.J. 940*in a case where the doctor certified the fitness of mind of the declarant an independent enquiry of fitness of the dying version was not required**.** Similarly the mere fact that Doctor in whose presence the dying declaration was recorded and/or who endorsed it, is not examined, does not affect the evidentiary value of the dying declaration (*Amar Singh Yadav Versus State Of U.P. (2014) 13 SCC 443 ; (2014) 5 SCC (Cri) 709 ; AIR 2014 SC 2486).*

10. Signature / Thumb Impression

10.1 A dying declaration should normally be signed by the declarant. It may, in the alternative carry the thumb mark of the deceased. The veracity of recording of dying declaration cannot be doubted on the ground that the same was not signed by the maker. The court has to observe the mandatory checks while accepting a dying declaration such as doctor's certificate of the fitness of the state of mind of declarant, the chance of tutoring or interference of others, etc. So far as the question of thumb impression

is concerned, the same depends upon facts as regards whether the skin of the thumb that was placed upon the dying declaration was also burnt. Even in case of such burns in the body, the skin of a small part of the body, i.e. of the thumb, may remain intact. Therefore, it is a question of fact regarding whether the skin of the thumb had in fact been completely burnt, and if not, whether the ridges and curves had remained intact.

11. Multiple dying declarations

11.1 In cases where the deceased makes multiple dying declarations the Court may face the problem of electing the appropriate one. The Court has to weigh the declarations on the parameters generally used for evaluating any evidence placed before it.

11.2 In *Hiraman Versus State of Maharashtra, 2013 Cr5l.J 2191* the Supreme Court considered a case of two contradictory dying declarations. The deceased lady in both the dying declarations had mentioned ill-treatment by the appellant and his demand for gold. But while in the first statement she mentioned the appellant's demand to marry her sister, in the second she mentioned his demand for land. The other witnesses to whom she narrated that the appellant had set her on fire were the head constable and the doctor. The Hon'ble Supreme Court explained that any person in such a condition will state only that much which he or she can remember on such an occasion. When asked once again, the person concerned cannot be expected to repeat the entire statement in a parrot-like fashion. This cannot in any way mean an attempt to improve. Similarly, the non-mention on the second occasion of his insistence to marry her sister cannot be an omission to discredit her statements**.**

11.3 On another occasion the Honb'le Supreme Court held that in case of multiple dying declarations, if complete consistency on major aspects of the incident and role played by the accused is present, conviction would be proper *(Ashabai vs State of Maharastra (2013) 2 SCC 224 ; AIR 2013 SC 341; (2013) 1 SCC (Cri) 943)*

12. Other documents treated as dying declaration

12.1 In *Munnu Raja & another vs. State of M.P., AIR 1976 SC 2199 the Supreme Court* and observed that the statement by victim recorded as F.I.R. could be treated as dying declaration if after making the statement before the police, the victim succumbs to his injuries.

12.2 Similarly for the statement under Section 161 Cr.P.C the Hon'ble Supreme Court explained in *Sri Bhagwan vs. State of U.P. 2012 (11) SCALE 734; (2013) 12 SCC 137; 2013 Cr L J 512*that a statement recorded under Section 161 Cr.P.C. was treated to be a dying declaration despite the objection of the learned defence counsel who quoted the police rules regarding attestation by two witnesses if a dying declaration was ever recorded by a police officer. The Supreme Court explained that the rules provided cautions to be observed by a police officer in case he was expecting the deponent to die. The non-fulfilment of the rules did not vitiate the character of the statement recorded. The statement recorded had all the characters of a dying declaration and therefore was treated as one under Section 32(1) of the Indian Evidence Act. Further the Supreme Court said that once the statement under Section 161 takes the character of a dying declaration, it can be relied upon as such for the purpose of holding conviction.

13. Oral dying declaration

13.1 An oral dying declaration is important when the injured dies before it is possible to formally record his or her statement as a document. The law also recognises dying declarations by signs.

13.2 An oral dying declaration, where the declarant is uttering words in his conscious mind, would have equal sanctity. If the declarant is fatally injured, until the means are arranged for his medical

treatment, the injured speaks some words in relation to cause of his death. These words would be relevant for fixing the liability in the court. The words uttered by the injured soon after the incident may also be relevant under *Sections 6 & 7*of *The Indian Evidence Act, 1872.*

13.3 In *Prakash And another v. State of Madhya Pradesh (1992) 4 SCC 225* it was observed that in the ordinary course, the members of the family including the father were expected to ask the victim the names of the assailants at 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 recognised the assailants. In *Laxman Vs. State of Maharashtra, (2002) 6 SCC 710 (Five-Judge Bench)***,** it was held that a Dying Declaration can be made by the declarant even verbally. Reducing it to writing is not mandatory. Recently in *Balbir v. Vazir, 2014 AIR 2778 SC ; (2014) 12 SCC 670 ; (2014) 5SCC (Cri) 190 ; 2014 Cri L J 3697*, it was opined that an oral dying declaration can form the basis of conviction if the deponent was in a fit condition to make the declaration and the statement is found to be truthful. The courts as a matter of prudence look for corroboration to oral dying declaration, but such corroboration is not mandatory.

14. Dying declaration and contradiction with other evidence

14.1 It could not be ruled out that the dying declaration may be in contradiction with surrounding circumstances of the case brought on record before the court of law or it may contradict the deposition of witnesses. The First Information Report or the statement of eye witness may be in conflict with the facts mentioned in the dying declaration. In *Ravi And another vs. State of T.N., 2005 SCC (Cri) 576* the dying declaration had namedfour accused persons whereas the F.I.R. recorded on the following day named only two who were the appellants before the Supreme Court. This contradiction was not considered to be of any relevance for the case of the two appellants who had been named in both the dying declaration and the F.I.R.

14.2 Similarly regarding contradiction between a dying declaration and the statement of eye witness the Hon'ble Supreme Court has been pleased to take the view in *Bastiram Versus State of Rajasthan (2014) 5 SCC 398 ; (2014) 2 SCC (Cri) 608 ; 2014 Cr L J 1761* that the Trial Judge was right in partially rejecting the deceased Rameshwarlal's dying declaration because it was too much at variance with the eye witness account and it was doubtful whether he was fit to make a statement.

*14.3 In Pradeep Kumar Versus State Of Haryana (2014) 7 SCC 359 ; (2014) 3 SCC (Cri) 208 ; AIR 2014 SC 2694 ; 2014 Cr L J 3806*the Court found one of the two conflicting Dying Declarations to have been tutored and hence placed reliance only upon the other dying declaration and convicted the accused.

14.4 It was held in *Godhu v. State of Rajasthan (1975) 3 SCC 241* that *"The rejection of a part of the dying declaration would put the court on the guard and induce it to apply a rule of caution. There may be cases wherein the part of the dying declaration which is not found to be correct is so indissolubly linked with the other part of the dying declaration that it is not possible to sever the two parts. In such an event the court would be justified in rejecting the whole of the dying declaration. There may, however, be other cases wherein the two parts of a dying declaration may be severable and the correctness of one part does not depend upon the correctness of the other part. In the last mentioned cases the court would not normally act upon a part of the dying declaration, the other part of which has not been found to be true, unless the part relied upon is corroborated in material particulars by the other evidence on record. If such other evidence shows that part of the dying declaration relied upon is correct and trustworthy the court can act upon that part of the dying declaration despite the fact that another part of the dying declaration has not been proved to be correct."*

15. Other uses of dying declaration

15.1 One's Dying Declaration may be relevant for the death of another in the same incident. This is explained with reference to the definition of "relevant facts" and "facts in issue" in Section 6 of the Evidence Act. The Hon'ble Supreme Court concluded in *TejramPatil versus State of Maharashtra 2015(2) Supreme743* that such statement may not by itself be admissible to determine the cause of death of anyone other than the person making the statement but when the circumstances of the transaction which resulted in the death of the person making the statement as well as death of any other person are part of the same transaction, the same will be relevant also about the cause of death of such other person.

15.2 The discussion would not be complete without considering the use of a dying declaration if the maker survives. On this point there are several judgments propounding that such dying declaration would have the value of statement recorded under *Section 164 Cr.P.C*. and the same may be used for corroboration or contradiction. The Hon'ble Supreme Court's opinion in *Gajula Surya Prakasarao Vs. State of A.P., 2009 (7) Supreme 299* would be relevant to mention here, which is as under:-

> *15.2.1 "Dying declaration or statement made by a person becomes relevant u/s. 32 of the Evidence Act only if he later dies. If he survives thereafter, his statement is admissible u/s. 157 Evidence Act as a former statement made by him in order to corroborate or contradict his testimony in court. It is well settled that when a person who has made a statement, may be in expectation of death, is not dead, it is not a dying declaration and is not admissible u/s. 32 of the Evidence Act. Such statement recorded by a Magistrate as dying declaration would be treated as statement recorded u/s. 164 Cr.P.C."*

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Anil Vs. Administration of Daman & Diu, 2007(57) ACC 397 (SC)
Gajula Surya PrakasaraoVs. State of A.P., 2009 (7) Supreme 299

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Session III
4.00 PM – 5.15 PM
Total Time: 1 hour 15 minutes

MODULE FOR TRAINING OF PANEL LAWYERS ON LAW FOR PERSONS WITH DISABILITIES

– Asha Menon[1]

SESSION PLAN

Objective

1. To help participants understand disability.
2. To inform participants the attitude towards the disabled, bothy socially as well as individually.
3. To inform the participants of the Constitutional rights of the Persons with Disabilities (PwDs) and the international convention.
4. To inform the participants of the laws relating to disability in India.

Expected learning outcome

1. The participants would be sensitized to the issues relating to disability and the PwDs.
2. They would understand the need to be proactive in providing help to the PwDs to enforce their legal rights and to access all welfare schemes, particularly in their capacity of legal services panel lawyers.
3. The participants will adopt the appropriate attitude towards disability.

Programme

1. Introduction 30 minutes

Trainer will conduct an ice-breaking session which will have an element of disability. For instance, the Trainer may ask all the participants to arrange themselves in increasing order as per the date of birth without using speech. Thus participants will not be able to tell out their date of birth, but may use whatever methods that may be available other than their voices to communicate to the others what their date of birth is and then sit according to the number in sequence.

Then the Trainer can initiate a group discussion on how the participants felt during the exercise. They may be asked to list out the difficulties they faced. The Trainer may ask a participant to write these down on the blackboard or flip-chart. The participants will then be asked what facilities are needed by the disabled to improve the quality of their lives. The Trainer may next ask the participants about their own feelings towards the PwDs. Then they may be asked to share any experience they may have had with a PwD or having seen someone interacting with a PWD. The participants may be encouraged to speak about their views on disability and impairment and whether the PwDs are productive or dependent people. The Trainer may note down all these responses on the board or Flip-chart.

2. Lecture (Power Point) 30 minutes

The Trainer should then briefly touch upon the important issues relating to disability such as Access in buildings, access to education, access to information, access to jobs, access to health and rehabilitation, access to independent decision making and access to legal assistance

[1] District and Sessions Judge, Saket Court, Delhi

to ensure all the other kinds of access. The Trainer should refer to all the constitutional rights and the statutory laws that protect the rights of the PwDs.

3. Success stories and concluding remarks 5 minutes

Drawing from the material the Trainer should highlight success stories and ask participants if they too have come across any such stories. If anyone has come across a failure, the causes of failure may be discussed.

4. Concluding remarks 10 minutes

By one of the participants or by the Trainer or by the DLSA or visiting dignitary**.**

Training method

1. Experiential
2. Group Discussions
3. Lecture
4. Power point presentation
5. Films.

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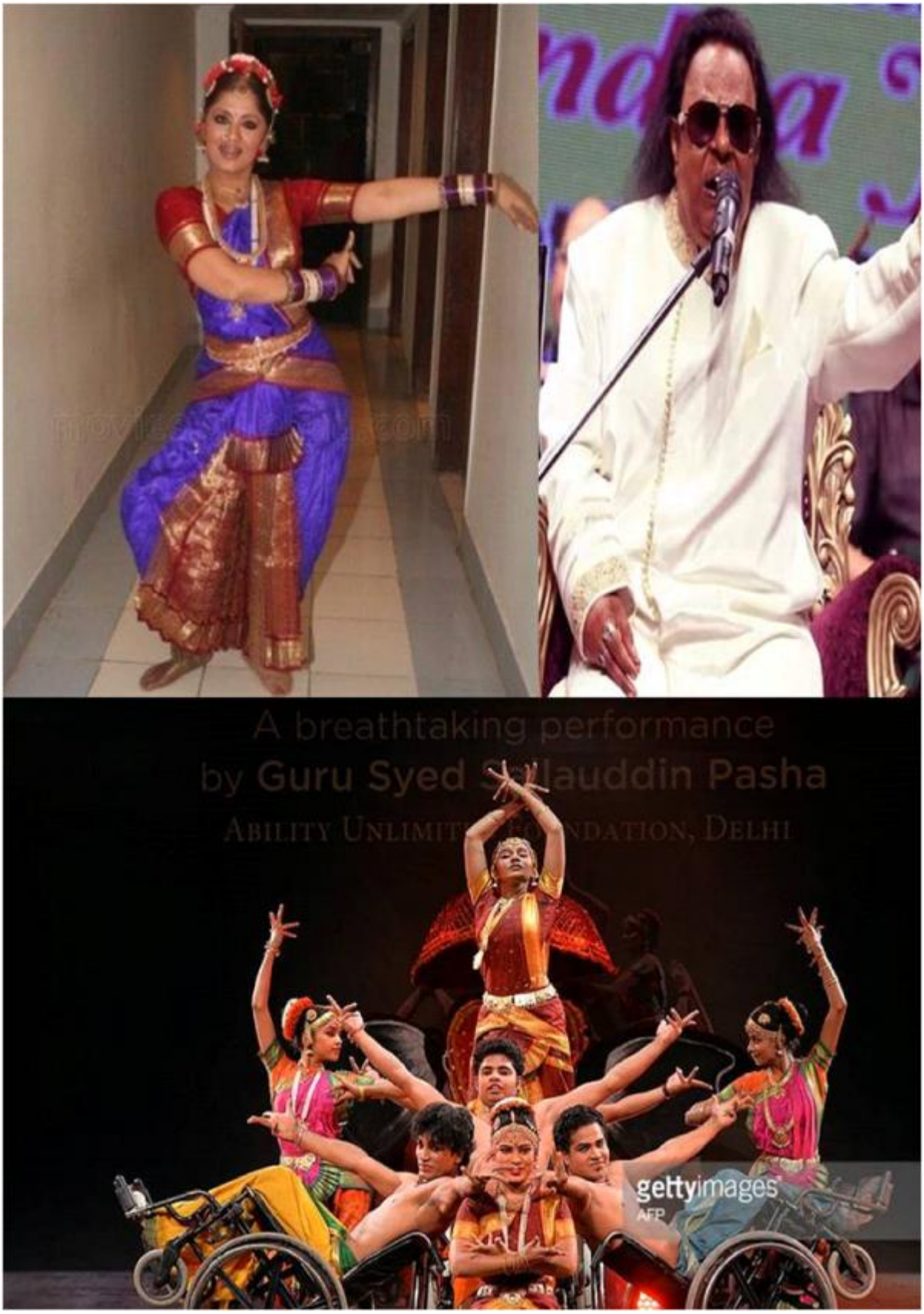
FAMOUS PERSONALITIES WITH DISABILITIES AND THEIR ACHIEVEMENTS

Who are these personalities?



KEY TO THE PHOTOGRAPHS

Sudha Chandran

She is an Indian film and television actress and an accomplished Bharatanatyam dancer. In June 1981, she lost a leg to gangrene following a road accident nearTiruchirapalli, Tamil Nadu while coming back from Madras with her parents. She however continued dancing, and subsequently went on to become an established Bharatnatyam dancer. Chandran is known for her roles in the Indian soap operas.

Ravindra Jain

He was an Indian music composer and lyricist. He won the Filmfare Best Music Director Award in 1985. He was born blind and hailed from Aligarh. He was a role model for many people as he overcame his disability of blindness.

Ravindra Jain is one of the most notable of the Hindi music directors who started his career in the early 1970s, composing for hit films such as Saudagar, Chor Machaye Shor, Paheli, Ankhiyon Ke Jharokhon Se and many more.

Ability Unlimited:

This group of disabled dancers are trained by Mentor Syed Sallauddin Pasha a Bharatanatyam and Kathak dancer,Choreographer, Actor and Founder Artistic Director of Ability Unimited, a therapeutic dance theater on Wheelchairs in India.

Ability Unlimited is a registered civil society, non-profit making social service organization for the benefit of differently abled people irrespective of race, religion, caste, colour and creed.Ability Unlimited strives to break this vicious circle through a holistic and dynamic programme aimed at recognizing, nurturing, and enabling the hidden potential and talents within the differently abled youngsters.

Stephen William Hawking

He is an English theoretical physicist, cosmologist, author and Director of Research at the Centre for Theoretical Cosmology within the University of Cambridge.

Hawking has a rare early-onset, slow-progressing form of amyotrophic lateral sclerosis (ALS), commonly known as motor neurone disease in the UK, that has gradually paralysed him over the decades. He now communicates using a single cheek muscle attached to a speech-generating device.

Hawking received the 2015 BBVA Foundation Frontiers of Knowledge Award in Basic Sciences shared withViatcheslav Mukhanov for discovering that the galaxies were formed from quantum fluctuations in the early Universe.

Mariyappan Thangavelu

He is an Indian paralympic high jumper. At the age of five, Mariyappan suffered permanent disability in his right leg when he was run over by a drunk bus driver while walking to school; the bus crushed his leg below the knee, causing it to become stunted. Despite this setback, he completed secondary school; he says he "didn't see myself as different from able-bodied kids."

He represented India in the 2016 Summer Paralympic games held in Rio de Janeiro in the men's high jump T-42 category, winning the gold medal in the finals.

There are many more such personalities. Try to find them.

SHORT NOTE ON
LAW OF PERSONS WITH DISABILITIES

– Asha Menon[1]

1. Introduction

1.1 Stephen Hawking, the greatest scientist of our time suffers from a rare early-onset, slow-progressing form of amyotrophic lateral sclerosis (ALS), commonly known as motor neurone disease in the UK, that has gradually paralysed him over the decades. He is carried on a wheel chair and can communicate using a single cheek muscle attached to a speech-generating device which converts his efforts into comprehensive language. He is the living example of how a person with physical impairment can be one of the most useful and valuable members of the human population.

1.2 Physical or mental impairment turns into disability on account of attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others. There is no denial of the fact that given the little supports from the society and the state persons with disability can not only improve the quality of their own lives but can also become valuable members of the society. The longest living quadriplegic, Janet Barnes said *"I have not been handicapped by my condition. I am physically challenged and differently able."* Whether we call them differently able or physically challenged the fact of the matter is that while we cannot in any way put any impediments in the exercise of their rights under the Indian Constitution we must also provide them with all the rights and facilities which have been promised to them by various international instruments and by national legislations.

1.2.1 For a variety of reasons, PwDs find it much more difficult than others to enjoy their rights and avail the benefits and entitlements. Their full inclusion and participation in the society and the development process is beset with a lot of impediments despite the special enabling laws in place. They have multiple disadvantages which include inadequate awareness, all sorts of barriers namely the physical, attitudinal, communication and information among establishments, family members and community and also perhaps due to the inherent limitations of the laws and the existing legislations that are based on a charity model.

1.2.2 Over 2% of the population in India is made up of people who suffer some physical or mental disability. Yet such a large proportion of citizens was not even counted as a section in the census and thus was excluded from all government welfare schemes and policies. It took continuous and prolonged efforts by activists to rectify this grave lapse.

1.2.3 The government apathy actually reflected societal apathy as even today the issues of disability and of the disabled are treated with disdain by those who are not disabled. Social norms predicate a pity for the people who have disabled children. There is scorn in some societies for parents whose progeny suffers impairment. Then, people with disability are often teased and tormented for their physical or mental condition. PwDs suffer individually on account of their disability at the physical and mental level due to actual physical pain or the consciousness of the physical limits to their ability to do things with the same ease as persons without disabilities. Added to this, are the attitudes, structures and processes at the societal level, which place added burden on PwDs.

1.2.4 At a deeper level, oppression of the disabled would include the non-recognition of their individuality and a denial to them of a productive status. Generally, economic activity which ensures employment are not tailored to include PwDs. The lack of opportunities forces them to be relegated into dependency and perceived unproductiveness. This condition may operate as added oppression to

[1] District and Sessions Judge, Saket Court, Delhi.

the PwDs inasmuch as the family and society treat them protectively/shabbily denying them the opportunities to become productive. The PWDs themselves become frustrated due to the lack of opportunities to show their ability to become a productive member of the society.

1.2.5 The environment into which the PwD is born or is living would also dictate the attitude of the family and society to a particular disability. An agrarian society may not set too much for anybody's ability to read and write and so a dyslexic would never be considered disabled in such an environment, unlike in an urban setting or in a family that sets high stakes on education. Again, in an urban setting, places of employment may require the job-seeker to go to them, but in a household manufacturing unit, the PWD may be accommodated in his home with a more disabled-friendly standard of productivity.

1.2.6 Thus, a distinction can be drawn between "impairment" and "disablement". To quote the Disabled People's International, 1981: "Impairment" is the loss or limitation of physical, mental or sensory function on a long-term and permanent basis. While, "Disablement" is the loss of limitation of opportunities to take part in the normal life of the community on an equal level with others due to physical and social barriers.

1.2.7 Internationally, the shift has occurred from the medical based approached to a rights based approach to deal with disability. No doubt the right to medical assistance is an important aspect. But the right of the disabled to a life of dignity and to enjoy all human rights as are enjoyed by others has gained in importance. Concepts such as access and assisted decision making are gaining ground. The emphasis is now on providing an enabling environment to help the PWDs achieve their full potential.

2. Constitutional and Legal Rights of Persons with Disabilities

2.1 All the fundamental rights available to a citizen of India are also available to PwDs, they like any other citizen can use the law to protect their interests. Persons with disabilities find mention in Article 41 of the Constitution of India which reads as under:

Article 41: *"The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and* ***disablement*** *and in other cases of undeserved want."*

2.2 11th Schedule to Article 243-G and 12th Schedule to Article 243-W, which pertain to the powers and responsibilities of the Panchayats and Municipalities respectively with respect to implementation of schemes for economic development and social justice, include welfare and safeguarding the interests of persons with disabilities among other weaker sections of the society. The relevant extracts of the said schedules are reproduced below:

2.3 **11th Schedule to Article 243-G:** *"Social welfare, including welfare of the* ***handicapped and mentally retarded.*** *"*

2.4 **12th Schedule to Article 243-W:** *"Safeguarding the interests of weaker sections of society, including the* ***handicapped and mentally retarded.*** *"*

3. Legislative Framework and Policy

India has one of the most comprehensive legislative frameworks for empowerment of persons with disabilities, comprising the following four legislations:

3.1 The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (PwD Act)

3.1.1 This is the main Act concerning disability issues in the country. A meeting to launch the Asian and Pacific Decade of Disabled Persons 1993-2002, convened by the Economic and Social Commission

for Asia and Pacific (ESCAP), was held in Beijing in December, 1992. The Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region was adopted in this meeting, to which India is a signatory. The Central Government enacted The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation Act), 1995 to implement this proclamation.

3.1.2 The Act extends to whole of India except the State of Jammu and Kashmir. The Government of Jammu & Kashmir has enacted The Jammu and Kashmir Persons with Disabilities (Equal Opportunities, Protection of Rights & Full Participation) Act, 1998 which has almost identical provisions as in the PwD Act, 1995.

3.1.3 The PwD Act defines "disability" as blindness, low vision, hearing impairment, locomotor disability, mental retardation, mental illness, and leprosy-cured. The definition of each of the disabilities given below:

"blindness" *refers to a condition where a person suffers from any of the following conditions, namely:-*

(i) total absence of sight; or

(ii) visual acuity not exceeding 6/60 or 20/200 (snellen) in the better eye with correcting lenses; or

(iii) limitation of the field of vision subtending an angle of 20 degree or worse.

"low vision" *means a person with impairment of visual functioning even after treatment of standard refractive correction but who uses or is potentially capable of using vision for the planning or execution of a task with appropriate assistive device.*

"hearing impairment" *means loss of sixty decibels or more in the better ear in the conversational range of frequencies.*

"locomotor disability" *means disability of the bones, joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy.*

"mental retardation" *means a condition of arrested or incomplete development of mind of a person which is specially characterised by subnormality of intelligence.*

"mental illness" *means any mental disorder other than mental retardation.*

"leprosy cured" *means any person who has been cured of leprosy but is suffering from :*

(i) loss of sensation in hands or feet as well as loss of sensation and paresis in the eye-lid but with no manifest deformity;

(ii) manifest deformity and paresis but having sufficient mobility in their hands and feet to enable them to engage in normal economic activity;

(iii) extreme physical deformity as well as advanced age which prevents him from undertaking any gainful occupation, and the expression "Leprosy Cured" shall be construed accordingly.

It defines persons with disabilities as those who have a minimum disability of 40%, as certified by a medical authority. Treatment and care of mentally ill persons is governed by the 'Mental Health Act, 1987', which is administered by the Ministry of Health and Family Welfare.

.3 The Pw3.1.4 The Act provides for Central and the State Coordination Committees for evolution of policies and its execution respectively. Among other things, prevention of disabilities,

education, rehabilitation, employment of PwDs, non-discrimination, research and development, social security and the institutions of the Chief Commissioner at the centre and the Commissioners for Persons with Disabilities in the states are also provide for in the Act.

3.1.5 **A new Legislation in place of the PwD Act, 1995,** keeping in view the developments which have taken place in disability sector over the last 14 years and to harmonize the provisions of PwD Act with United Nations Convention on the Rights for Persons with Disabilities (UNCRPD), which India has ratified, is in the process of making. A draft Rights of Persons with Disabilities Bill, 2012 in close consultation with primary stakeholders, State Governments, NGOs, Disabled Persons Organizations and experts has been prepared which is expected to be introduced in the Parliament soon.

3.2 The National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation & Multiple Disabilities Act, 1999 (NT Act)

The definition of disabilities defines in the National Trust Act is given below:

"autism" *means a condition of uneven skill development primarily affecting the communication and social abilities of a person, marked by repetitive and ritualistic behaviour.*

"cerebral Palsy" *means a group of non-progressive conditions of a person characterised by abnormal motor control and posture resulting from brain insult or injuries occurring in the pre-natal, peri-natal or infant period of development.*

"Multiple Disabilities" *means a combination of two or more disabilities as defined in clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996).*

3.2.1 The Act in section 3 provides for Constitution of the National Trust and the main objects are provided in section 10 of the Act which are as under:

- *" to enable and empower persons with disability (persons with Autism, Cerebral Palsy, Mental Retardation & Multiple Disabilities) to live independently and as fully as possible within and as close to their community;*
- *to extend support to registered organizations (NGOs) to provide need based services;*
- *to evolve procedures for appointment of guardians and trustees for persons with disabilities;*
- *to facilitate the realization of equal opportunities, protection of rights and full participation of persons with disabilities."*

3.2.2 **Appointment of Guardian**

Sections 14 to 17 of the Act provide for appointment of legal guardian of a person with Autism, Cerebral Palsy, Mental Retardation & Multiple Disabilities.

3.2.3 **Local Level Committees**

Section 13 of the Act, provides for Constitution of Local Level Committees (LLC), consisting of –

- an officer of the civil service of the Union or State, not below the rank of District Magistrate;
- a representative of the registered organization (NGO); and
- a person with disability

The term of an LLC is 3 years or till such time it is reconstituted. LLCs are responsible for appointment and removal of guardians. The guardians appointed under the Act are responsible for maintenance of persons with disabilities and his/ her properties.

3.3 The Rehabilitation Council of India Act, 1992 (RCI Act)

The Rehabilitation Council of India was set up under the RCI Act. The Council regulates and monitors the training of rehabilitation professionals and personnel and promotes research in rehabilitation and special education. Its functions are as under:

3.3.1 Recognition of qualifications granted by University etc., in India for Rehabilitation Professionals

The qualification granted by any University or other institution in India which are included in the Schedule shall be recognized qualifications for rehabilitation professional

3.3.2 Recognition of qualification by Institutions outside India

The Council may enter into negotiation with the authority in any country outside India for settling of a scheme or reciprocity for the recognition of qualifications, and the pursuance of any such Scheme, the Central Government may, by notification amend the schedule so as to include therein any qualification which the Council has decided should be recognized.

3.3.3 Rights of persons possessing qualifications included in the schedule to be enrolled

Subject to the other provisions contained in this Act, any qualification included in the Schedule shall be sufficient qualifications for enrolment on the Register. No person, other than the rehabilitation professional who processes a recognized rehabilitation qualification and is enrolled in the Register-

1. shall hold office as rehabilitation professional or any such office(by whatever designation called) in Government or in any institution maintained by a local or other authority;

2. shall practice as rehabilitation professional anywhere in India;

3. shall be entitled to sign or authenticate any certificate required by any law to be signed or authenticated by a rehabilitation professional

4. shall be entitled to give any evidence in any court as an expert under section 45 of the Indian Evidence Act, 1872 in any matter relating to the handicapped:

Any person who acts in contravention of any of the above provision shall be punished with imprisonment for a term which may extend to one year or with fine which may extend to one thousand rupees or with both.

3.3.4 Inspectors at examinations

The Council shall appoint such number of Inspector as it may deem requisite to inspect any University or Institution where education for practicing as rehabilitation professional is given or to attend any examination held by any University or Institution for the purpose of recommending to the Central Government recognition of qualifications granted by that University or Institution as recognized rehabilitation qualifications.

3.3.5 Visitors examination

The Council may appoint such number of Visitors as it may deem requisite to inspect any University or institution wherein education for rehabilitation professional is given or attend any examination for the purpose of granting recognized rehabilitation qualifications.

3.3.6 **Minimum standards of education**

The Council may prescribe the minimum standards of education required for granting recognition of rehabilitation qualification by Universities or institutions in India.

3.3.7 **Registration of professionals in the Register and privileges of the registered persons.**

Council to maintain the Register of the rehabilitation professional/other personnel and determine privileges and professional conduct of registered persons.

3.3.8 **Professional Conduct and removal of names from Register**

The Council may prescribe standards of professional conduct and etiquette and a code of ethics for rehabilitation professionals.

Regulations made by the Council under sub-section (1) may specify which violation thereof shall constitute infamous conduct in any professional respect, that is to say, professional misconduct, and such provision shall have effect notwithstanding anything contained in any other law for the time being in force.

The Council may order that the name of any person shall be removed from the Register where it is satisfied, after giving that person a reasonable opportunity of being heard and after such further inquiry, if any as it may deem fit to make-

1. that his name has been entered in the Register by error or on account of misrepresentation or suppression of a material fact;

2. that he has convicted of any offence or has been guilty of any infamous conduct in any professional respect, or has violated the standard of professional conduct and etiquette or the code of ethics prescribed under sub-section (1) which, in the opinion of the Council, renders him unfit to be kept in the Register.

An order under sub-section (3) may direct that any person whose name is ordered to be removed from the Register shall be ineligible for registration under this Act either permanently or for such period of years as may be specified

3.4 **Mental Health Act, 1987 (MH Act)**

3.4.1 The Mental Health Act, 1987 came into force with effect from 01.04.1993 in all the States and Union Territories. The aim of the Act are to consolidate and amend the law relating to the treatment and care of mentally ill persons, to make better provisions with respect to their property and affairs and for matters connected therewith or incidental thereto.

3.4.2 The Mental Health Act, 1987 (MHA, 1987) has the following main provisions:

(i) regulate admission to psychiatric hospitals or psychiatric nursing homes of mentally ill-persons who do not have sufficient understanding to seek treatment on a voluntary basis, and to protect the rights of such persons while being detained;

(ii) protect citizens from being detained in psychiatric hospitals or psychiatric nursing homes without sufficient cause;

(iii) regulate responsibility for maintenance charges of mentally ill persons who are admitted to psychiatric hospitals or psychiatric nursing homes;

(iv) provide facilities for establishing guardianship or custody of mentally ill persons who are incapable of managing their own affairs;

(v) provide for the establishment of Central Authority and State Authorities for Mental Health Services;

(vi) lay down the powers of the Government for establishing, licensing and controlling psychiatric hospitals and psychiatric nursing homes for mentally ill persons;

(vii) provide for legal aid to mentally ill persons at State expense in certain cases.

3.4.3 The terms "psychiatric hospital" and "psychiatric nursing home" defined in the Act include convalescent homes.

3.4.4 Government of India has recognised that the MHA, 1987 has not been able to adequately protect the rights of persons with mental illness and promote access to mental health care in the country. In order to protect, promote and fulfil the rights of persons with mental illness and to ensure health care, treatment and rehabilitation in the least restrictive environment possible and in a manner that does not intrude on their rights and dignity and to fulfil obligations under the Constitution of India and obligations under various International Conventions ratified by India, MHA, 1987 is also being replaced by a new legislation. A draft **Mental Health Care Bill, 2011** has been prepared.

3.5 National Policy for Persons with Disabilities, 2006

3.5.1 Ministry of Social Justice and Empowerment also brought out the National Policy for Persons with Disabilities in 2006. The National Policy recognizes that Persons with Disabilities are a valuable human resource for the country and seeks to create an environment that provides them equal opportunities, protects their rights and ensures full participation in the society. It is in consonance with the basic principles of equality, freedom, justice and dignity of all individuals that are enshrined in the Constitution of India and implicitly mandates an inclusive society for all, including persons with disabilities. The National Policy recognizes the fact that a majority of persons with disabilities can lead a better quality of life if they have equal opportunities and effective access to rehabilitation measures.

3.5.2 The Policy provides for the following:

I. Prevention of Disabilities
II. Rehabilitation Measures
II A. Physical Rehabilitation Strategies
  (a) Early Detection and Intervention
  (b) Counseling & Medical Rehabilitation
  (c) Assistive Devices
  (d) Development of Rehabilitation Professionals
II B. Education for Persons with Disabilities
II C. Economic Rehabilitation of Persons with Disabilities
  (i) Employment in Government Establishments
  (ii) Wage employment in Private Sector
  (iii) Self-employment
III. Women with disabilities
IV. Children with Disabilities
V. Barrier-free environment
VI. Issue of Disability Certificates
VII. Social Security
VIII. Promotion of Non-Governmental Organizations (NGOs)
IX. Collection of regular information on Persons with Disabilities

X. Research

XI. Sports, Recreation and Cultural life

XII. Amendments to existing Acts dealing with the Persons with Disabilities

3.5.3 The following mechanism is in place for implementation of the National Policy:

i. Department of Disability Affairs, Ministry of Social Justice & Empowerment is the nodal Department to coordinate all matters relating to implementation of the Policy.

ii. The Central Coordination Committee, with stakeholder representation, coordinates matters relating to implementation of the National Policy. There is a similar Committee at the State level.

iii. The Ministries of Home Affairs, Health & Family Welfare, Rural Development, Urban Development, Youth Affairs & Sports, Railways, Science & Technology, Statistics & Programme Implementation, Labour, Panchayati Raj and Women & Child Development and Departments of Elementary Education & Literacy, Secondary & Higher Education, Road Transport & Highways, Public Enterprises, Revenue, Information Technology and Personnel & Training are also identified for implementation of the policy.

iv. Panchayati Raj Institutions and Urban Local Bodies are associated in the functioning of the District Disability Rehabilitation Centres. They are required to play a crucial role in the implementation of the National Policy to address local level issues.

v. The Chief Commissioner for Persons with Disabilities at Central level and State Commissioners at the State level play key role in implementation of National Policy, apart from their statutory responsibilities.

4. Human Rights with Special Reference to UNCRPD

4.1 The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is an international human rights treaty. The purpose of the UNCRPD is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

4.2 India signed the UNCRPD on 30th March, 2007, the day it opened for signature and ratified it on 1st October 2008.

4.3 The General Principles of the Convention are:

a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

b. Non-discrimination;

c. Full and effective participation and inclusion in society;

d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

e. Equality of opportunity;

f. Accessibility;

g. Equality between men and women;

h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

4.4 The main obligations of the member states are as under:

a. To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;

b. To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

c. To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;

d. To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;

e. To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;

f. To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in Article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;

g. To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;

h. To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;

i. To promote the training of professionals and staff working with persons with disabilities in the rights recognized in this Convention so as to better provide the assistance and services guaranteed by those rights.

4.6 The implications of ratifying the Convention are also two-fold, namely, (a) that the States parties undertake to implement the said Convention in letter and spirit in their respective countries; and (b) that the States parties harmonize all their relevant domestic laws with the Convention.

5. Civil & Political Rights

5.1 The Constitution of India pledges to secure, to all its citizens, among other things, justice, social, economic and political. Besides, the directive principles of State policy enshrined in Part IV of the Constitution articulates a range of social, economic and cultural measures and principles which are aspirational in nature as opposed to the fundamental rights enshrined in Part III which envisage the set of civil and political rights which are enforceable. There is no restriction on persons with disabilities to participate in political and public life. Many persons with disabilities have been elected as Members of Parliament, State Legislators and other political/public institutions as people's representatives. To facilitate exercise of voting rights by persons with disabilities, it is ensured that the polling booths are accessible. The voting machines have Braille buttons. The visually impaired also have option for casting their vote by a person of their choice. However, there are still some provisions in some states that do not entitle a person with hearing impairment (Deaf and Dumb) to be a candidate in the Panchayat

elections. Instances have also come to the notice of the Office of Chief Commissioner for Persons with Disabilities that a person with blindness was also not allowed to file his nomination and subsequently the nomination was rejected because he could not sign.

6. Educational Rights

6.1 The PwD Act provides for access to free education in an appropriate environment to every child with a disability till he attains the age of eighteen years among other facilities including reservation of not less than 3% seats.

6.1.1 The Right of Children to Free and Compulsory Education Act, 2009 which provides for the right of every child of age 6-14 years to free and compulsory education in a neighbourhood school till completion of elementary education has a specific provision that a child suffering from disability shall have the right to pursue free and compulsory elementary education in accordance with the provision of PwD Act.

6.2 A centrally sponsored scheme of 'Inclusive Education for the Disabled at Secondary Stage (IEDSS) has been launched in 2009 to ensure inclusion of children with disabilities in mainstream schools up to the secondary stage.

7. Economic Rights

.7.1 In pursuance to the provision for reservation of at least 3% of the vacancies for persons with disabilities, all the government organizations including Public Sector Undertakings are mandated to reserve vacancies and appoint persons with disabilities at all levels in recruitment. 3% of the vacancies are also to be reserved in promotion in Group 'C'and Group 'D' posts. Relaxation in upper age limit, concession/ exemption in application/examination fee, relaxation in standard of selection etc. are also extended to them.

7.2 National Handicapped Finance Development Corporation (NHFDC) setup by MSJE provides soft loans to persons with disabilities or to the parents/siblings in case of persons with mental retardation, autism, etc., for self-employment. The Corporation also provides educational loans and scholarships to PwDs.

7.3 20 Vocational Rehabilitation Centres (VRCs) across the country under Ministry of Labour, Govt. of India impart vocational training in various skills to persons with disabilities including those who are illiterate to enable them to secure job in the organized sector or help them in self-employment.

7.4 Govt. of India is also implementing a scheme for incentives to employers in private sector to promote employment of persons with disabilities. Under the scheme, employers' contribution towards Employees Provident Fund and Employees State Insurance in respect of the employees with disabilities with a salary of up to Rs.25,000/ pm appointed by the private employer is paid by the Government for 03 years.

7.5 In accordance with the provision in the Persons with Disabilities Act, at least 3% is reserved for persons with disabilities in all the poverty alleviation schemes including those schemes that are aimed at creating job opportunities.

8. Enforcement Mechanism

8.1 The PwD Act provides for the Chief Commissioner for Persons with Disabilities and the State Commissioners. CCPD has the following statutory functions:-

i. Coordination of the work of the State Commissioners for Persons with Disabilities;

ii. Monitoring the utilization of' funds disbursed by the Central Government;

iii. Taking steps to safeguard the rights and facilities made available to persons with disabilities;

iv. Submitting reports to the Central Government on the implementation of the PwD Act.

8.2 The Chief Commissioner may of his own motion or on the application of any aggrieved person or otherwise look into complaints with respect to matters relating to-

i. Deprivation of rights of persons with Disabilities.

ii. Non-implementation of laws, rules, bye-laws, regulations, executive orders, guidelines or instructions made or issued by the appropriate Governments and the local authorities for the welfare and protection of rights of persons with disabilities and take up the matter with the appropriate authorities.

8.3 The State Commissioners perform similar functions within their respective states.

8.4 The Chief Commissioner and the State Commissioners have been given certain powers of a Civil Court in matters of summoning witnesses, production of documents, requisition of public records, recording of evidence, etc.

8.5 Proactive interventions of the Office of the Chief Commissioner have had far reaching, wide and perceptible impact in the disability sector particularly in ensuring the rights of persons with disabilities. These have resulted in formulation of policies, better implementation of the laws for the benefit of persons with disabilities and awareness and sensitization among various stakeholders across the country. Reservation and appointment of persons with disabilities as civil servants, scientists, engineers, bank officers and admission in professional courses like medicine, engineering, law, etc., are some of the important outcomes of the interventions of the office of the Chief Commissioner. More importantly, prompt response, positive action and easy accessibility have created confidence among the people with disabilities, their parents and the DPOs across the country.

8.6 CCPD receives a large number of complaints involving non-implementation of the laws, programmes, schemes, etc., for the benefit of persons with disabilities. Many issues concerning infringement of the rights of persons with disabilities are also taken up by the Chief Commissioner on her/his own motion with the concerned authorities.

8.7 In order to reach out to persons with disabilities nearer their homes (in smaller towns, villages and remote areas) and to ensure better access to the grievance redressal mechanism, Office of Chief Commissioner has organized Joint Mobile Courts along with State Disability Commissioners in different parts of the country.

8.8 Since inception, the office of Chief Commissioner registered a total of **27,533** complaints and disposed off **26,013** complaints as on 31.07.2014.

8.9 In the initial years, most of the cases were related to reservation in employment and admission in educational institutions. The number of such complaints has now considerably reduced indicating better compliance by the concerned authorities. Presently, most of the complaints pertain to service matters, accessibility, discrimination, etc.

8.10 Chief Commissioner has also taken the initiative to create awareness about various disability issues with special focus on accessible built environment, inclusive education and employment of persons with disabilities by organising and participating in workshops, seminars, conferences and meetings. Approximately 1300 persons from Govt. Departments and NGOs participated in such workshops; conferences etc. and more than 500 persons were trained on conduct of audit of built environment for accessibility.

9. Role of Legal Services Authorities and Legal fraternity

9.1 PwDs face enormous problems in accessing the Legal Services primarily due to lack of information, inaccessible physical environment, transport, requirement of multiple visits and sometimes less responsiveness and sensitivity of the legal fraternity.

9.2 The National Legal Services Authority (NALSA) has been constituted under the Legal Services Authorities Act, 1987 to provide free Legal Services to the weaker sections of the society and to organize Lok Adalats for amicable settlement of disputes. NALSA is headed by Hon'ble Chief Justice of India.

9.3 In every State, State Legal Services Authority has been constituted to give effect to the policies and directions of the NALSA and to give free legal services to the people and conduct Lok Adalats in the State. The State Legal Services Authority is headed by Hon'ble the Chief Justice of the respective High Court who is its Patron-in-Chief.

9.4 In every District, District Legal Services Authority has been constituted to implement Legal Services Programmes in the District. The District Legal Services Authority is situated in the District Courts Complex in every District and chaired by the District Judge of the respective district.

9.5 Taluk Legal Services Committees are also constituted for each of the Taluk or Mandal or for a group of Taluks or Mandals to coordinate the activities of legal services in the Taluk and to organise Lok Adalats. Every Taluk Legal Services Committee is headed by a senior Civil Judge operating within the jurisdiction of the Committee who is its ex-officio Chairman.

9.6 A mentally ill or otherwise disabled person is entitled to legal services as per the provisions of Section 12 of the Legal Services Authority Act, 1987.

9.7 'Legal service' includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter.

9.8 Legal Services Authorities after examining the eligibility criteria of an applicant and the existence of a prima facie case in his favour provide him counsel at State expense, pay the required Court Fee in the matter and bear all incidental expenses in connection with the case. The person to whom legal aid is provided is not called upon to spend anything on the litigation once it is supported by a Legal Services Authority.

9.9 A nationwide network has been envisaged under the Act for providing legal aid and assistance. National Legal Services Authority is the apex body constituted to lay down policies and principles for making legal services available under the provisions of the Act and to frame most effective and economical schemes for legal services. It also disburses funds and grants to State Legal Services Authorities and NGOs for implementing legal aid schemes and programmes.

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The Buddha in the Majjhima Nikata (I.111) states that "what one feels, one perceives". Unenlightened beings see the world indirectly through a veil of negative emotions and erroneous views. The knowledge of unenlightened beings has papal-Ica, or mental constructions, as its root cause. Papanca refers to the tendency of unenlightened minds to construct or fabricate concepts conducive to suffering, especially essentialist and ego- related concepts such as 'I' and 'mine', which lead to a variety of negative mental states such as craving, conceit, and dogmatic views about the self.

SUCCESS STORIES RELATED TO JUSTICE DELIVERED TO THE DISABLED.

Source: Office of the Chief Commissioner for Persons with Disabilities, Ministry of Social Justice and Empowerment, Govt. Of India through T.D. Dhariyal, Dy. Chief Commissioner.

1. Reasonable Accommodation

Nivya Subramanian has 75% locomotor disability in both lower limbs.

- Due to her un-steady hands, she writes with great effort and pain.
- Few people can read her written matter properly.
- Her speech is also not clear; so she cannot take the help of a Scribe.
- She did her B.A. Eco (Hons.) from Maitrey College (Delhi University).
- One of her papers had to be re-evaluated — D.U. agreed for it.
- She got admission in PG course in Global Business from SRCC, DU.
- Appropriate evaluation mechanism needs to be developed for such students

–Allow answer sheets to be read over to the examiner

–Allow use of computer for writing the examination with adequate additional time;

- UGC vide letter F. No.6-1/2011 (SCT) dated 21.4.2011 has advised all the Universities including Pvt. Universities to make appropriate arrangements for evaluation of answer sheets of students like Nivya as per the advice of the 0/o CCPD.
- MHRD has asked Delhi University to comply with CCPD's advice

2. Transfer

- Shri Bhanwar Lal, a Constable in CRPF has a 17 year old son with 80% disability (MR & CP). He is mentally unstable and often relives himself on the bed and therefore, landlords do not rent out house to him. He is getting treatment and training at Ajmer.
- Bhanwal Lal was not aware about any facilities being provided by Govt. agencies to MR & CP.
- As per rules, he could not be transferred back to Ajmer and CRPF, therefore, posted him to Jaipur.
- On the advice of CCPD vide Order dated 16/08/2011, CRPF relaxed the rule and posted him to Ajmer in Sept. 2011 to ensure that his son could be looked after by him and provided the treatment/training.

3. Reasonable interpretation of provisions of the law

- A 75% visually impaired Gopal KrishnaTiwari got 142nd rank in CSE-2007 and entitled to IAS. IAS is identified for Low Vision but the physical requirement of the jobs among other things are seeing and reading & writing.
- As he could not see, read & write as others do, allocation of IAS was not a straight forward exercise in his case.
- Allocating him IAS took 6 months after authorities appreciated that Tiwari could read & write his way with the screen reader and aids like scanner as others do their way. He joined training 6 months later than his batch mates in Feb 2009.
- Now on Supreme Court's direction, even a person with blindness (Shri Ravi Prakash) has been allotted IAS.

4. Lifetime Pension to disabled children of Govt. Employees

- Shri Dushyant P. Chhaya [aged 63 years], a person with 60% mental retardation filed a complaint against the Office of the Dy. Commissioner of Central Excise, Bhavnagar, Gujarat regarding denial of lifetime family pension.
- On intervention of 0/o CCPD, Pay & Accounts Office, Central Board of Excise & Customs, Bhavnagar issued PPO in favour of the complainant on 01.08.2011.

5. Change of shift

- Shri Suresh Gupta father of Master Harsh Gupta a child with profound hearing impairment and visual impairment filed a complaint dated 15.05.2012 regarding change of shift from Second to First in Kendriya Vidyalaya, Andrews Ganj.
- The matter was taken up with the Commissioner, Kendriya Vidyalaya Sangathan, (KVS) vide this court's letter dated15.05.2012 directing the concerned officials of Kendriya Vidyalaya, Andrews Ganj to shift Master Harsh Gupta to the first shift to enable him to study in an appropriate and conducive environment.
- An interim reply in the matter was received from the Assistant Commissioner (Acad), KVS which was forwarded to complainant for his information. Thereafter Joint Commissioner, (TRG), KVS had requested the Dy. Commissioner, KVS to exercise the discretionary power vested in him rule 9 (B) of admission guidelines.
- A reminder dated 02.09.2013 was issued to parties o Joint Commissioner (Acad.), KVS vide its letter dated 11.09.2013 has informed that Master Harsh Gupta of Class VIII C (Session 2012 — 13) has been shifted from Second shift to First shift in KV, Andrews Ganj and at present he is studying in Class IX C (Session 2013 -14).

6. Reservation of seats for children with special needs.

- The Commissioner for Persons with Disabilities, Govt. of West Bengal has forwarded the application of Mohd. Isam, father of Master Ayaan Islam, a child with special needs regarding admission in Kendriya Vidyalaya Sangathan (KVS), Alipore, Kolkata.
- The matter was taken up with the Commissioner, KVS vide this court's letter dated 19.09.2012 advising them that word 'disability' should be used in place of 'handicapped and 'children with disabilities in place of 'physically handicapped children'.
- Despite lapse of more than eleven months nothing was received from KVS, then a reminder was issued on 04.09.2013.
- The Joint Commissioner (Acad.), KVS vide letter no. 110331/01/2013-KVS(HQ)/Acad dated 12.09.2013 has informed that KVS has complied with the directions issued by Chief Commissioner for Persons with Disabilities and Incorporated necessary corrections in KVS Admission Guidelines 2013-14 which are as under:-
  - 03% seats of total available seats for fresh admission will be horizontally reserved for differently abled children, visually challenged, orthopedically and hearing impaired
  - The reservation is provided as per the provisions of Section 39 of the persons with Disabilities (Equal Opportunities, Protection of Rights and full participation) Act, 1995.
  - KVS is not using the term 'physically handicapped' in the Admission Guidelines and other communications.

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Session IV
9.30 AM – 11.00 AM
Total Time: 1 Hour 30 minutes

MODULE FOR TRAINING OF PANEL LAWYERS ON MOTOR ACCIDENT CLAIMS

– *Geetanjli Goel*[1]

SESSION PLAN

Objective

1. To provide the young lawyers grounding in concept and law relating to claims for compensation in case of vehicular accidents.

2. To give them an understanding of the procedure for claiming compensation in case of vehicular accidents and execution of awards passed by Motor Accident Claims Tribunals.

Expected learning outcome:-

1. Participants will be able to draft pleadings when the client seeks compensation in case of vehicular accidents or seeks to defend against a claim for compensation.

2. Participants will be able to argue for and against the entitlement of compensation in a case.

3. Participants will be able to identify the grounds of appeal against an order of the MACT under the Act.

4. Participants will be able to take appropriate steps for enforcement of the awards passed by the MACT.

Programme

1. Introduction 20 minutes

Trainer will familiarise the participants with the need for separate bodies to deal with claims for compensation arising out of vehicular accidents leading to the inclusion of the relevant provisions in the Motor Vehicles Act, 1988 and introduce the scheme of the Act. He/she can introduce the various provisions under which compensation can be claimed under the Act and the difference between them and what can be done to get compensation for the clients without delay. He/she can give an overview of the procedure followed before the MACT and discuss how the awards can be got enforced.

2. Group Discussions: Presentation and whole group discussions 1 hour

Participants will be divided in groups of 4-6 and each group will be asked to find the answers to the questions in the readings. Each group will present its views to the whole group for a whole group discussion. The resource person will provide the points missed by the participants and will present a wholesome view of the topics.

3. Concluding Remarks 10 minutes

The remarks can be made at the end by the trainer or by one of the participants or by the dignitary, if any, invited to inspire the participants.

[1] Director NALSA and Officer of Delhi Higher Judicial Service

Training methods:

1. Lecture
2. Group Discussion & presentation
3. Experience sharing

Note: The resource person will pool the points on the flip chart/white board. He/she may prepare a power point for the lecture.

Tools required

1. Facility for power point presentation
2. Flip chart
3. Pens
4. Blue tack

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Activity for Session IV- Motor Accident Claims

Reading for Group Discussion-I

Ram died in a road accident while returning home from the market and the criminal case has been lodged against the driver of the offending vehicle for his rash and negligent driving. His legal heirs seek compensation for the death of Ram in the road accident.

The Secretary, Taluka Legal Services Committee has assigned the case to you.

On interviewing the legal heirs you find the following facts which they can raise:

1) Ram is survived by his parents, wife and 2 children one son aged 5 years and one daughter aged 3 years and one brother aged 30 years who is working.
2) Ram was aged about 32 years at the time of the accident.
3) Ram was illiterate and did not have any fixed income.

Questions for group discussion

1) Can the legal heirs of Ram seek compensation, if yes then how will you proceed with the matter?
2) Can all the legal heirs be regarded as dependent on the deceased?
3) Can the legal heirs plead that as the deceased was only 32 years old, he would have earned for at least another 30 to 35 years and they should be suitably compensated on that basis?
4) Can the legal heirs contend that the income of the deceased would have increased over time and that should be taken into account for computing the compensation?
5) Can the legal heirs seek compensation for loss of consortium, loss of love and affection, loss of estate and towards funeral expenses?
6) What factors do you have to show to make out your case for compensation under the Act?
7) Would you also move an application for interim award, if any, if so what would be the frame of such an application?

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Reading for Group Discussion-II

Vineet met with a road accident and died. His legal heirs seek compensation for the death of Ram in the road accident.

The Secretary, Taluka Legal Services Committee has assigned the case to you. On interviewing the legal heirs you find the following facts which they can raise:

1) Vineet is survived by his wife and 2 children.
2) Vineet was aged about 44 years at the time of the accident.
3) Vineet was working as a supervisor and was earning Rs.7,000/- per month
4) The legal heirs of Vineet do not have any proof regarding rash and negligent driving of the offending vehicle.

Questions for group discussion

1) Can the legal heirs of Vineet seek compensation under the MV Act?
2) Would it make a difference that the legal heirs of the deceased cannot show that the vehicle was driven in a rash and negligent manner and how would you proceed with the matter then?
3) Can the legal heirs plead that as the deceased was only 44 years old, he would have earned for at least another 20 years and they should be suitably compensated on that basis?
4) Can the legal heirs contend that the income of the deceased would have increased over time and that should be taken into account while computing the compensation?
5) Can the legal heirs seek compensation for loss of consortium, loss of love and affection, loss of estate and towards funeral expenses?
6) What factors do you have to plead to make out your case for compensation under the Act?
7) Would you also move an application for interim award, if any, if so what would be the frame of such an application?

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Reading for Group Discussion-III

Surbhi, while going to her office met with an accident and suffered permanent disability of 40% disability in relation to her right leg. She seeks compensation for the injuries sustained by her.

The Secretary, Taluka Legal Services Committee has assigned the case to you.

On interviewing Surbhi you find the following facts which she can raise:

1) Surbhi was aged 23 years and unmarried.

2) Surbhi was working as computer operator and earning Rs.10,000/- per month.

3) Surbhi remained admitted in hospital for about 20 days and underwent treatment for about 6 months during which period she had to remain on leave.

Questions for group discussion

1) Can Surbhi seek compensation under the MV Act?

2) Can Surbhi plead that as she was only 23 years old, her whole life had been spoilt and she would not be able to find a suitable match for herself?

3) Under what heads would you seek compensation for Surbhi?

4) Can Surbhi contend that her income would have increased over time and that should be taken into account while computing the compensation?

5) Can Surbhi plead that though she had suffered 40% permanent disability but she was prevented from working altogether and the compensation should be granted to her accordingly?

6) What factors do you have to plead to make out your case for compensation under the Act?

7) Would you also move an application for interim award, if any, if so what would be the frame of such an application?

*****

Reading for Group Discussion-IV

Raman met with a road accident and suffered grievous injuries. A claim for compensation was filed before the concerned MACT and when the insurance company appeared, it stated that it was not liable to pay any compensation as the driver of the offending vehicle did not have a valid driving license.

The Secretary, Taluka Legal Services Committee has assigned the case to you.

On interviewing Raman you find the following facts which he can allege:

1) Raman sustained fracture of both bones in the right leg.

2) Raman was doing a good job and was earning Rs.25,000/- per month

Questions for group discussion

1) Can Raman seek compensation under the MV Act?

2) Under what heads can Raman seek compensation?

3) What factors do you have to show to make out your case for compensation under the Act?

4) Would you also move an application for interim award, if any, if so what would be the frame of such an application?

5) How would you meet the plea raised by the insurance company so that your client is not deprived of compensation in the case?

*****

Reading for Group Discussion-V

Avinash died in a road accident while returning from school. His legal heirs seek compensation for the death of Avinash in the road accident.

The Secretary, Taluka Legal Services Committee has assigned the case to you.

On interviewing the legal heirs you find the following facts which they can raise:

1) Avinash is survived by his parents and one brother and one sister.

2) Avinash was aged about 7 years at the time of the accident.

3) Avinash was studying in class II at the time of the accident.

Questions for group discussion

1) Can the legal heirs of Avinash seek compensation?

2) Can all the legal heirs be regarded as dependent on the deceased?

3) Can the legal heirs contend that if the deceased had not died in the accident, he would have lived upto at least 80 years and he would have earned a huge amount which should be taken into account while granting compensation?

4) What factors do you have to show to make out your case for compensation under the Act?

5) Would you also move an application for interim award, if any, if so what would be the frame of such an application?

*****

SHORT NOTE ON MOTOR ACCIDENT CLAIM CASES

– Dr. Bharat Bhushan Parsoon[1]

– Geetanjli Goel[2]

1. Indian Position

1.1 *In India, the population is increasing day by day and soon our country will become number one in the world population wise. The living standard of the people has also improved, therefore, the number of motor vehicles i.e. commercial or personal for the movement has gone up tremendously in the country. As there is increase in the number of vehicle, the number of road accidents has also gone up, as also the litigation regarding the motor vehicular accidents.*

1.2 As per the **234th Report on Legal Reforms to Combat Road Accidents**[3], the view regarding the accident cases is as under:

1. India has one of the largest road networks in the world, of 3.314 million kilometers, consisting of National Highways, Expressways, State Highways, Major District Roads, Other District Roads and Village Roads. About 65 per cent of freight and 86.7 per cent passenger traffic is carried by the roads. Roads are used not only by the motorized transport, but also by the non-motorized transport as well as pedestrians.

2. More than 100,000 Indians die every year in road accidents. More than a million are injured or maimed. Many years ago, a study found that road accidents cost the country some Rs.550 billion every year. India's share in world fatalities is increasing. So far, China topped the list of most number of fatal road accidents and India finished a close second. However, the latest statistics show that while China has managed to decrease its fatalities, India has not learnt much. The total road length of India is about 12 per cent of the total world road network, but India's percentage in road injury is 5.4 per cent of the world total.

3. Is it due to lack of apt provisions in our law that travel through Indian roads is a tryst with Death? This crucial question has been engaging the attention of the Law Commission of India for quite some time.

4. Driving recklessly/dangerously, non-observance of traffic rules, like crossing speed limit, jumping red light, driving without driving licence, driving by untrained/disqualified driver, driving by minor, driving under the influence of liquor, driving while talking on mobile, driving without helmet, ill-health of vehicle and bad road infrastructure are amongst the causes of road accidents.

5. In view of the above, the Law Commission prepared a Consultation Paper on this important subject taken up ***suo moto***, with a view to elicit views/suggestions/comments from all those concerned. It was earlier thought that the Commission would hold a seminar on the subject, but this idea could not materialize owing to paucity of funds. However, the recommendations in this Report have been made after taking into consideration the responses received.

6. The Law Commission has recommended amendment in Section 304-A of the Indian Penal Code to make the offence of rash and negligent driving punishable with the maximum term of imprisonment of ten years, instead of two years as at present provided. It has also been recommended that causing death of any person through driving under the influence of drink or drugs should be punishable with the minimum term of imprisonment of two years. We have also recommended various other legal measures to combat road accidents.[3]

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[3] **234th Report on Legal Reforms** to Combat Road Accidents Submitted to the Union Minister of Law and Justice, Ministry of Law and Justice, Government of India by Dr. Justice AR. Lakshmanan, Chairman, Law Commission of India, on the 22nd day of August, 2009.

1.3 The Indian civil courts are already overburdened with the number of cases. Hence, to sort out the disputes/litigation regarding motor vehicular accidents there is a need of separate and distinct set-up specifically dealing with accident cases and that too speedily.

2. Term: Accident

2.1 The term 'accident' means an undesirable or unfortunate happening that occurs unintentionally and usually results in harm, injury, damage, or loss; casualty; mishap as per Automobile Accidents Law. Such a happening resulting in injury that is in no way the fault of the injured person for which compensation or indemnity is legally sought.

2.2 An accident is an incident that happens unexpectedly and unintentionally. It is occasioned either by human failure or human negligence. Viewed from the above perspective every road accident is an avoidable happening. The history of humankind has been one of conquests over the inevitable. The resignation to fate has never been the accepted philosophy of human life. Challenges have to be met to make human life more meaningful. This is how the constitutional philosophy behind Article 21 has been evolved by the Indian courts over a long period of time. *[S. Rajaseekaran V. Union of India & Ors., Writ Petition (Civil) No.295 OF 2012, (2014) 6 SCC 36.]*

2.3 The Constitution of India guarantees life and personal liberty under Article 21 which provides: "***No person shall be deprived of life or personal liberty except according to procedure established by law.***" When death occurs due to road accident involving a motor vehicle, it is deprivation of life otherwise than according to the procedure established by law.

3. Doctrine of "res ipsa loquitur"

3.1 It is a legal Latin phrase which translates to "***the thing or event speaks for itself.***" The doctrine indicates that there is no need to provide any further detail, the facts of the case are sufficient to find liability. Generally, because the facts are so obvious, a party does not need to provide further explanation[4].The said maxim is applied in the cases of negligence relating to motor accidents and plays a key role in deciding the cases by the civil courts as well as by the criminal courts. By the application of this doctrine the courts presume rash and negligent driving where the facts are eloquent enough to lead to that conclusion. Thus where the victim got hooked to the vehicle and was dragged for some distance before the vehicle came to a stop, rash and negligent driving was apparent and was treated as established.

3.2 The evolution of the above doctrine and its application to the Indian context has brought much needed relief to the victims of road accidents. As the number of road accidents increased, untold hardship suffered by the victims and their dependents came to the notice of the courts, which through judicial verdicts, increased the pressure on the drivers reminding them of their obligation as users of the public highways. They came very close to telling the drivers that they had the dutyto so drive their vehicles as to be able to stop them within the fraction of a second.

3.3 This appears to flow from the following observation made by the Supreme Court in *R.D. Hattangadi v. Pest Control (India) Pvt. Ltd., 1995 SCC (Crl) 250*– "There has never been any doubt that those who use highways are under a duty to be careful and the legal position to-day is quite plain that any person using the road as a motorist will be liable, if by his action he negligently causes physical injury to anybody else."[4]

[4] http://www.translegal.com/legal-latin/res-ipsa-loquitur

4. Motor Vehicles Act

4.1 In 1988 a new Motor Vehicles Act (hereinafter referred to as the Act) was introduced to replace the Motor Vehicles Act, 1939 as the need was felt that the Act should take into account the changes in the road transport, pattern of passenger and freight movements, development of road network, road safety standards and pollution control measures. The Supreme Court in *M.K. Kunhimohammedv. P.A. Ahmedkutty AIR 1987 SC 2158* had made certain suggestions to raise the limit of compensation payable as a result of motor accidents in respect of death and permanent disablement in the event of there being no proof of fault on the part of the person involved in the accident and also in hit and run motor accidents and to remove certain disparities in the liability of the insurer to pay compensation depending upon the class or type of vehicles involved in the accident. The Act of 1988 sought to rationalize the different definitions, provide for stricter procedures relating to grant of driving licenses and the period of validity thereof, administration of the Solatium Scheme by the General Insurance Corporation and for payment of enhanced compensation in cases of 'no fault liability' and in hit and run motor accidents. This Act came into force with effect from 1.7.1989.

4.2 In 1990 a Review Committee was constituted to examine and review the Act of 1988 and it made various recommendations. Based on the same, the Act of 1988 was amended in 1994 and it simplified the procedure for grant of driving licenses, increased the amount of compensation of the victims of hit and run cases, removed the time limit for filing of application by road accident victims for compensation, made more stringent the punishment in case of certain offences and provided for a new pre-determined formula for payment of compensation to road accident victims on the basis of age/ income which was more liberal and rational. It also made provision to incorporate the recommendation of the 119th Report of the Law Commission regarding the jurisdiction of the Claims Tribunals. The Act has been amended thereafter as well.

4.3 The Act is a social welfare legislation and the provisions underlying it are beneficent in nature. It has been held that the Act being a beneficent legislation should be given a liberal construction rather than adopting a narrow and pedantic approach and technicalities should not come in the way of doing justice.

5. Definitions

5.1 The Act contains various definitions and the Act would apply in case of motor vehicles which have been defined in section 2(28) as meaning *"any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer, but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty five cubic centimeters"*. It makes distinction between vehicles on the basis of being 'heavy goods vehicle' [defined in section 2(16)], 'heavy passenger motor vehicle' [defined in section 2(17)], 'light motor vehicle' [defined in section 2(21)], 'medium goods vehicle' (defined in section 2(23)], 'medium passenger motor vehicle' [defined in section 2(24)], 'private service vehicle' [defined in section 2(33)], 'public service vehicle' [defined in section 2(35)] and 'transport vehicle' [defined in section 2(47)].

6. Mandatory Insurance

6.1 The Act makes it mandatory to get a vehicle insured against third party risk. Under section 146 of the Act, no person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements as laid down. However, this provision does not apply to any vehicle owned by the Central or State Government and

used for Government purposes unconnected with any commercial enterprise. Further the Government can also exempt vehicles owned by the Central Government or a State Government, if the vehicle is used for Government purposes connected with any commercial enterprise, any local authority, any State transport undertaking. Even in such cases, it has been provided that no such order shall be made in relation to any such authority unless a fund has been established and is maintained by that authority for meeting any liability arising out of the use of any vehicle of that authority which that authority or any person in its employment may incur to third parties. Contravention of this provision is punishable under section 177 of the Act.

6.2 It has been further provided in section 147 that the policy of insurance must insure the person or classes of persons specified in the policy i.e. the insured against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including owner of the goods or his authorized representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place and against the death of or a bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place. According to this section the policy does not require covering the liability of death or injuries arising to the employees in the course of employment except to the extent of liability under the Workmen Compensation Act *(Oriental Insurance Co. Ltd. v. Dyamavva (2013) 9 SCC 406).*Chapter XI of the Motor Vehicles Act, 1988 providing for compulsory insurance of vehicles against third-party risks is a social welfare legislation meant to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles is with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object. (*National Insurance Company Limited v Laxmi Narain Dhut, 2007 (Arising out of SLP (C) No.25305 of 2004).* In case the vehicle is not insured, the owner of the vehicle would be liable.

6.3 While the passengers in a public service vehicle were covered, the passengers in a private vehicle or pillion rider on a two wheeler were not covered. However it has been held by the Supreme Court in *National Insurance Company Ltd. v. Balakrishnan & another Civil Appeal No.8163 of 2012 decided on 20.11.2012* where in reference was made to various judgments including of the High Court of Delhi in *Yashpal Luthra v. United India Insurance Co. Ltd. and others MAC. APP. No.176/2009* and the circular of Insurance Regulatory and Development Authority (IRDA) that:

> "21. In view of the aforesaid factual position, there is no scintilla of doubt that a "comprehensive/ package policy" would cover the liability of the insurer for payment of compensation for the occupant in a car. There is no cavil that an "Act Policy" stands on a different footing from a "Comprehensive/ Package Policy". As the circulars have made the position very clear and the IRDA, which is presently the statutory authority, has commanded the insurance companies stating that a "Comprehensive/ Package Policy" covers the liability, there cannot be any dispute in that regard. We may hasten to clarify that the earlier pronouncements were rendered in respect of the "Act Policy" which admittedly cannot cover a third party risk of an occupant in a car. But, if the policy is a "Comprehensive/ Package Policy", the liability would be covered."

6.4 Thus a distinction has been made between a comprehensive/ package policy which would cover the liability of the insurer for payment of compensation for the occupant in a car or a pillion rider on a two wheeler and an "Act Policy" which would not cover a third party risk of an occupant in a car. In case of the former additional premium is required to be paid for the passengers whereas no such premium is paid in the latter case.

7. Compensation

7.1 The Act makes special provisions for award of compensation to victims of accidents or to their dependents. As regards the hit and run motor accident i.e. an accident arising out of the use of a motor vehicle or motor vehicles the identity whereof cannot be ascertained in spite of reasonable efforts for the purpose, the Act provides for a *solatium fund* from which the compensation is to be paid in respect of death or grievous hurt (sections 161, 162 and 163). It has been held by the Delhi High Court in a recent judgment that the Victim Compensation Scheme formulated by the Government would also apply in cases of 'hit and run motor accidents'. Apart from the said provisions, the Act provides for compensation under 3 heads:

i) No fault liability: Section 140
ii) Payment of compensation on structured formula basis: Section 163A
iii) Fault liability: Section 166

8. No fault liability

8.1 *Chapter 10 with Sections 140 to 144* provides for compensation on *'No Fault'* basis. It is often termed as 'interim compensation' but that is a misnomer as it is a provision in itself though compensation under this provision is resorted to provide immediate succour to the victims or their dependents and it does not take away the right to claim compensation on the principle of fault. According to this provision Rs.50,000/- (Rupees Fifty Thousand only) is to be given to the kith and kin of the deceased and Rs.25,000/- (Rupees Twenty Five Thousand only) to the victim in case of permanent disablement. The compensation under Section 140 is made payable, if *prima facie* evidence of the following is available;

1. Accident arising out of the use of a motor vehicle or motor vehicles; and
2. Death or permanent disablement has resulted therefrom.

8.2 Under this provision, negligence is not required to be proved, the claimant is not required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person. Further the compensation is not refundable even if negligence is not proved and a claim for compensation shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made, nor shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement, as such the defence of contributory negligence would not be available where compensation is claimed under section 140. The insurer is not permitted to raise any defence relating to negligence of the applicant. The word 'use' in the expression ***"accident arising out of the use of a motor vehicle"*** under this section cannot be given a restrictive meaning. Thus, it will cover the case where workmen engaged in loading a motor vehicle were electrocuted due to high tension wire drawn above that place *(Babu v. Remensen, MANU/KE/0016/1996 : AIR 1996 Ker 95).*

8.3 Permanent disablement has been defined under section 142 of the Act. It provides that permanent disablement of a person shall be deemed to have resulted from an accident if such person has suffered by reason of the accident any injury or injuries involving—

a. Permanent privation of the sight of either eye or the hearing of either ear, or privation of any member or joint; or
b. Destruction or permanent impairing of the powers of any members or joint; or
c. Permanent disfiguration of the head or face.

8.4 Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, the percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Sometimes it is wrongly assumed that a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced shows 45% as the permanent disability, it is held that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation.*(Basappa S/o Sanganabasappa Bahvikatti v. Ramesh S/o Tangavelu and another,2015(1) SCC (Civil) 133).*

8.5 This section therefore attaches strict liability of the owner or the insurance company. However, for a claim exceeding the fixed sum of amount, the claimant has to establish fault and Section 141(1) specifically provides that the right to claim compensation under Section 140 in respect of death or permanent disablement of any person shall be in addition to any other right to claim compensation in respect thereof under any other provision of the Act or any other law for the time being in force. At the same time, compensation under Section 140 cannot be claimed alongside compensation under Section 163A and Section 141 specifically adverts to that.

8.6 The provisions of Chapter X of the Motor Vehicle Act shall also apply in relation to any claim for compensation in respect of death or permanent disablement of any person under the Employee's Compensation Act, 1923 (formerly Workmen's Compensation Act, 1923) resulting from an accident of the nature referred to in section 140.

9. Compensation on structured formula basis

9.1 Section 163-A was added by the amending Act 54 of 1994 w.e.f. 14.11.94 whereby a special provision for payment of compensation on structured formula basis has been made. This provision has been introduced to provide compensation to the victims without proving negligence or tortious act. Schedule-II appended to the Act gives the structured formula. Under this section, the owner of the motor vehicle or the authorized insurer shall be liable to pay in the case of *death* or *permanent disablement* due to accident *arising out of the use of motor vehicle* compensation as indicated in the Second Schedule to the legal heirs or the victim, as the case may be. The Supreme Court has held that an award under Section 163-A is final, independent and not in addition to the award in a claim petition under Section 166 where claim is sought on negligence basis. Thus, one can claim compensation under either of the sections but not under both *(Deepal Girishbhai Soni v. United India Ins. Co. Ltd. Baroda 1(2004) ACC 728 S.C.: AIR 2004 SC 2107). In Oriental Insurance Co. Ltd Vs Dhanbai Kanji Gandhiv AIR 2011SC 1138* the Supreme Court held that "*The remedy for payment of compensation under the section 163-A and section 166 of the Motor Vehicle Act, 1988 being final and independent of each other as statutorily provided, a claimant cannot pursue his remedies there under simultaneously. The claimant must opt/elect to go either for a proceeding under section 163- A or under section 166 of the Act, but not under both*".

9.2 As regards the question whether a claim petition filed under section 163-A can be converted to that under section 166 of the Act, in *New India Assurance Company Ltd VS Ashabai Kalyan Kothi & Ors 2009 ACJ 163* the Bombay High Court held that "*The Tribunal as well as this Court always has a power to allow the conversion of a claim petition under section 163-A into a claim petition under section 166 of the said Act*. The procedure is always a handmaid of justice. We are

dealing with a beneficial legislation which provides for payment of compensation to the legal representatives of the victims of an accident involving a motor vehicle. *The power of the Tribunal or this Court to allow conversion of the claim petition is discretionary."*It has also been held in *Prem Devi &Ors. v. Jagdish Kumar &Ors. (Delhi) 2013(3) AICJ 681*that:

> *"If a Petition under Section 166 of the Act is dismissed for want of proof of negligence on the part of the alleged tortfeasor, would a subsequent petition under Section 163-A on the same cause of action be barred. Admittedly, in the subsequent petition under Section 163-A of the Act, the Claimant would not be required to prove and plead the negligence. The subsequent petition would not be barred under Order 2 Rule 2 Civil Procedure Code as the claim under Section 163-A of the Act was not permissible in the earlier petition. The finding in the earlier petition would also not be res judicata against the Claimant, unless a finding is given by the Court that the vehicle alleged to be involved in the accident, was not involved in the accident.*
>
> *Thus, when there is no prohibition or embargo on filing a petition under Section 163-A after dismissal of a Petition under Section 166 of the Act, a victim cannot be debarred from amending a Petition under Section 166 to one under Section 163-A of the Act".*

9.3 However, the Court cannot suo moto convert the petition under Section 166 of the Act to award compensation under Section 163-A of the Act where the negligence is not proved. In *United India Insurance Company Ltd. v. Sheela Devi (Punjab and Haryana) (D.B.)2007(3) TAC 136* it was held that in a case where plea of non-applicability of procedure of Section 163A of the Act is to be upheld, claimant cannot be deprived of compensation under Section 166 of the Act. Thus a petition filed under section 163-A can be converted to one under section 166 and vice-versa a petition filed under section 166 can be converted to one under section 163-A.

9.4 Schedule-II has been adjudged as suffering from several mistakes and the Supreme Court has held that total reliance cannot be placed on this schedule. As such the calculations given in the Schedule are not taken but the multiplier is applied as per the schedule as also the deductions and the additions. This section is limited to those cases where the income of the deceased or the victim is claimed to be upto Rs.40,000/- p.a. It has been held that even when the claim is made on the basis of the income which is higher than Rs.40,000/- p.a., a petition under section 163-A can be maintainable if the Tribunal gives a finding that the income of the claimant was below Rs.40,000/- p.a. *[New India Assurance Co. Ltd. v. Nagjibhai Dmajibhai Gadesara 2008 (2) TAC 528 (Guj)]*

9.4 In a claim under section 166 the ***"fault or negligence should be proved"*** but not under section 163-A as the said section is based upon the "p**rinciple of *no fault liability".*** As per sub-section (2) of section 163-A, the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person**.** It has been held in the case of *Smt. Rita Devi &Ors. v. New India Assurance Co. Ltd. JT 2000 (SC) 355* that a conjoint reading of sub-clauses of Section 163A shows that a victim or his legal heirs are entitled to claim from the owner or insurance company a compensation for death or permanent disablement suffered due to accident arising out of the use of the motor vehicle without having to prove wrongful act or neglect or default of anyone. It was held that it was in the nature of beneficial legislation enacted with a view to confer the benefit of expeditious payment of a limited amount by way of compensation to the victims of an accident arising out of the use of a motor vehicle on the basis of no fault liability. In the matter of interpretation of a beneficial legislation, the approach of the Courts is to adopt a construction which advances the beneficent purpose underlying the enactment in preference to a construction which

tends to defeat that purpose. It was held that the word arising out of would imply that accident should be connected with the use of motor vehicle but the said connection need not be direct and immediate.

9.5 Recently the Supreme Court in *National Insurance Company Ltd. v. Sinitha (2012) 2 SCC 356* has held as under:

> *"At the instant juncture, it is also necessary to reiterate a conclusion already drawn above, namely, that Section 163A of the Act has an overriding effect on all other provisions of the Motor Vehicles Act, 1988. Stated in other words, none of the provisions of the Motor Vehicles Act which is in conflict with Section 163A of the Act will negate the mandate contained therein (in Section 163A of the Act). Therefore, no matter what, Section 163A of the Act shall stand on its own, without being diluted by any provision. Furthermore, in the course of our determination including the inferences and conclusions drawn by us from the judgment of this Court in Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala, as also, the statutory provisions dealt with by this Court in its aforesaid determination, we are of the view, that there is no basis for inferring that Section 163A of the Act is founded under the "no-fault" liability principle.*
>
> *In view of the above authoritative pronouncement of the Apex Court, it will be open to the owner or insurance company, as the case may be, to defeat a claim under Section 163-A of the Act by pleading and establishing through cogent evidence a 'fault' ground i.e. accident being result of 'wrongful act' or 'neglect' or 'default'. In claims falling under Section 163-A, the Tribunal can only grant compensation in terms of the Second Schedule of the Act. No amount not provided for in the Schedule can be awarded."*

9.6 However another Bench of the Supreme Court has not agreed with the views expressed in *Sinitha's case* and the matter stands referred to a larger bench in *United India Insurance Co. Ltd. v. Sushil Kumar and Another Civil Appeal No.9694 of 2013 dated 29.10.2013.*

10. Compensation on Fault Liability

10.1 In a petition filed under section 166, as per the settled law, the person, who brings the petition for compensation, must show that the respondent was negligent. For a person to be legally responsible for his action, it is essential to have evidence that he is at fault. For the purpose of such an action, although, there is no statutory definition of negligence, ordinarily, it would mean omission of duty caused either by omission to do something which a reasonable man guided upon those considerations, who ordinarily by reason of conduct of human affairs would do or be obligated to, or by doing something which a reasonable or prudent man would not do.[5] If a person is not driving negligently then he cannot be made liable.[6]

10.2 In *Rathnashalvan v. State of Karnataka, AIR 2007 SC 1064* the Supreme Court defined "rashness" as follows :- "Rashness" consists in hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury. The criminality lies in such a case in running the risk of doing such an act with recklessness or indifference as to the consequences."

10.3 In *State of Karnataka v. Muralidhar, AIR 2009 SC 1621* the Supreme Court defined word "negligence" as follows : "Negligence means omission to do some-thing with reasonable and prudent means granted by the consideration which ordinarily regulate human affairs or doing something which prudent and a reasonable man guided by similar considerations would not do." [7]

[5] *(2007) 10 S.C.C. 643.*
[6] Lachoo Ram and others v.Himachal Road Transport Corpn., 2014(13) SCC 254
[7] Himachal Pradesh Judicial Academy :Award of Compensation Under The Motor Vehicles Act, 1988 Guiding Principles For Motor Accidents Claims Tribunals :By Justice Deepak Gupta

10.4 At the same time it is established law that in a claim petition under Motor Vehicles Act, the standard of proof to establish rash and negligent driving by the driver of the offending vehicle is not at par with the criminal case where such rashness and negligence is required to be proved beyond all shadow of reasonable doubt. To determine the negligence of the driver of the offending vehicle it has been held in *National Insurance Company Ltd. vs Pushpa Rana & Another 2009 Accident Claims Journal 287* as follows:

> "The last contention of the appellant insurance company is that the respondents/claimants should have proved negligence on the part of the driver and in this regard the counsel has placed reliance on the judgment of the Hon'ble Apex Court in *Oriental Insurance Company Ltd. V. Meena Variyal (supra)*. On perusal of the award of the Tribunal, it becomes clear that the wife of the deceased had produced: (i) certified copy of the criminal record of criminal case in FIR No.955 of 2004, pertaining to involvement of offending vehicle (ii) criminal record showing completion of investigation of police and issue of charge sheet under sections 279/304A, Indian Penal Code against the driver; (iii) certified copy of FIR, wherein criminal case against the driver was lodged; and (iv) recovery memo and mechanical inspection report of offending vehicle and vehicle of deceased. These documents are sufficient proofs to reach the conclusion that the driver was negligent. Proceedings under the Motor Vehicle Act are not akin to proceedings in a civil suit and hence strict rules of evidence are not required to be followed in this regard. Hence, this contention of the counsel for the appellant also falls face down. There is ample evidence on record to prove negligence on part of the driver."

10.5 In *Kaushnamma Begum and others v. New India Assurance Company Limited 2001 ACJ 428,* it was inter alia held by the Hon'ble Supreme Court that the issue of wrongful act or omission on the part of the driver of the motor vehicle involved in the accident has been left to a secondary importance and mere use or involvement of motor vehicle in causing bodily injury or death to a human being or damage to property would make the petition maintainable under Sections 166 and 140 of the Motor Vehicle Act. In *Basant Kaur and others v. Chattar Pal Singh and others 2003 ACJ 369 MP (DB)* it was observed that registration of criminal case against the driver of the offending vehicle was enough to record a finding that the driver of the offending vehicle was responsible for causing the accident.

11. Motor Accident Claims Tribunal

11.1 Chapter 12 of the Act provides for the constitution of Claims Tribunal and adjudication of claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damage to any property of a third party. The claims for compensation can be those under section 140 or section 163A or section 166. Further the Tribunals deal with claims relating to loss of life/property and injury resulting from Motor Accidents. The Claims Tribunals are presided over by Judicial Officers from the State Higher Judicial Service and are under the direct supervision of the High Court of the respective State. Being a welfare legislation the scope of the claim has been widened to include claim in respect of accident by a stationary vehicle, injuries suffered by passengers in bomb blast, injuries due to fire in petrol tanker as also murder in a motor vehicle. The limitation period for filing a claim petition has been done away with so a claim petition can be filed even several years after the date of the accident.

12. Who can file a claim?

12.1 In case of damage to property, the application for compensation has to be made by the owner of the property damaged. It is implied that in case of death of owner of the property, the legal representatives of the deceased owner can competently claim compensation.[8] Apart from that:

[8] [Dr. R. G. Chaturvedi, "Law of Motor Accident Claims and Compensation" (2010) p.642]

1. People, who have been injured in accidents on the road, can themselves file for compensation or route the claims through their advocates.

2. But accident victims, who are below 18 years of age, cannot file for compensation themselves; they have to go through their natural or legal guardians.

3. Legal heirs of people who have died in accidents can also claim compensation; alternatively, they can route their claims through their advocates.[9]

12.2 It has been held in *Sarla Verma vs. Delhi Transport Corporation (2009) 6 S.C.C. 121* as under:

> *"Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependent and the mother alone will be considered as a dependent. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependents, because they will either be independent and earning, or married, or be dependent on the father. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependent……"*

12.3 In view of the judgment of Supreme Court in *Manjuri Bera vs. Oriental Insurance Company (2007) 10 S.C.C. 643,* even the brothers or father would be entitled to the compensation under section 140 of Motor Vehicles Act, because the liability under section 140 of the Motor Vehicles Act does not cease because there is absence of dependency. Moreover, the legal heirs who were not dependent on the deceased would be entitled to compensation for loss of estate. But an appeal filed by the injured- claimants for personal injuries cannot be continued by his legal heirs as stated in the case of *Smt. Ram Ashari vs. H.R.T.C, 2005 (1) Sim LC 359* except in respect of the pecuniary heads. *V. Mepherson and Anr. v. Shiv Charan Singh &Ors. 1 (1998) ACC 6* relied on judgment of Punjab and Haryana High Court in *Joti Ram &Ors. v. Chaman Lal &Ors. 1984 ACJ 645* and held that in a claim for damages for injuries suffered by a deceased, the claim so far as it relates to non-pecuniary damages, i.e. pain and suffering etc suffered by the injured would abate on the death of the injured. The right to sue would survive in case of the pecuniary damages which could be on account of special diet, purchase of medicines, conveyance etc. This has been reiterated in *Bajaj Allianz General Insurance Company Ltd. v. Kamla Bist III (2010) ACC 55* and in *Rajani Sharma & Ors. v. Bodhu & Ors. MAC. APP.877/2010 and National Insurance Company Ltd. v. Smt. Rajani Sharma &Ors. MAC. APP.49/2011 decided on 15.10.2012.*

13. What all documents should accompany the petition?

1. Copy of the FIR registered in connection with the accident, if any or the DD entry.
2. Copy of the MLC/Post Mortem Report/Death Report as the case may be.
3. The documents of identity of the victim or the claimants and of the deceased in a death case.
4. Original bills of expenses incurred on the treatment alongwith treatment record.
5. Documents of the educational qualifications of the deceased, if any.
6. Disability Certificate, if already obtained, in an injury case.

[9] *Oriental Insurance Co. Ltd. vs. Raji Devi, (2008) 5 SCC 736 and FAO No. 49 of 2009, decided on 4/07/2011, titled as New India Insurance Co. Ltd. vs. Smt. Sarita Devi.*

7. The proof of income of the deceased/injured.

8. Documents about the age of the victim.

9. The cover note or the insurance policy, if any.

10. An affidavit detailing the relationship of the claimants with the deceased along with documentary proof.

11. Copy of Driving License of the driver, RC of the offending vehicle and other documents such as permit, if any.

12. Copy of charge sheet, if available, along with copy of site plan, mechanical inspection report of the vehicle.

14. Jurisdiction of Claims Tribunal

14.1 A plain reading of Section 166(2) shows the legislative intent to leave the filing of the claim petition totally at the option of the claimant, either to the claims tribunal having jurisdiction over the area where the accident took place, or to such tribunal within local limits of whose jurisdiction the claimant resides or carries on business or within local limits of whose jurisdiction the defendant resides. In other words, the claimant can file an application within the jurisdiction of claims tribunal:

i. Where the accident occurred, or

ii. Before the tribunal within local limits of whose jurisdiction, the claimant resides or carries on his business, or

iii. Within local limits of whose jurisdiction, the defendant resides.

14.2 In *Sanno Devi v. Balram [2007, ACJ 1881 (MP) DB]* it was held that jurisdiction of tribunal depends essentially on the fact whether there had been any use of motor vehicle and once it has been established, tribunal's jurisdiction cannot be held ousted on findings that it is negligence of other joint tortfeasor and not of the motor vehicle in question.

14.3 In *Mantoo Sarkar v. Oriental Insurance C. Ltd (2009 ACJ 564)* it was held by the Supreme Court of India that a victim of an accident arising out of use of motor vehicles may file a claim application to the Claims Tribunal within local limits of whose jurisdiction the claimant resides or carries on business. While it has been held that the provision would not allow the filing of the petition in the Claims Tribunal within whose jurisdiction the defendant carries on business, it was laid down that the petition could be filed where the policy issuing office of the insurance company is located *(New India Assurance Co. Ltd. v Kutiswar Pramanik & Another, 2010 ACJ 1749)*. The Supreme Court, in a recent judgement in *Malati Sardar* v. *National Insurance Company Limited Civil Appeal No.10 of 2016 decided on 5.1.2016* has held that there is no bar to a claim petition being filed at a place where the insurance company, which is the main contesting party in such cases, has its business.

14.4 As regards an accident occurring in a foreign country, the legal position is that a suit or proceeding can be filed in a court or tribunal having jurisdiction in relation with the place where the cause of action or part thereof had arisen *(Civil Procedure Code, 1908, Section 20)*. Where a bus was booked at Delhi, part of cause action had arisen in India and it was held that the claimants could file a claim in the tribunal having jurisdiction over the place of residence of the claimant under section 166(2) of the Act *(Sarbati v. Anil Kumar, 2006 ACJ 2532 (P&H)*. In the above case, a bus for pilgrimage from Delhi to Kathmandu was booked at Delhi and the vehicle was registered in India. The bus fell into a river in the territory of Nepal. It was held that a claim under section 163A of the Act was maintainable in a tribunal within the State of Punjab. It was further held that the Motor Vehicles Operations and Contiguous

Counties Rules, 1963 had no application, since the rules could operate only if the claim was filed in Nepal. Eventually, the insurer was held liable.

14.5 Section 175 of the Act, 1988 bars the jurisdiction of Civil Courts where any Claims Tribunal has been constituted in respect of "*any question relating to any claim for compensation which may be adjudicated upon by the Claims tribunal for that area, and no injunction in respect of any action taken or to be taken by or before the Claims Tribunal in respect of the claim for compensation shall be granted by the Civil Court*".

15. Procedure to be followed by the Claims Tribunal

15.1 The Act does not conceive of a Claims Tribunal to be a civil court and the expression used is Claims Tribunal. Section 169 lays down that the claims tribunal may, subject to any rules that may be made in this behalf, follow such *summary* procedure as it thinks fit. Further the Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed. In *Vatticherukuru Village Panchayat v. Nori Venkataraman Deehsithulu (1991 (5) JT 140)* it was held by the Apex Court that the procedure before the tribunal is simple and not hidebound by intricate procedure of pleadings and trial, admissibility of the evidence and proof of facts according to law. Therefore, there is abundant flexibility in the discharge of the functions with greater expedition and in an inexpensive manner. In *Mayur Arora v. Amit @ Pange and others 2011 (1) TAC 878* the High Court of Delhi deprecated the practice of dealing with claims petitions like regular civil suits and referred to the judgment of the Supreme Court in *New India Assurance Co. Limited v. Anita order dated 6th January, 2010 in SLP (Civil) No. 35537/2009* where it was held:

> *"We may also observe that a Tribunal constituted under the Act is not a regular Court and it is required to decide applications filed for compensation by adopting a summary procedure consistent with the rules of nature justice (Section 168 and 169 of the Act). By virtue of Section 169, the Tribunal is clothed with the powers of Civil Court for the purpose of taking evidence on oath, enforcing the attendance of witnesses and compelling the discovery and production of documents and material objects but there is nothing in the Act from which it can be inferred that the Tribunal is bound by the technical rules of evidence. Therefore, the Tribunal cannot be faulted for having allowed the parties to lead secondary evidence. Rather, that was the only course available to the Tribunal for doing justice to the parties because the original file was lost in 1994 and the case had to be decided on the basis of reconstructed file."*

15.2 Thus the Tribunals are to follow a summary procedure. The injured or the legal representatives of deceased can file claim application in a prescribed format making driver, owner and insurer as party. However, the Driver is not a necessary party in some states. For e.g. in the *Rajasthan Motor Accident Claims Tribunal Rules only owner and insurer are required to be parties*.

16. Heads of Compensation

16.1 The Tribunals as is clear are to mainly deal with claims for compensation filed on account of:

a) Death
b) Injury whether simple or grievous injury and including permanent disability
c) Damage to Property

16.2 Further the claimant is entitled to interest on the compensation awarded *pendente lite* as well as till the realization of the award amount.

16.3 As regards damage to property, the compensation would be based on the actual damage suffered and the expenses incurred in repairing the damage to the property.

17. Compensation in a death case

17.1 There was a lot of uncertainty as to how the compensation was to be computed but the position has been more or less settled by the judgment of the Supreme Court in *Sarla Verma's case (supra)* which has been followed in the subsequent cases. The Supreme Court has laid down how the compensation has to be computed and the principles to be followed in that regard. It was observed:

> *"Basically only three facts need to be established by the claimants for assessing compensation in the case of death : (a) age of the deceased; (b) income of the deceased; and the (c) the number of dependents. The issues to be determined by the Tribunal to arrive at the loss of dependency are (i) additions/deductions to be made for arriving at the income; (ii) the deduction to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference of the age of the deceased. If these determinants are standardized, there will be uniformity and consistency in the decisions. There will lesser need for detailed evidence. It will also be easier for the insurance companies to settle accident claims without delay. To have uniformity and consistency, Tribunals should determine compensation in cases of death, by the following well settled steps."*

17.2 The steps to be followed were also laid down the first step being ascertaining the multiplicand. For this the income of the deceased per annum should be determined. Out of the said income a deduction should be made in regard to the amount which the deceased would have spent on himself by way of personal and living expenses. The balance, which is considered to be the contribution to the dependant family, constitutes the multiplicand.

17.3 The next step is ascertaining the multiplier. For this having regard to the age of the deceased and period of active career, the appropriate multiplier should be selected from the table which was provided.

17.4 The third step is the actual calculation and the annual contribution to the family (multiplicand) when multiplied by such multiplier gives the 'loss of dependency' to the family. Thereafter, a conventional amount is added as loss of estate. Where the deceased is survived by his widow, another conventional amount should be added under the head of loss of consortium. But no amount is to be awarded under the head of pain, suffering or hardship caused to the legal heirs of the deceased. The funeral expenses, cost of transportation of the body (if incurred)and cost of any medical treatment of the deceased before death (if incurred) should also added.

17.5 Regarding the question of addition to income for future prospects, it was observed that generally the actual income of the deceased less income tax should be the starting point for calculating the compensation. The question is whether actual income at the time of death should be taken as the income or whether any addition should be made by taking note of future prospects. It was held:

> *"In view of imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. [Where the annual income is in the taxable range, the words*

`actual salary' should be read as `actual salary less tax']. The addition should be only 30% if the age of the deceased was 40 to 50 years.

There should be no addition, where the age of deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardize the addition to avoid different yardsticks being applied or different methods of calculations being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances."

17.6 This judgment has been followed in subsequent cases and in the case of *Rajesh v. Rajbir 2013 (9) SCC 54* which has been followed *in Munna Lal Jain and another v. Vipin Kumar Sharma and others Civil Appeal No.4497 of 2015 decided on 15.5.2015*the Supreme Court held as under:

"11. Since, the Court in Santosh Devi's case (supra) actually intended to follow the principle in the case of salaried persons as laid in SarlaVerma's case (supra) and to make it applicable also to the self-employed and persons on fixed wages, it is clarified that the increase in the case of those groups is not 30% always; it will also have a reference to the age. In other words, in the case of self-employed or persons with fixed wages, in case, the deceased victim was below 40 years, there must be an addition of 50% to the actual income of the deceased while computing future prospects. Needless to say that the actual income should be income after paying the tax, if any. Addition should be 30% in case the deceased was in the age group of 40 to 50 years."

"12. In SarlaVerma's case (supra), it has been stated that in the case of those above 50 years, there shall be no addition. Having regard to the fact that in the case of those self-employed or on fixed wages, where there is normally no age of superannuation, we are of the view that it will only be just and equitable to provide an addition of 15% in the case where the victim is between the age group of 50 to 60 years so as to make the compensation just, equitable, fair and reasonable. There shall normally be no addition thereafter."

17.7 Thus an addition of 15% was allowed in the age group of 50 to 60 years and the benefit of future prospects was extended to self-employed persons and persons with fixed wages. However the latter part stands referred to a larger bench in view of the conflicting views on the same. The Supreme Court in case of *Neeta v. Div. Manager, MSRTC, Kohlapur 2015 (1) RCR (Civil) 625*has held that even in case of private employment future prospects can be added.

17.8 As regards the question of deduction for personal and living expenses, it was held:

"Having considered several subsequent decisions of this court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependant family members is 4 to 6, and one-fifth (1/5th) where the number of dependant family members exceed six.

15. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor

would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent/s and siblings is likely to be cut drastically."

As regards the selection of multiplier, it was held:

"21. We therefore hold that the multiplier to be used should be as mentioned in column (4) of the Table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

17.9 Thus applying the said principles the compensation payable is to be arrived at.

18. Compensation in case of death of a child

18.1 The problem arises when the compensation is to be awarded in case of death of a child, because, the child may not be earning anything and may be studying. One cannot measure on golden scales the value of opportunities one would have availed and at the same time could not have availed. The subject matter has to be guided by surrounding circumstances. In *R.K. Malik and Anr. V. Kiran Pal and Ors. AIR 2009 SC 2506*, the Hon'ble Supreme Court has observed as under:

"15. The real problem that arises in the cases of death of children is that they are not earning at the time of accident. In most of the cases they were still studying and not working. However, under no stretch of imagination it can be said that the parents, who are appellants herein, have not suffered any pecuniary loss. In fact, loss of dependency by its very nature is awarded for prospective or future loss. In this context Lord Atkinson aptly observed in Taff Vale Rly. Col. v. Jenkins (1911-13) All England Reporter 160 as follows:

"In the case of death of an infant, there may have been no actual pecuniary benefit derived by its parents during the child's lifetime. But this will not necessarily bar the parent's claim and prospective loss will found a valid claim provided that the parents establish that they had a reasonable expectation of pecuniary benefit if the child had lived."

16. Then, how does one calculate the pecuniary compensation for loss of future earnings and loss of dependency of the parents, grandparents etc. in the case of non-working student? Under the Second Schedule of the Act in the case of a non-earning person, his income is notionally estimated at Rs.15,000/- per annum. The Second Schedule is applicable to claim petitions filed under Section 163-A of the Act. The Second Schedule provides for the multiplier to be applied in cases where the age of the victim was less than 15 years and between 15 years but not exceeding 20 years. Even when compensation is payable under Section 166 read with 168 of the Act, deviation from the structured formula as provided in the Second Schedule is not ordinarily permissible, except in exceptional cases."

(See Abati Bezbaruah v. Dy. Director General Geological Survey of India (2003) 3 SCC 148; United India Insurance Company Ltd. v. Patricia Jean Mahajan (2002) 6 SCC 281 and UP State Road Transport Corp. v. Trilok Chandra (1996) 4 SCC 362).

18.2 It was thus held that though the child may not be earning at the time of the accident but under no stretch of imagination it can be said that the parents have not suffered any pecuniary loss and loss of dependency by its very nature is awarded for prospective or future loss. In this case the notional income of the deceased who was a student and non-earning person was taken as Rs.15,000/- per annum and as per the Second Schedule of the Motor Vehicle Act, 1988 the multiplier of 15 was to be applied in case the victim was upto 15 years. In *Kishan Gopal &Anr. v. Lala&Ors. (2014) 1 SCC 244*the Hon'ble Supreme Court, in case of a 10 year old boy took the notional income as Rs.30,000/-. Thus the loss of dependency comes to Rs.30,000/- X 15 = Rs.4,50,000/-. Further the Supreme Court awarded an amount of Rs.50,000/- towards loss of love and affection, funeral expenses and last rites i.e. the conventional heads and the total amount of compensation awarded was Rs.5,00,000/-.

19. Compensation in case of death of a housewife

19.1 Computing the income of a housewife has been a vexed question. However the High Court of Delhi in *Royal Sundaram Alliance Insurance Co. Ltd. v. Master Manmeet Singh &Ors. MAC. APP 590/2011 decided on 30.1.2012*, while laying down the principles for determination of loss of dependency on account of gratuitous services rendered by a housewife held:

> *"34. To sum up, the loss of dependency on account of gratuitous services rendered by a housewife shall be:-*
>
> *(i) Minimum salary of a Graduate where she is a Graduate.*
>
> *(ii) Minimum salary of a Matriculate where she is a Matriculate.*
>
> *(iii) Minimum salary of a non-Matriculate in other cases.*
>
> *(iv) There will be an addition of 25% in the assumed income in (i), (ii) and (iii) where the age of the homemaker is upto 40 years; the increase will be restricted to 15% where her age is above 40 years but less than 50 years; there will not be any addition in the assumed salary where the age is more than 50 years.*
>
> *(v) When the deceased home maker is above 55 years but less than 60 years; there will be deduction of 25%; and when the deceased home maker is above 60 years there will be deduction of 50% in the assumed income as the services rendered decrease substantially. Normally, the value of gratuitous services rendered will be NIL (unless there is evidence to the contrary) when the home maker is above 65 years.*
>
> *(vi) If a housewife dies issueless, the contribution towards the gratuitous services is much less, as there are greater chances of the husband's re-marriage. In such cases, the loss of dependency shall be 50% of the income as per the qualification stated in (i), (ii) and (iii) above and addition and deduction thereon as per (iv) and (v) above.*
>
> *(vii) There shall not be any deduction towards the personal and living expenses.*
>
> *(viii) As an attempt has been made to compensate the loss of dependency, only a notional sum which may be uptoRs. 25,000/- (on present scale of the money value) towards loss of love and affection and Rs.10,000/- towards loss of consortium, if the husband is alive, may be awarded.*
>
> *(ix) Since a homemaker is not working and thus not earning, no amount should be awarded towards loss of estate."*

20. Compensation in injury cases

20.1 As regards the injury cases, they can be simple injury cases or grievous injury cases and can also involve permanent disability. The law is now well settled that the compensation has to be awarded in personal injury cases under the following heads:- (1) for loss of earnings during the period of treatment (2) loss of future earnings on account of permanent disability (3) expenses suffered by him on his treatment, hospitalization, medicines, transportation, nourishing food etc. In addition, he is further entitled to non-pecuniary damages/general damages which include (1) damages for pain, suffering and trauma as a consequence of injuries and (2) loss of expectation of life. Thus both pecuniary and non-pecuniary damages have to be awarded and the latter would depend on the facts and circumstances of each case.

20.2 As regards disability, it is only in cases of permanent disability that compensation can be granted considering the percentage of permanent disability. However, as per the settled law, the percentage of permanent disability is not to be taken per se but the functional disability is considered i.e. the loss on the earning capacity of a person and accordingly, the percentage of loss may be more than the percentage of permanent disability or it may be less than the percentage of permanent disability. In *Raj Kumar v Ajay Kumar &Anr.(2011)1 SCC 343,* the Supreme Court has held that :

> *"4.....The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or tribunal has to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. Thus Tribunal has to assess whether the petitioners suffered loss of future earning on account of permanent disability."*
>
> *6.Disability refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human being. Permanent disability refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the period of treatment and recuperation, after achieving the maximum bodily improvement or recovery which is likely to remain for the remainder life of the injured. Temporary disability refers to the incapacity or loss of use of some part of the body on account of the injury, which will cease to exist at the end of the period of treatment and recuperation. Permanent disability can be either partial or total. Partial permanent disability refers to a person's inability to perform all the duties and bodily functions that he could perform before the accident, though he is able to perform some of them and is still able to engage in some gainful activity. Total permanent disability refers to a person's inability to perform any avocation or employment related activities as a result of the accident. The permanent disabilities that may arise from motor accidents injuries, are of a much wider range when compared to the physical disabilities which are enumerated in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ('Disabilities Act' for short). But if any of the disabilities enumerated in section 2(i) of the Disabilities Act are the result of injuries sustained in a motor accident, they can be permanent disabilities for the purpose of claiming compensation".*

8.....What requires to be assessed by the Tribunal is the effect of the permanently disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency).”

20.3 Thus it has been held that what requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured i.e. the functional disability and after assessing the loss of earning capacity in terms of percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings. After the income of a person who has suffered permanent disability is arrived at, the actual income is taken as per the percentage of functional disability and thereafter the multiplier as per the judgment in *Sarla Verma's case (supra)* is applied and future prospects are also to be considered but there is no deduction towards personal and living expenses of the deceased.

21. General Defences Raised by the Opposite Party

21.1 The general defences refer to the defences that can be legally taken by the insurance companies to avoid making payment of compensation under the Act. Under section 149 the insurer has the statutory liability to satisfy the judgment and award against the person insured in respect of third party risk. These defences include:

1. Use of vehicle for hire and reward.
2. For organizing racing and speed testing;
3. Use of transport vehicle not allowed by permit or a commercial vehicle being plied without a permit.
4. Driver not holding valid driving license or having been disqualified for holding such license ((In CIVIL APPEAL No. 4834 OF 2013 (Arising out of Special Leave Petition (Civil) No.5091 of 2009) *S. Iyyapan V. M/S United India Insurance Company Ltd. And Another*, a plea was raised by the insurance company that the driver was holding a valid driving licence to drive light motor vehicle but not a taxi i.e. a commercial vehicle so it was not liable to pay the compensation but the same was negative).
5. Policy taken is void as the same is obtained by non-disclosure of material fact or the policy was cancelled on account of the cheque issued towards the premium of the policy having bounced.

21.2 The insurance companies also raise defences regarding the fitness certificate not being valid, carrying of more than its registered capacity by the vehicle etc. but the courts construe the defences strictly. Moreover the law is now well settled that the insurance company has to establish that there was a conscious breach of the terms and conditions of the policy. Further the insurance company would first have to satisfy the liability towards third party though it may subsequently recover the amount from the insured. The issue was considered at length by the High Court of Delhi in *Sanjay v. Suresh Chand &Ors. F.A.O. No.445/2000 decided on 3.8.2012* and it was observed:

“The issue of satisfying the third party liability even in case of breach of the terms of insurance policy is settled by three Judge Bench report in Sohan Lal Passi v. P. Sesh Reddy, (1996) 5 SCC 21. As per Section 149(2) of the Motor Vehicles Act (the Act), an insurer is entitled to defend the action on the grounds as mentioned under Section 149(2)(a)(i)(ii) of the Act. Thus, the onus is on the insurer to prove that there is breach of the condition of the policy. It is well settled that the breach must be conscious

and willful. Even if a conscious breach on the part of the insured is established, still the insurer has a statutory liability to pay the compensation to the third party and will simply have the right to recover the same from the insured/tortfeasor either in the same proceedings or by independent proceedings as the case may be, as ordered by the Claims Tribunal or the Court. The question of statutory liability to pay the compensation was discussed in detail by a two Judge Bench of the Supreme Court in Skandia Insurance Company Limited v. Kokilaben Chandravadan, (1987) 2 SCC 654where it was held that exclusion clause in the contract of Insurance must be read down being in conflict with the main statutory provision enacted for protection of victim of accidents. It was laid down that the victim would be entitled to recover the compensation from the insurer irrespective of the breach of the condition of policy. The three Judge Bench of the Supreme Court in Sohan Lal Passianalyzed the corresponding provisions under the Motor Vehicles Act, 1939 and the Motor Vehicles Act, 1988 and approved the decision in Skandia. In New India Assurance Co., Shimla v. Kamla and Ors., (2001) 4 SCC 342, the Supreme Court referred to the decision of the two Judge Bench in Skandia, the three Judge Bench decision in Sohan Lal Passi and held that the insurer who has been made liable to pay the compensation to third parties on account of issuance of certificate of insurance, shall be entitled to recover the same if there was any breach of the policy condition on account of the vehicle being driven without a valid driving licence.

This Court in MAC APP. No.329/2010 Oriental Insurance Company Limited v. Rakesh Kumar and Others and other Appeals decided by a common judgment dated 29.02.2012, noticed some divergence of opinion in National Insurance Company Limited v. Kusum Rai &Ors., (2006) 4 SCC 250, National Insurance Company Limited v. VidhyadharMahariwala&Ors., (2008) 12 SCC 701; Ishwar Chandra & Ors. v. The Oriental Insurance Company Limited & Ors.(2007) 10 SCC 650 and Premkumari & Ors. v. Prahalad Dev & Ors., (2008) 3 SCC 193 and held that in view of the three Judge Bench decision in Sohan Lal Passi (supra) and Swaran Singh, the liability of the Insurance Company vis-à-vis the third party is statutory. If the Insurance Company successfully proves the conscious breach of the terms of the policy, then it would be entitled to recovery rights against the owner or driver, as the case may be."

21.3 Thus if the insurance company proves conscious breach of the terms of the policy, it would be entitled to recovery rights though first it would have to deposit the amount of compensation.

21.4 Another defence raised by the insurance companies is that the victim was a Gratuitous Passenger. In *New India Assurance Company Limited vs. Asha Rani* [11] *and others* the Supreme Court had an occasion to consider the correctness of its earlier decision rendered in*New India Assurance Company v. Satpal Singh's* [12] and it held that the insurance company would have no liability in respect of a gratuitous passenger. Subsequently, in *Oriental Insurance Company Limited vs. Devireddy Konda Reddy* [13], the Supreme Court again considered the same issue. Relying on *Asha Rani's* case the Supreme Court reiterated that the provisions of Motor Vehicles Act, 1988 do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods carriage and the insurer would have no liability therefore.

[11] (2003) 2 SCC 223
[12](2000) 1 SCC 237
[13](2003) 2 SCC 339

21.5 A defence may also be raised that the driver of the offending vehicle was in drunken condition but the same would be of avail to the insurance company if there is medical and other evidence to show the quantity of alcohol in the blood of the driver.

22. Section 170: Impleading insurer in certain cases.

22.1 If at any stage the insurance company feels that the owner and the victim/claimant have colluded with each other just to grab the claim from the insurance company, it can move an application under section 170 of the Motor Vehicles Act, 1988 to raise all the defences whatever be which could be raised by the owner/ insured of the vehicle before the Motor Accident Claim Tribunal.

23. Implementation/ Execution of the Award

23.1 An important aspect is how the award can be implemented or how it can be ensured that the claimant eventually gets the money. Section 168 (3) provides that when an award is made, the person who is required to pay any amount in terms of such award shall, within thirty days of the date of announcing the award by the Claims Tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct. As per the law, the claimant can file an execution petition against the party against whom the award has been made. The Supreme Court in *Rajasthan State Corporation, Jaipur v. Poonam Pahwa1997 ACJ 1049,* has held that Order XXI rule 1 CPC is applicable to the MACT. In Delhi, the same has been specifically incorporated in the Delhi Motor Vehicle Rules, 2009. Further directions have been given from time to time by the High Court regarding deposit of the award amount and its disbursal and in *Sobat Singh v. Ramesh Chandra Gupta and Another2011 ACJ 20162***,** it was directed:

> *"(i) Before or at the time of passing of the award, the Claims Tribunals shall examine the claimants to ascertain their financial condition and needs and shall pass an order with regard to their share, mode of disbursement, amount to be kept in fixed deposit and period of fixed deposit according to the financial condition of the claimants. (It has been noticed that, in many cases, the Tribunals have been passing the standard orders of disbursement and fixed deposits without examining the financial condition and needs of the claimants and the poor victims are left at the mercy of either accepting the order or again engaging the counsel to approach the Court for modification).*
>
> *(ii) At the time of examining the Claimants, the Claims Tribunals shall also ascertain the complete address of the claimants as well as their counsel. In the award, the Claims Tribunals shall specifically direct the Insurance company and/or the owner/driver, as the case may be, to deposit the award amount with the Tribunal and/or the Bank along with the interest upto the date of notice of deposit to the claimants with a copy to their counsel. The names and addresses of the claimants and their counsel for issuance of notice of deposit be mentioned in the award.*
>
> *(iii) If the award amount has been directed to be deposited by the Insurance*
>
> *Company with the bank, copy of the award be sent to the Nodal Officer of the Bank along with the Court stamped copy of the photographs and signatures of the claimants. The photographs and signatures of the claimants be taken at the time of examining them before or at the time of passing the award. Two sets of photographs and signatures should be taken, out of which one set should be sent to the Nodal Officer of the Bank along with the copy of the award and the second set should be retained in the Court record for future reference and/or any*

irregularity being pointed out. (The forwarding of the Court stamped photographs and the signatures of the claimants would ensure that no attempt is made to defraud the system). If possible, the proof of residence and the details of the Bank Account should also be collected from the claimant at the time of examining them and one stamped set of the same should also be forwarded to the Bank and the second set be retained in the Court record.

(iv) The Claims Tribunal shall fix a date for reporting compliance in the award itself.

The Claims Tribunals shall also direct the Insurance Company and/or driver or owner to place on record the proof of deposit of the award amount, the notice of deposit and the calculation of interest on the date fixed. Upon such proof being filed, the Claims Tribunal shall ensure that the interest upto date of notice of deposit has been deposited by all concerned.

(v) If the award amount is not deposited within the time provided in the award, the Claims Tribunals shall proceed to recover/execute the award in terms of the directions of this Court in the case of New India Assurance Co. Ltd. v. Kashmiri Lal 2007 ACJ 688, (which include imposing fine on the insurance company if it does not pay the amount in time).''

23.2 It has been emphasized time and again in various judicial pronouncements that as far as possible, the insurance companies should not delay the matter and they should at least deposit the admitted amount immediately.

23.3 For safeguarding the compensation amount, directions have been given by Supreme Court for preserving the award amount in the case of *Jai Prakash Vs. National Insurance Co. Ltd. and Others (2010) 2 SCC 607*. It has been directed that the amount can be directed to be deposited in the bank account and further kept in FDRs and:

a) The interest on the fixed deposits shall be paid monthly by automatic credit of interest in the savings account of the claimant.

b) The withdrawal from the aforesaid account shall be permitted to the claimant after due verification and the bank shall issue photo identity card to the claimant to facilitate identity.

c) No cheque book shall be issued to the claimant without the permission of the court.

d) The original fixed deposit receipts shall be retained by the bank in safe custody. However, the original pass book shall be given to the claimant along with the photocopy of the fixed deposit receipts. Upon the expiry of period of FDR the bank shall automatically credit the maturity amount in the saving account of the beneficiary.

e) The original fixed deposit receipts shall be handed over to the claimant on the expiry of the period of the fixed deposit receipts.

f) No loan, advance, or withdrawal shall be allowed on the said FDRs without the permission of the court.

g) On the request of the claimant, the bank shall transfer the saving account to any other branch/bank, according to the convenience of the claimant.

24. Directions of Supreme Court with respect to filing of accident information report (AIR):

24.1 Concerned with the delay in award of compensation in accident cases, the High Courts and Supreme Court have issued directions from time to time. Section 158(6) was incorporated in the Motor Vehicles Act in 1994 and it provides that SHO of the Police Station shall send Accident Information Report (AIR) to the Claims Tribunal within 30 days of the recording of the FIR and a copy to the concerned Insurance Company. The object of Section 158 (6) of the Motor Vehicles Act is that the police should set the motor accident claim into motion as police is the first agency to take cognizance of the accident and it has the entire material required for initiating the proceedings for compensation. In *General Insurance Council v. State of Andhra Pradesh, IV (2007) ACC 385 (SC)* the Supreme Court issued directions regarding the procedure in the motor accident trials and specifically on section 158(6) of the Motor Vehicle Act in said case as under:

> *"Since there is a mandatory requirement to act in the manner provided in Section 158 (6) there is no justifiable reason as to why the requirement is not being followed. It is, therefore, directed that all the State Governments and the Union Territories shall instruct, if not already done, all concerned police officers about the need to comply with the requirement of Section 158 (6) keeping in view the requirement indicated in Rule 159 and in Form 54. Periodical checking shall be done by the Inspector General of Police concerned to ensure that the requirements are being complied with. In case there is non-compliance, appropriate action shall be taken against the erring officials. The Department of Transport and Highway shall make periodical verification to ensure that action is being taken and in case of any deviation immediately bring the same to the notice of the concerned State Government/Union Territories so that necessary action can be taken against the concerned officials."*

24.2 Further Section 166 (4) of the Motor Vehicles Act was also incorporated in 1994 and it provides that the Claims Tribunal shall treat the Accident Information Report (AIR) under Section 158(6) as a claim petition. The object of Section 166(4) of the Motor Vehicles Act is that poor and helpless victims of the road accident may be ignorant of their rights and therefore, the cognizance of the claim for compensation be taken by the Claims Tribunal directly on the basis of the Accident Information Report of the police without the requirement of a separate claim petition being filed by the claimant. However, this provision was not being enforced as the police was not filing the Accident Information Report with the Claims Tribunal. In *Rajesh Tyagi and others v. Jaibir Singh and others FAO No.842/ 2003 decided on 21.4.2009*, directions were given to all concerned to follow the procedure laid down in the said two sections [the directions given in various judgments have been discussed in *Mayur Arora's case (supra)*]. Thereafter, orders have been passed time and again to make the system more effective. In *Jai Prakash v. National Insurance Company MANU/SC/1949/2009: 2010ACJ455,* the Supreme Court issued various directions for the said procedure to be followed and it issued the following directions to the Claims Tribunals:-

Directions to the Claims Tribunals:

1. The Registrar General of each High Court is directed to instruct all Claims Tribunals in his State to register the reports of accidents received under Section 158(6) of the Act as applications for compensation under Section 166(4) of the Act and deal with them without waiting for the filing of claim applications by the injured or by the family of the deceased. The Registrar General shall ensure that necessary Registers, forms and other support are extended to the Tribunal to give effect to Section 166(4) of the Act.

2. For complying with Section 166(4) of the Act, the jurisdictional Motor Accident Claims Tribunals shall initiate the following steps:

a) The Tribunal shall maintain an Institution Register for recording the AIR's which are received from the Station House Officers of the Police Stations and register them as miscellaneous petitions. If any private claim petitions are directly filed with reference to an AIR, they should also be recorded in the Register.

b) The Tribunal shall list the AIRs as miscellaneous petitions. It shall fix a date for preliminary hearing so as to enable the police to notify such date to the victim (family of victim in the event of death) and the owner, driver and insurer of the vehicle involved in the accident. Once the claimant/s appears, the miscellaneous application shall be converted to claim petition. Where a claimant/s files the claim petition even before the receipt of the AIR by the Tribunal, the AIR may be tagged to the claim petition.

c) The Tribunal shall enquire and satisfy itself that the AIR relates to a real accident and is not the result of any collusion and fabrication of an accident (by any 'Police Officer - Advocate -Doctor' nexus, which has come to light in several cases).

d) The Tribunal shall by a summary enquiry ascertain the dependent family members/ legal heirs. The jurisdictional police shall also enquire and submit the names of the dependent legal heirs.

e) The Tribunal shall categorise the claim cases registered, into those where the insurer disputes liability and those where the insurer does not dispute the liability.

f) Wherever the insurer does not dispute the liability under the policy, the Tribunal shall make an endeavour to determine the compensation amount by a summary enquiry or refer the matter to the Lok Adalat for settlement, so as to dispose of the claim petition itself, within a time frame not exceeding six months from the date of registration of the claim petition.

g) The insurance companies shall be directed to deposit the admitted amount or the amount determined, with the claims tribunals within 30 days of determination. The Tribunals should ensure that the compensation amount is kept in fixed deposit and disbursed as per the directions contained in *General Manager, KSRTC Vs. Susamma Thomas 1994 (2) SCC 176.*

h) As the proceedings initiated in pursuance of Section 158(6) and 166(4) of the Act, are different in nature from an application by the victim/s under Section 166(1) of the Act, Section 170 will not apply. The insurers will therefore be entitled to assist the Tribunal (either independently or with the owners of the vehicles) to verify the correctness in regard to the accident, injuries, age, income and dependents of the deceased victim and in determining the quantum of compensation.

24.3 The aforesaid directions to the Tribunals are without prejudice to the discretion of each Tribunal to follow such summary procedure as it deems fit as provided under Section 169 of the Act. Many Tribunals instead of holding an inquiry into the claim by following suitable summary procedure, as mandated by Section 168 and 169 of the Act, tend to conduct motor accident cases like regular civil suits. This should be avoided. The Tribunal shall take an active role in deciding and expeditious disposal of the applications for compensation and make effective use of Section 165 of the Evidence Act, 1872, to determine the just compensation."

[14] MOTOR ACCIDENT CLAIMS REFERENCER-Delhi Judicial Academy 2011 –By Justice J. R. Midha, JUDGE HIGH COURT OF DELHI

24.4 Directions were also issued to the Insurance Companies to deposit the admitted amount with the Claims Tribunals.[14]

24.5 In Delhi, the said procedure is being adhered to and directions have been given by the High Court from time to time. A format of the Detailed Accident Report has also been incorporated and it is mandatory for police officials to follow it and it also takes into account the impact on the victim. Once the DAR is filed before the MACT, it is treated as a claim petition.

25. Need for reforms in the Accident Cases

25.1 Most of the victims of the road accidents are poor people walking on the road or riding on bicycles/scooters. The drivers of the cars/trucks have least respect for the road users and they do not even care to stop and provide medical aid to the victims of the road accidents. The insurance companies wait for a case to be filed before Motor Accidents Claims Tribunal and on receipt of summons also, no steps are taken to resolve the case and the trial goes on for years. This is a matter of serious concern.

26. The reasons for delay in disposal of claim cases are as under:-

1. Delay in summon/service of the driver and owner.
2. Non-appearance of the driver and owner despite service of summons.
3. Non-production of the driving licence by the driver and the owner.
4. Non-production of the insurance policy, registration cover, fitness certificate and permit by the owner.
5. The plea of the owner that he has sold the vehicle before the accident.
6. Avoidance of liability by the insurance company on the ground that the driver and owner are not producing the relevant documents.
7. In the case of uninsured vehicles, claimants are unable to enforce the award against the owner.

26.1 This calls for reforms in the system for awarding compensation to the victims/ dependents and if the procedure prescribed in section 158 (6) is strictly followed, it would go a long way in alleviating the hardship faced by the victims or their dependents.

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[Virtue is harder to be got than a knowledge of the world; and if lost, is seldom recovered. Sheepishness and ignorance of the world, the faults imputed to education are incurable evils. Vice is the more stubborn, as well as the more dangerous evil and therefore, in the first place, to be fenced against. (John Locke, Some Thoughts Concerning Education)]

Session V
11.15 AM – 1.15PM
Total Time: 2 Hours

MODULE FOR TRAINING OF PANEL LAWYERS ON PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

– *Geetanjli Goel*[1]

SESSION PLAN

Objective

1. To provide the young lawyers grounding in concept and law relating to domestic violence.
2. To give them clear perspective of topics such as domestic relationship, shared household.
3. To give them an understanding of the reliefs that can be sought under the Protection of Women from Domestic Violence Act, 2005.

Expected learning outcome

1. Participants will be able to draft pleadings when the client seeks reliefs under the Act or seeks to defend against an application under the Act including for interim reliefs.
2. Participants will be able to argue for and against a prayer for orders under the Act.
3. Participants will be able to identify the grounds of appeal against an order of the trial court under the Act.
4. Participants will be able to take appropriate steps for enforcement of the orders passed under the Act.
5. Participants will also get an idea of the other laws under which relief can be sought.

Programme

1. Introduction 30 minutes

Trainer will familiarise the participants with the social scenario and the gravity of the problem of domestic violence leading to the enactment of the Act and introduce the scheme of the Act. He/she can introduce the concept of domestic violence and other relevant terms under the Act and discuss the reliefs which can be sought under the Act, how the orders can be enforced and also inform about the related laws in this regard.

2. Group Discussions (Presentation and whole group discussions) 1 hour

Participants will be divided in groups of 4-6 and they will be asked to find the answers to the questions in the cases. Each group will present its views to the whole group for a whole group discussion. The resource person will provide the points missed by the participants and will present a wholesome view of the topics.

3. Quiz 25 minutes

This is not a competitive or evaluative quiz but only questions raised to evoke previous experience and to generate a discussion. This is an individual exercise. The participants will be given 10 minutes time to answer the questions. This will be followed by the trainer compiling/asking for the answers and raising a discussion giving the law on the subject.

[1] Director, NALSA and Officer of Delhi Higher Judicial Service.

4. Concluding Remarks 05 minutes

The remarks can be made at the end by the trainer or by one of the participants or by the visiting dignitary.

Training methods:

1. Lecture
2. Group Discussion & presentation
3. Quiz (experiential).

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Activity for Session V- Protection of Women from Domestic Violence Act, 2005

Reading for Group Discussion- I

Sushila has been married to Ramesh for 8 years. She is thrown out of the matrimonial home. She seeks relief under the Protection of Women from Domestic Violence Act, 2005.

The Secretary, Taluka Legal Services Committee has assigned the case to you.

On interviewing Sushila you find the following facts which she can raise:

1) She has one son aged 5 years and one daughter aged 3 years.

2) She was subjected to frequent dowry demands and beatings by her husband and in laws.

3) She was thrown out of the matrimonial home and is now residing at her parental home.

4) Her children were kept by her husband and in laws.

5) She has no source of income.

6) Her stridhan and other items were also retained by her in laws.

Questions for group discussion

1. Can Sushila seek an order that she be taken back in the matrimonial home or be provided alternative residence?
2. Can Sushila ask for the return of her stridhan and other items?
3. Can Sushila claim the custody of her children?
4. Can Sushila claim maintenance from her husband?
5. Can Sushila seek compensation for the wrongs done to her?
6. What would you do first of all – would you try for reconciliation and, if so, how?
7. If you decide to go to the Court, what would be the frame of your application or would you first approach the designated Protection Officer?
8. What factors do you have to show to make out your case for reliefs under the Act?
9. Would you also move an application for interim relief, and if so what would be the frame of such an application?
10. What other remedies would you suggest to her?

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Reading for Group Discussion- II

Deepali has been staying with Amit for about 2 years. Amit has now left her and states that he would get married to a girl of his parents' choice. She seeks relief under the Protection of Women from Domestic Violence Act, 2005.

The Secretary, Taluka Legal Services Committee has assigned the case to you.

On interviewing Deepali you find the following facts which she can allege:

1. She states that Amit had married her whereas Amit denies any marriage had ever taken place.
2. Amit is earning a handsome amount every month whereas she is not working anywhere.
3. She had broken of all relations with her parents in order to be with Amit.
4. Amit is refusing to pay the rent for the room where they were residing.

Questions for group discussion

1. Can Deepali seek relief under the Act?
2. Can she ask for maintenance and compensation?
3. Can she seek a direction to Amit to pay the rent of the rented room?
4. Can she seek to restrain Amit from marrying again with a girl of his parents' choice?
5. If you decide to go to the Court, what would be the frame of your application or would you first approach the designated Protection Officer?
6. What factors do you have to show to make out your case for reliefs under the Act?
7. Would you also move an application for interim reliefs, and if so what would be the frame of such an application?

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Reading for Group Discussion-III

Surbhi had filed a petition under Section 12 of the DV Act against her husband Sumit in which certain orders were passed in her favour. However, Sumit was not following those orders. She seeks enforcement of those orders.

The Secretary, Taluka Legal Services Committee has assigned the case to you.

On interviewing Surbhi you find the following facts which she can allege:

1) She states that she was thrown out of the matrimonial home by Sumit after giving her beatings.

2) She states that thereafter Sumit used to send her threatening e-mails and SMS to harass her making false allegations.

3) She had started doing graduation and he would come to the college and pass remarks.

4) She had filed an application under Section 12 of the DV Act which stood disposed of.

5) The court had granted a protection order in her favour restraining Sumit from causing any further violence to her and from communicating with her in any manner or from sending her e-mails and SMS and from going to her college.

6) Sumit had continued sending her e-mails and SMS of which she had the record.

7) He also used to come to her college and she had photographs to show the same.

8) Further the court had directed Sumit to pay maintenance at the rate of Rs.5000/- per month to her but her husband had not paid even a single penny to her.

Questions for group discussion

1. Can Surbhi seek enforcement of the orders passed by the court under the Act?
2. Can she approach the police to register an FIR against Sumit?
3. If the police refuse to register an FIR, can she approach the court?
4. If you decide to approach the court as Sumit is not complying with the order, what would be the frame of your application?
5. What would be the nature of the application that would be filed seeking enforcement of the maintenance order?

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Reading for Group Discussion-IV

Vinita was married to Rupesh in the year 1996 and her husband expired in 2012. She was residing in the house in the name of her mother in law with her husband. Now her mother in law and brother in law state that she has no right to continue living in the said house and are trying to forcibly evict her from the house.

The Secretary, Taluka Legal Services Committee has assigned the case to you.

On interviewing Vinita you find the following facts which she can allege:

1) She states that she was continuously living in the same house since her marriage till the death of her husband and even thereafter.

2) She states that both her children were born in the said house and are studying in the vicinity of the house.

3) She states that her husband had contributed to the making of the house.

4) She states that she has no source of income and nowhere to go.

Questions for group discussion

1. Can Vinita seek an order restraining her mother in law and brother in law from forcibly evicting her from the house?
2. Can Vinita claim a right to residence in the house?
3. Can Vinita seek a relief that she be not subjected to any cruelty by her mother in law and brother in law?
4. Can she ask her mother in law and brother in law to pay her and her children maintenance?
5. Can she claim a right in the property?

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Time: 10 minutes

QUIZ ON PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

– Geetanjli Goel[1]

Please tick the correct answer

1. Does the Protection of Women from Domestic Violence Act, 2005 violate the guarantee of equality under the Constitution of India?

a) Yes b) No.

2. As per the figures of the National Crime Records Bureau, the reported crimes against women in India in 2013 were:

a) Less than 1 lakh

b) More than 1,50,000 but less than 2 lakhs

c) More than 2 lakhs but less than 3 lakhs

d) More than 3 lakhs

3. Prior to the coming into force of the Protection of Women from Domestic Violence Act, 2005, women suffering from domestic violence could resort to:

1. Provisions of IPC such as Sections 498A IPC, 304B IPC and offences relating to body.
2. Women had to accept domestic violence as a part of life and their fate.
3. General Civil Law relating to suits for injunction, possession, damages
4. Matrimonial Law

a) Only i) b) Only i) and iii)

c) Only ii) d) Only i), iii) and iv)

4. Can a woman 'married' to a man for about 2 years without prior knowledge of his earlier marriage seek relief under the Act?

a) Yes b) No.

5. Can a daughter in law seek a residence order in respect of the self-owned property of her mother in law?

a) Yes b) No.

6. A woman relative of the husband cannot be made a respondent under the DV Act.

a) True b) False

7. Can the husband file an application under the Act to restrain his wife from meeting the children?

a) Yes b) No.

8. Can one kick given by a drunk husband be considered as normal wear and tear of marriage and not constituting domestic violence?

a) Yes b) No.

[1]Director, NALSA and Officer of Delhi Higher Judicial Service.

9. Can the police refuse to register an FIR for breach of a protection order?

a) Yes b) No.

10. Who can file a complaint under the DV Act?

a) The woman herself

b) The father in law against the daughter in law

c) The parents of the aggrieved woman

d) The protection officer

e) Only a), c) and d)

f) All the above

11. Which of the following are incidents of domestic violence?

a) The husband does not allow his wife to go to her parents' house.

b) The husband asks his wife to make tea for him.

c) The wife is not allowed to take up an occupation.

d) The in laws taunt the daughter in law for being ugly in front of outsiders.

e) All of the above

f) Only a), c) and d)

12. Which of the following can be claimed in an application under the DV Act?

a) The husband be restrained from going to the school of the child.

b) The husband be directed to pay maintenance to the wife.

c) The husband and in laws be directed to pay compensation for causing domestic violence.

d) The sister in law be asked to leave the shared household.

e) All the above.

f) Only a), b) and c)

13. Can an application under Section 12 of the Act be filed before a Family Court?

a) Yes b) No.

14. The matrimonial home of A is at Mumbai. She is residing with her parents at Delhi. The application under the Act can be filed before the court at Delhi.

a) Yes b) No.

15. Can the wife ask for an order that the employer of her husband be directed to deposit the maintenance granted in her favour in her bank account?

a) Yes b) No.

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KEY TO THE QUIZ ON PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

– *Geetanjli Goel*[1]

1. Does the Protection of Women from Domestic Violence Act, 2005 violate the guarantee of equality under the Constitution of India?

a) Yes b) No.

Ans. b) No.

Article 14 of the Constitution mandates equality. However equality as envisaged does not mean absolute equality. Unequals cannot be treated as equals. What Article 14 prohibits is 'class legislation' and not 'classification for purpose of legislation' and the classification must be founded on intelligible differentia which distinguishes persons grouped together from others who are left out of the group and the differentia must have a rational connection to the object sought to be achieved. In order to make the guarantee of equality under Article 14 meaningful, Article 15 has been incorporated and under Article 15(3) the State can make special provision for women and children. Besides India is a signatory to various international conventions more importantly the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) adopted by the General Assembly of the United Nations in 1979 which imposes obligations on the state parties to ensure equality of women. India has signed the Convention with some reservations including a reservation to Article 16 which deals with equality in marriage and family laws. This Convention was followed by the Declaration on the Elimination of All Forms of Violence Against Women adopted by the General Assembly of the United Nations on 20th December, 1993; Vienna Declaration adopted by the World Conference on Human Rights in June 1993 and the Beijing Declaration of 1996. Thus the Act cannot be said to be violative of the Constitution and the constitutional validity of the Act has been upheld by the High Court of Delhi in *Aruna Parmod Shah v. Union of India 2008 (102) DRJ 543* and in the judgment in *Dennison Paulraj v. UOI (2008) 2 MLJ 389: II (2009) DMC 252.*

2. As per the figures of the National Crime Records Bureau, the reported crimes against women in India in 2013 were:

a) Less than 1 lakh

b) More than 1,50,000 but less than 2 lakhs

c) More than 2 lakhs but less than 3 lakhs

d) More than 3 lakhs

Ans. d)

According to the figures released by the National Crime Records Bureau for 2013, the total number of reported crimes against women (including all kinds of offences under IPC and special laws) was 3,09,546 compared to 2,44,270 in 2012. This includes reported cases of rape, dowry death and cruelty under Section 498A IPC.

Domestic violence in India is prevalent amongst all castes, socio-economic classes, religious groups and regions. According to National Family and Health Survey, 2005, the prevalence of domestic violence was 33.5% and 8.5 % for sexual violence, among women aged 15-49 years. As per the National Crime Records Bureau statistics, in 2012 the rate of dowry deaths was 0.7 per 100,000 and

[1]Director, NALSA and Officer of Delhi Higher Judicial Service.

the rate of domestic cruelty by husband or his relatives was 5.9 per 100,000. In 2013 there were 8083 cases of dowry deaths besides 1,18,866 reported cases of cruelty by husbands and relatives.

3. Prior to the coming into force of the Protection of Women from Domestic Violence Act, 2005, women suffering from domestic violence could resort to:

i) Provisions of IPC such as Sections 498A IPC, 304B IPC and offences relating to body.

ii) Women had to accept domestic violence as a part of life and their fate.

iii) General Civil Law relating to suits for injunction, possession, damages

iv) Matrimonial Law

a) Only i) b) Only i) and iii)

c) Only ii) d) Only i), iii) and iv)

Ans. d)

In India theoretically a victim of domestic abuse has three different types of remedies at law: recourse to the criminal law, a civil suit and matrimonial relief. The Indian Penal Code, 1860 was amended to include Sections 498A (making cruelty to the wife by her husband or his relatives an offence) and Section 304B (commonly called dowry death) while Section 306 is available to punish relatives for abetment of suicide and instances of misappropriation of property can also be addressed under the IPC under Section 406. Similarly Dowry Prohibition Act is available which criminalizes the giving and taking of dowry. Besides the penal provisions for general offences of assault (Sections 349 to 352, 354 to 354D, Section 355, 357 and 358) and causing hurt (more specifically Sections 319 to 326, 328) and offences affecting the life (Sections 299 to 302, 304, 307, 308) are available. Causing miscarriage is recognized as an offence under Sections 312-314 IPC as also an act done with the intent to prevent a child being born alive or to cause it to die after birth (Section 315) and causing death of quick unborn child by act amounting to culpable homicide (Section 316). Wrongful restraint or confinement (Sections 339 to 347) are similarly covered besides the offence of rape (Section 376 IPC) and insulting modesty of a woman (Section 509). There are offences against marriage such as bigamy (Sections 494 and 495), fraudulent marriage ceremony (496), adultery (497) and cohabitation by a man deceitfully inducing a person to believe that she is lawfully married (493). Even Sections 107 to 114 Cr.P.C. can be used to prevent the occurrence of violence within the home. Throwing or administering acid has also been made punishable under the amendments to IPC.

Under the civil law a woman can seek remedy under the Specific Relief Act and Civil Procedure Code and she can resort to remedy in tort for physical and psychological injury. However there are hardly any cases where the civil law provisions have been invoked in cases of domestic violence. As such women have to take recourse to matrimonial remedies to obtain relief such as cruelty being a ground for divorce. However if a woman desired relief from domestic abuse outside a matrimonial proceeding for dissolution of marriage there was hardly any remedy available *(see Indra Sarma v. VKV Sarma 2013 (14) SCALE 448).*

This Act supplements rather than replaces the existing laws *(Neetu Singh v. Sunil Singh AIR 2008 Chhatisgarh 1, Mony v. M. P. Leelamma 2007 CRI. L.J. 2604 Kerala)* and is a civil law with criminal features. It is a comprehensive piece of legislation covering various rights under one umbrella and is a secular legislation which applies across all religions and irrespective of the personal laws applicable. It is also preventive in nature and seeks to provide immediate relief to the victim compared to reliefs under other Acts which may require going into detailed procedure.

4. Can a woman 'married' to a man for about 2 years without prior knowledge of his earlier marriage seek relief under the Act?

a) Yes b) No.

Ans. a) Yes.

The expression *'Relationship in the nature of marriage'* used in the definition of *'domestic relationship' provides* remedy to those women whose marriages may be void or invalid in the eyes of law and also extends protection to women who are in 'live-in relationships' and at the same time reiterates the legal position that long periods of cohabitation between a man and a woman raise a presumption of marriage *[Aruna Parmod Shah v. Union of India 2008 (102) DRJ 543; M. Palani v. Meenakshi AIR 2008 MADRAS 162; Narinder Pal Kaur Chawla v. Shri Manjeet Singh Chawla AIR 2008 Delhi 7; and D. Velusamy v. D. Patchaiammal (2010) 10 SCC 469).* See also the observations in*Chanmuniya v. Virendra Kumar Singh Kushwaha and Anr. (2011) 1 SCC 141]*.

5. Can a daughter in law seek a right of ownership in respect of the self-owned property of her mother in law?

a) Yes b) No.

Ans. b) No.

'*Shared household'* means a household where the aggrieved person lives or has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them. Thus it is not necessary that either of them should own the property. It will be considered a shared household even if it belongs to the joint household of which the respondent is a member.

The Act recognizes the right to residence of a woman in a shared household and it lays down that every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same. Further the Act provides that the aggrieved woman shall not be evicted or excluded from the shared household or any part of it by the respondent *except in accordance with the procedure established by law*. (*Section 17 of the Act*). The right to residence is however different from property rights and the right does not entitle a woman to claim ownership over the premises. The Supreme Court in *S.R. Batra & Anr. V. Taruna Batra AIR 2007 SC 1118*, held that the right is available to a woman only against her husband and not against father in law or other relatives like mother in law. It was also held therein that the mother in law's house does not become shared household only because the wife shared that house with her husband. The shared household has to be a house owned or taken on rent by the husband or a house which belongs to joint family of which the husband is a member. The same has been followed in *Shumita Didi Sandhu v. Sanjay Singh Sandhu & Ors. 174 (2010) DLT 79; Sunil Madan v. Rachna Madan Crl.M.C. 3071/2008 dated 2.6.2012: MANU/DE/2548/2012; Barun Kumar Nahar v. Parul Nahar 2013 (199) DLT 1; Sardar Malkiat Singh v. Kanwaljeet Kaur (2010) 168 DLT 521; Neetu Mittal v. Kanta Mittal AIR 2009 DELHI 72: 2008 (106) DRJ 6223 and Kavita Chaudhari v. Eveneet Singh & Anr. judgment dated 19.9.2013 of Delhi High Court: MANU/DE/2766/2012.* However generally a wide interpretation has been given to the term 'shared household' to hold that if the daughter in law was residing throughout with the mother in law in the house of the latter as a shared household, she would be entitled to a right of residence *(Vandana v. T. Srikanth & Ors. (2007) 6 MLJ 205; Navneet Arora v. Surender Kaur & Ors. judgment dated 10.9.2014 in FAO (OS) 196/2014 of Delhi High Court; Smt. Preeti Satija v. Smt. Raj Kumari & Anr. judgment*

dated 15.1.2014 of Delhi High Court in RFA (OS) 24/2012: MANU/DE/0167/2014. Also see Kavita Dass v. NCT of Delhi & Anr. judgment dated 17.4.2012 of Delhi High Court in Crl.M.C. 4282/2011: MANU/DE/1671/2012. For tenanted premises see *B.P. Achala Anand v. S. Appi Reddy & Anr. (2005) 3 SCC 313).*

6. A woman relative of the husband cannot be made a respondent under the DV Act.

a) True b) False

Ans. b) False.

The application can be filed against any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief.

An exception has been carved out that an application can also be filed by an aggrieved wife or female living in a relationship in the nature of a marriage against a relative of the husband or the male partner. There have been conflicting judgments on whether female relatives can be made respondents with the High Courts of Madhya Pradesh *(Ajay Kant v. Alka Sharma 2008 Crl.L.J. 264) and Andhra Pradesh (Renuka & Ors. v. Smt. Menakuru Mona Reddy & Ors. judgment in Crl.P.No.4106/2008)* taking the view that women cannot be made respondents while High Courts of Rajasthan *(Smt. Sarita v. Smt. Umrao 2008 (1) WLN 359; Nand Kishor & Ors. v. State of Rajasthan MANU/RH/0636/2008: II (2009) DMC 210), Kerala (Reema Devi v. State of Kerala I (2008) DMC 297), Andhra Pradesh (Afzalunnisa Begum v. State of A. P. 2009 Cri.L.J. 4191) and Delhi (Varsha Kapoor v. UOI & Ors. (170) 2010 DLT 166: 2010 VI AD (Del) 472)*have held that they can be made respondents. The Supreme Court in *Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade [2011] 2 SCR 261: (2011) 3 SCC 650,* has reiterated the latter view that female relatives can also be made respondents.

It may be mentioned that there has been divergence of opinion on the issue whether a *mother in law can file a claim petition against the daughter in law* but by way of interpretation such a petition has been held to be maintainable. *(Kusum Lata Sharma v. State & Anr. Crl.MC No.725/ 2011 and Crl. MA No.2797/2011 decided on 2.9.2011 by Delhi High Court: MANU/DE/3409/ 2011)*However, the question whether the mother in law can seek relief against the daughter in law under the Act is pending before the Supreme Court.

7. Can the husband file an application under the Act to restrain his wife from meeting the children?

a) Yes b) No.

Ans. b) No.

Only an '**aggrieved person'** can file an application under the Act and 'aggrieved person' means any *woman* who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent. As such any application seeking relief cannot be filed by a male.

8. Can one kick given by a drunk husband be considered as normal wear and tear of marriage and not constituting domestic violence?

a) Yes b) No.

Ans. b) No.

It is not necessary that to constitute domestic violence, habitual assault should be there. Even a **single act** may amount to domestic violence.

9. Can the police refuse to register an FIR for breach of a protection order?

a) Yes b) No.

Ans. b) No.

A breach of a protection order, or of an interim protection order, by the respondent shall be an offence under the Act. It is punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to Rs.20,000/- or with both. The offence is *cognizable* and *non-bailable*. It is also significant that upon the sole testimony of the aggrieved person, the Court may conclude that an offence under Section 31 has been committed by the accused. Under Rule 15 an aggrieved person may report a breach of the protection order or of an interim protection order to the Protection Officer who shall forward it to the concerned Magistrate. The aggrieved person may, if she so desires, make a complaint of breach of the order directly to the Magistrate or the Police. The police can thus also register the complaint and take further proceedings. Rule 15 (9) provides that while enlarging the person on bail, the Court may impose various conditions to protect the aggrieved person and to ensure the presence of the accused before the Court.

10. Who can file a complaint under the DV Act?

a) The woman herself

b) The father in law against the daughter in law

c) The parents of the aggrieved woman

d) The protection officer

e) Only a), c) and d)

f) All the above

Ans. e)

An aggrieved person, Protection Officer or any other person on behalf of the aggrieved person may present an application. An application may also be filed on behalf of a child.

An '**aggrieved person'** means any *woman* who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.

'**Protection Officer'** means an officer appointed by the State Government.

Any neighbor, relative, social worker or other person can also file the application. It is significant that any person who has reason to believe that an act of domestic violence has been, or is being, or is likely to be committed, may give information about it to the concerned Protection Officer (Section 4(1)). However a domestic worker cannot be considered to be an 'aggrieved person'.

A complaint can be filed by a lady even against her father and brothers.

11. Which of the following are incidents of domestic violence?

a) The husband does not allow his wife to go to her parents' house.

b) The husband asks his wife to make tea for him.

c) The wife is not allowed to take up an occupation.

d) The in laws taunt the daughter in law for being ugly in front of outsiders.

e) All of the above

f) Only a), c) and d)

Ans. f)

Domestic violence includes any form of violence suffered by a person from a biological relative but typically it is violence suffered by a woman from male members of her family or relatives.

'*Domestic violence*' has been given a very wide meaning under Section 3 of the Act and includes any act, omission or commission or conduct of the respondent which harms or injures or endangers the health, safety, life, limb or well-being whether mental or physical or done with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security or has the effect of threatening the aggrieved person. It includes 'physical abuse' such as beating, slapping, hitting, biting; sexual abuse such as forced sexual intercourse, being compelled to watch pornography; verbal and emotional abuse such as name calling, threatening to desert, forcing a woman to marry against her will, preventing woman from leaving the home and economic abuse such as refusing to give money for maintenance, compelling the woman to leave her job, taking away the woman's salary etc.

12. Which of the following can be claimed in an application under the DV Act?

a) The husband be restrained from going to the school of the child.

b) The husband be directed to pay maintenance to the wife.

c) The husband and in laws be directed to pay compensation for causing domestic violence.

d) The sister in law be asked to leave the shared household.

e) All the above.

f) Only a), b) and c)

Ans. f)

The Act provides for a number of reliefs that can be sought in an application under the Act.

a) **Protection Orders**: The Magistrate, on being *prima facie* satisfied that domestic violence has taken place or is likely to take place can pass a protection order in favour of the aggrieved person and prohibit the respondent from committing or aiding or abetting in the commission of any act of domestic violence, entering the place of employment/ school or any other place frequented by the aggrieved person; attempting to communicate with the aggrieved person in any manner; alienating any assets and causing violence to the dependents, other relatives or those assisting her against the violence. *(Section 18).*

A protection order would be in operation till the aggrieved person applies for discharge and the order can also be altered, modified or revoked if there is a change in circumstances *(Section 25).*

b) **Residence Orders:** The Magistrate can pass a residence order restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household; directing the respondent to remove himself from the shared household; restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides; restraining the respondent from alienating or disposing off the shared household or directing

the respondent to secure alternative accommodation for the aggrieved person and can also direct the respondent to pay rent and other payments and to return to the possession of the aggrieved person her stridhan or any other property or valuable security *(Section 19).*

No order directing the respondent to remove from the shared household can be passed against a woman (Proviso to Section 19(1)).

c) **Monetary Reliefs**: Under Section 20 of the Act a woman can claim maintenance, monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of domestic violence which may include loss of earnings, medical expenses, loss caused due to removal of property from her control and such relief should be adequate, fair and reasonable and consistent with the standard of living to which she is accustomed. Further she can claim compensation and damages for the injuries, including mental torture and emotional distress caused by the acts of domestic violence committed by that respondent *(Section 22).* The provisions relating to maintenance are in addition to any other remedy available to the aggrieved person and she is not required to establish her case in terms of Section 125 of Cr.P.C. *[Rajesh Kurre v. Safurabai & Ors. judgment dated 11.11.2008 of High Court of Chhattisgarh at Bilaspur: 2009 (1) MPHT 37 (CG)].*

d) **Custody orders:** Under Section 21 of the Act, the Magistrate can grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the respondent (the Magistrate can refuse to allow such visit if he is of the opinion that any visit of the respondent may be harmful to the interests of the child or children). Permanent custody can be granted only in separate proceedings under the relevant law.

13. Can an application under Section 12 of the Act be filed before a Family Court?

a) Yes b) No.

Ans. b) No.

An application under Section 12 of the Act can be filed only before the Magistrate seeking one or more reliefs under the Act. However an application seeking any of the reliefs under the Act may be filed in any pending legal proceeding before any civil court, family court or criminal court under Section 26 of the Act and such reliefs may be sought in addition to the reliefs sought in other pending proceedings, irrespective of whether such proceeding was initiated before or after the commencement of the Act. In case any relief has been obtained by the aggrieved person in any proceedings other than the proceeding under the Act, she shall be bound to inform the Magistrate of the grant of such relief. Thus a separate application under Section 12 of the Act cannot be filed in a Family Court but an application can be filed under Section 26 of the Act in a pending proceeding in Family *Court (Rajkumar Rampal Pandey v. Sarita Rajkumar Pandey MANU/MH/1295/2008 (Bom), Neetu Singh v. Sunil Singh AIR 2008 Chhatisgarh 1, Mony v. M. P. Leelamma 2007 CRI. L.J. 2604 Kerala)* though instead of filing an application Section 26 of the Act, the aggrieved person may file an application under *Section 12* of the Act before a Magistrate even if there are pending proceedings between the parties.

14**. The matrimonial home of A is at Mumbai. She is residing with her parents at Delhi. The application under the Act can be filed before the court at Delhi.**

a) Yes b) No.

Ans. **a) Yes**.

The application can be filed in the Court of Judicial Magistrate of the first class or the Metropolitan Magistrate, within the local limits of which:

i) the person aggrieved permanently or temporarily resides or carries on business or is employed – however such stay should not be transient or for a few days only.

ii) the respondent resides or carries on business or is employed.

iii) the cause of action has arisen.(Section 27)

15. **Can the wife ask for an order that the employer of her husband be directed to deposit the maintenance granted in her favour in her bank account?**

a) Yes b) No.

Ans. a) Yes.

Upon failure of the respondent to make payment of monetary reliefs, the Magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person or to deposit with the Court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent.

*****

SHORT NOTE ON LAW OF DOMESTIC VIOLENCE

– *Geetanjli Goel*[1]

A. Background

a) The general notion is that the family is a 'cradle of safety' but it can actually be a 'cradle of violence' and much of the violence is directed against the female members, in particular against the wife by the husband. Domestic violence has been sought to be justified throughout the ages; legal and cultural traditions have granted men permission to beat their wives and even to kill them in certain circumstances and is intended to subordinate women.According to the figures released by the National Crime Records Bureau for 2013, the total number of reported crimes against women (including all kinds of offences under IPC and special laws) was 3,09,546 compared to 2,44,270 in 2012. This includes reported cases of rape, dowry death and cruelty under Section 498A IPC.

b) Domestic violence in India is prevalent amongst all castes, socio-economic classes, religious groups and regions. According to National Family and Health Survey, 2005, the prevalence of domestic violence was 33.5% and 8.5 % for sexual violence, among women aged 15-49 years. As per the National Crime Records Bureau statistics, in 2012 the rate of dowry deaths was 0.7 per 100,000 and the rate of domestic cruelty by husband or his relatives was 5.9 per 100,000. In 2013 there were 8083 cases of dowry deaths besides 1,18,866 reported cases of cruelty by husbands and relatives.

c) Causes of domestic violence may be many – alcohol and drug related violence, dowry related violence, frustration due to unemployment and financial constraints, acceptance of violence by women as their due, societal acceptance of wife beating, illiteracy amongst women, male dominance and belief that women are men's property and male has right to control her sexuality, fertility and labour in a patriarchal family structure and lack of independent social existence for the women. Women also continue in violent relationships due to various reasons such as economic dependence upon men, family and social pressure to keep the family intact and preserve the marriage, lack of parental support, absence of faith in the law enforcement delivery systems and fear of losing custody of children. Whatever be the form of violence, domestic violence can result in physical injury, even death, and psychological impairment and mental injury besides adversely affecting the family life and impacting the children negatively.

d) It is only in recent years that attention has been given to the rights of women. Several international instruments have been concluded such as the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) adopted by the General Assembly of the United Nations in 1979which imposes obligations on the state parties to ensure equality of women. India has signed the Convention with some reservations including a reservation to Article 16 which deals with equality in marriage and family laws. This Convention was followed by the Declaration on the Elimination of All Forms of Violence Against Women adopted by the General Assembly of the United Nations on 20th December, 1993; Vienna Declaration adopted by the World Conference on Human Rights in June 1993 and the Beijing Declaration of 1996.

e) In India Articles 14 and 15 of the Constitution mandate equality and Article 15(3) enables the State to make special provisions in favour of the women. In India theoretically a victim of domestic abuse has three different types of remedies at law: recourse to the criminal law, a civil suit and matrimonial relief. The Indian Penal Code, 1860 was amended to include Sections 498A (making cruelty to the wife by her husband or his relatives an offence) and Section 304B while Section 306 is available to punish relatives for abetment of suicide and instances of misappropriation of property can also be

[1]Director, NALSA and Officer of Delhi Higher Judicial Service.

addressed under the IPC under Section 406. Similarly Dowry Prohibition Act is available which criminalizes the giving and taking of dowry. Besides the general offences of assault and causing injury are available. Female infanticide, or forcing the wife to terminate her pregnancy are also recognized as offences under Sections 312-316 IPC, wrongful restraint or confinement are similarly covered besides the offences of rape and outraging the modesty of a woman. There are offences against marriage such as bigamy, fraudulent marriage ceremony (496), adultery (497) and deceitfully causing a person to believe that she is lawfully married (493). Even Sections 107 to 114 Cr.P.C. can be used to prevent the occurrence of violence within the home. Throwing or administering acid has also been made punishable under the amendments to IPC.

f) Under the civil law a woman can seek remedy under the Specific Relief Act and Civil Procedure Code and she can resort to remedy in tort for physical and psychological injury. However there are hardly any cases where the civil law provisions have been invoked in cases of domestic violence. As such women have to take recourse to matrimonial remedies to obtain relief such as cruelty being a ground for divorce. However if a woman desires relief from domestic abuse outside a matrimonial proceeding for dissolution of marriage there is hardly any remedy available *(see Indra Sarma v. VKV Sarma 2013 (14) SCALE 448).*

g) The inadequacies of the existing provisions led to the enactment of the Protection of Women from Domestic Violence Act, 2005 which was brought into force on 26.10.2006 and is an Act to provide for more effective protection of rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family. This Act is:

i) a comprehensive piece of legislation covering various rights under one umbrella;

ii) a secular legislation which applies across all religions and irrespective of the personal laws applicable (*Md. Rajab Ali & Ors. v. Mustt. Manjula Khatoon 2014 Cri.L.J. 2162 where an interpretation of the term 'joint family' was made in context of Mahomedan family;Navneet Arora v. Surender Kaur & Ors. judgment dated 10.9.2014 in FAO (OS) 196/2014 of Delhi High Court).*

i) a civil law with criminal features and supplements rather than replaces the existing laws *(Ms. Nidhi Kaushik & Ors. v. UOI & Ors. judgment dated 26.5.2014 of Delhi High Court in LPA 736/2013; Shambhu Prasad Singh v. Manjari (190) 2012 DLT 647; Varsha Kapoor v, UOI (170) 2010 DLT 166; Savita Bhanot v. V.D. Bhanot 168 (2010) DLT 68; Naorem Shamungon Singh v. Moirangthem Guni Devi AIR 2014 Mani 25; Vijaya Baskar v. Suganya Devi MANU/TN/3477/2010 (Mad)).*

ii) preventive in nature and seeks to provide immediate relief to the victim compared to reliefs under other Acts which may require going into detailed procedure.

The constitutional validity of the Act has been upheld by the High Court of Delhi in *Aruna Parmod Shah v. Union of India 2008 (102) DRJ 543* and in the judgment in *Dennison Paulraj v. UOI (2008) 2 MLJ 389: II (2009) DMC 252.*

B. Concepts

a) '*Domestic violence*' has been given a very wide meaning under Section 3 of the Act and includes any act, omission or commission or conduct of the respondent which harms or injures or endangers the health, safety, life, limb or well-being whether mental or physical or done with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security or has the effect of threatening the aggrieved person. It includes 'physical

abuse' such as beating, slapping, hitting, biting; sexual abuse such as forced sexual intercourse, being compelled to watch pornography; verbal and emotional abuse such as name calling, threatening to desert, forcing a woman to marry against her will, preventing woman from leaving the home and economic abuse such as refusing to give money for maintenance, compelling the woman to leave her job, taking away the woman's salary. Importantly it is not necessary that to constitute domestic violence, habitual assault should be there and even a single act may amount to domestic violence.

b) *'Domestic relationship'* means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity (being related to another person through a common ancestor), marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. This concept has broadened the scope of who may seek remedy under the law. Considering this definition it has been held that immediate residence of the two parties is not required and prior acts of violence can also be taken into account *(Azimuddin & Ors. v. State of Uttar Pradesh & Anr. Dated 12.2.2008 of Allahabad High Court)* and the Act has retroactive application *(Dennison Paulraj v. UOI (2008) 2 MLJ 389)* though it has also been held that where divorce had already taken place prior to coming into force of the Act, the Act could not be had recourse to *(Harbans Lal Malik v. Payal Malik 171 (2010)DLT 67: 2011 (1) Crimes 496; Poonam v. V.P. Sharma judgment in Crl.M.C. 1105/2009 dated 25.2.2014; Abdul Haque (MD) v. Jesmina Begum Chaudhary & Anr. I (2013) DMC 384. Per contra Smt. Bharati Naik v. Ravi Ramnath Kalarnkar & Anr. 2011 Cr.L.J. 3572 (Bom); Smt. Sabana @ Chand Bai & Anr. v. Mohd. Talib Ali & Anr. Crl. Rev. Pet.No.362/11 (Raj) and Sunil Kumar v. Sumitra Panda judgment dated 6.1.2014 of Orissa High Court in Crl. Rev. No.781/13).*

> '*Relationship in the nature of marriage*' provides remedy to those women whose marriages may be void or invalid in the eyes of law and also extends protection to women who are in 'live-in relationships' and at the same time reiterates the legal position that long periods of cohabitation between a man and a woman raise a presumption of marriage *(Aruna Parmod Shah v. Union of India judgment dated 7.4.2008 of the High Court of Delhi; M. Palani v. Meenakshi AIR 2008 MADRAS 162; Narinder Pal Kaur Chawla v. Shri Najeet Singh Chawla AIR 2008 Delhi 7; and D. Velusamy v. D. Patchaiammal (2010) 10 SCC 469)*

c) '*Shared household'* has been the subject matter of the maximum pronouncements on the Act till date. It means a household where the aggrieved person lives or has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them. Thus it is not necessary that either of them should own the property. It will be considered a shared household even if it belongs to the joint household of which the respondent is a member. (discussed in C)

C. Right to residence

The Act recognizes the right to residence of a woman in a shared household and it lays down that every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same. Further the aggrieved woman shall not be evicted or excluded from the shared household or any part of it by the respondent except in accordance with the procedure established by law. (Section 17 of the Act) Thus to be entitled to protection under this Section the woman will have to establish that she was in a 'domestic relationship' and that the house in respect of which she seeks to enforce the right is a 'shared household.'

The right to residence is different from property rights and the right does not entitle a woman to claim ownership over the premises. The Supreme Court in *S.R. Batra & Anr. V. Taruna Batra AIR 2007 SC 1118* held that the right is available to a woman only against her husband and not against father in law or other relatives, mother in law. It was also held that the mother in law's house does not become shared household only because the wife shared that house with her husband and for that it has to be a house owned or taken on rent by the husband or a house which belongs to joint family of which the husband is a member. The same has been followed in *Shumita Didi Sandhu v. Sanjay Singh Sandhu & Ors. 174 (2010) DLT 79; Sunil Madan v. Rachna Madan Crl.M.C. 3071/2008 dated 2.6.2012; Barun Kumar Nahar v. Parul Nahar 2013 (199) DLT 1; Sardar Malkiat Singh v. Kanwaljeet Kaur (2010) 168 DLT 521; Neetu Mittal v. Kanta Mittal AIR 2009 DELHI 72: 2008 (106) DRJ 6223 and Kanta Chaudhari v. Eveneet Singh & Anr. judgment dated 19.9.2013 of Delhi High Court*. However generally a wide interpretation has been given to the term 'shared household' to hold that if the daughter in law was residing throughout with the mother in law in the house of the latter as a shared household, she would be entitled to a right of residence *(Vandana v. T. Srikanth & Ors. (2007) 6 MLJ 205; Navneet Arora v. Surender Kaur & Ors. judgment dated 10.9.2014 in FAO (OS) 196/2014 of Delhi High Court where it was observed that if a couple live as members of 'joint family' in a domestic relationship with the relatives of the husband in a premises owned by such relatives of the husband, statutory prescription would indeed enable the wife to claim 'right of residence' since it would fall within the realm of 'shared household' as contemplated under Section 2(s) of the Act irrespective of whether she or her husband has any right, title or interest in the 'shared household'; Smt. Preeti Satija v. Smt. Raj Kumari & Anr. judgment dated 15.1.2014 of Delhi High Court in RFA (OS) 24/2012. Also see Kavita Dass v. NCT of Delhi & Anr. judgment dated 17.4.2012 of Delhi High Court in Crl.M.C. 4282/2011.* For tenanted premises see *B.P. Achala Anand v. S. Appi Reddy & Anr. (2005) 3 SCC 313 where it was held that a deserted wife would be entitled to contest the suit for eviction instituted against her husband)*.

D. Reliefs That Can Be Sought

The Act provides for a number of reliefs that can be sought in an application under the Act.

a) **Protection Orders**:

The Magistrate, on being *prima facie* satisfied that domestic violence has taken place or is likely to take place pass a protection order in favour of the aggrieved person and prohibit the respondent from committing or aiding or abetting in the commission of any act of domestic violence, entering the place of employment/ school or any other place frequented by the aggrieved person; attempting to communicate with the aggrieved person in any manner; alienating any assets and causing violence to the dependents, other relatives or those assisting her against the violence or committing any other act specified in the order (Section 18). Thus a wide range of reliefs can be sought to prevent domestic violence against the woman under this.

A protection order would be in operation till the aggrieved person applies for discharge and the order can also be altered, modified or revoked if there is a change in circumstances (Section 25).

b) **Residence Orders**

The Magistrate can pass a residence order restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;

directing the respondent to remove himself from the shared household; restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides; restraining the respondent from alienating or disposing off the shared household or directing the respondent to secure alternative accommodation for the aggrieved person and can also direct the respondent to pay rent and other payments and to return to the possession of the aggrieved person her stridhan or any other property or valuable security (Section 19). Thus if a woman is subjected to cruelty and fears for her life in the shared household, the court can direct the respondent to provide an alternate accommodation which should be of the same level as enjoyed by her in the shared household.

No order directing the respondent to remove from the shared household can be passed against a woman.

The right of a divorced woman to residence in the shared household would depend on the terms and conditions of the divorce order [*B.P. Achala Anand v. S. Appi Reddy & Anr. (2005) 3 SCC 313; Komalam Amma v. Raghavan Pillai & Ors. AIR 2008 SC 1594; also see the judgments referred to earlier in B (b)]*.

c) **Monetary Reliefs**:

Under Section 20 of the Act a woman can claim maintenance, monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of domestic violence which may include loss of earnings, medical expenses, loss caused due to removal of property from her control and such relief should be adequate, fair and reasonable and consistent with the standard of living to which she is accustomed. Further she can claim compensation and damages for the injuries, including mental torture and emotional distress caused by the acts of domestic violence committed by that respondent (Section 22). The provisions relating to maintenance are in addition to any other remedy available to the aggrieved person and she is not required to establish her case in terms of Section 125 of Cr.P.C. *(Rajesh Kurre v. Safurabai & Ors. judgment dated 11.11.2008 of High Court of Chhattisgarh at Bilaspur).*

d) **Custody orders**

Under Section 21 of the Act, the Magistrate can grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the respondent (the Magistrate can refuse to allow such visit if he is of the opinion that any visit of the respondent may be harmful to the interests of the child or children). Permanent custody can be granted only in separate proceedings under the relevant law.

E. Procedure

An application under Section 12 of the Act can be filed before the Magistrate seeking one or more reliefs under the Act though a complaint can be made to the police or protection officer or service provider as well. Thus an application can be filed before the Magistrate directly *[Milan Kumar Singh v. State of Uttar Pradesh (2007) Cr.L.L.4742 (All)]*.

a) *Who may file the application*: An aggrieved person, Protection Officer or any other person on behalf of the aggrieved person may present an application. An application may also be filed on behalf of a child.

An '**aggrieved person'** means any *woman* who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.

'**Protection Officer'** means an officer appointed by the State Government.

Any neighbor, relative, social worker or other person can also file the application. It is significant that any person who has reason to believe that an act of domestic violence has been, or is being, or is likely to be committed, may give information about it to the concerned Protection Officer (Section 4(1)). However a domestic worker cannot be considered to be an 'aggrieved person'.

b) *Against whom the application can be filed*: The application can be filed against any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief. Thus an application cannot be filed by a daughter against her mother or by a sister against her sister or by a mother against her daughter.

An exception has been carved out that an application can also be filed by an aggrieved wife or female living in a relationship in the nature of a marriage against a relative of the husband or the male partner. There have been conflicting judgments on whether female relatives can be made respondents with the High Courts of Madhya *Pradesh (Ajay Kant v. Alka Sharma 2008 Crl.L.J. 264) and Andhra Pradesh (Renuka & Ors. v. Smt. Menakuru Mona Reddy & Ors. judgment in Crl.P.No.4106/2008)* taking the view that women cannot be made respondents while High Courts of Rajasthan *(Smt. Sarita v. Smt. Umrao 2008 (1) WLN 359; Nand Kishor & Ors. v. State of Rajasthan MANU/RH/0636/2008), Kerala (Reema Devi v. State of Kerala I (2008) DMC 297), Andhra Pradesh (Afzalunnisa Begum v. State of A. P. 2009 CRI. L. J. 4191) and Delhi (Varsha Kapoor v. UOI & Ors. (170) 2010 DLT 166: 2010 VI AD (Del) 472)* have held that they can be made respondents. The Supreme Court in *Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade [2011] 2 SCR 261* has reiterated the latter view that female relatives can also be made respondents.

c) *Where can the application be filed*: The application can be filed in the Court of Judicial Magistrate of the first class or the Metropolitan Magistrate, within the local limits of which:

i) the person aggrieved permanently or temporarily resides or carries on business or is employed – however such stay should not be transient or for a few days only.

ii) the respondent resides or carries on business or is employed.

iii) the cause of action has arisen.

An order made under the Act shall be enforceable throughout India. Further the relief may also be sought in any legal proceeding before any civil court, family court or criminal court under Section 26 *(Rajkumar Rampal Pandey v. Sarita Rajkumar Pandey MANU/MH/ 1295/2008 (Bom), Neetu Singh v. Sunil Singh AIR 2008 Chhatisgarh 1).*

d) *Domestic Incident Report*: This is a report made in the prescribed form on receipt of a complaint of domestic violence from an aggrieved person. The Magistrate is bound to take the same into consideration before passing any order on the application under Section 12. There are conflicting views on whether no order whatsoever can be passed in the absence of

DIR or the Magistrate can pass the order even in the absence of DIR with the High Court of Madhya Pradesh taking the view that if the report has not been called or has not been considered, it cannot be a ground for quashing the proceeding *(Ajay Kant v. Alka Sharma 2008 Crl.L.J. 264; Rakesh Sachdeva & Ors. v. State of Jharkhand & Anr. 2011 Cr.L.J. 158 has also taken the same view as also the Delhi High Court in Shambhu Prasad Singh v. Manjari (190) 2012 DLT 647* though a contrary view was taken in *Bhupender Singh Mehra & Anr. v. State of NCT of Delhi & Anr. 2010 (4) JCC 2939).*

e) *Format of the application*: Form II contains the prescribed format. However the application cannot be thrown out if it is not in the prescribed format *[Milan Kumar Singh v. State of Uttar Pradesh (2007) Cr.L.L.4742 (All)]*. On the issue of limitation, see *Krishna Bhatacharjee v. Sarathi Choudhary and Anr. Crl. Appeal No.1545 of 2015 decided by the Supreme Court on 20.11.2015 where in the context of stridhan, it was observed that so long as the status of the aggrieved person remains and stridhan remains in the custody of the husband, the wife can always put forth her claim under Section 12 of the 2005 Act.*

f) *Service of notice*: The notice to the respondent is served after the filing of the application through the Protection Officer.

g) *Interim and ex-parte orders*: The Magistrate can pass an interim order to prevent urther violence and to provide immediate relief to the woman. Similarly an ex-parte order can be passed if the Magistrate is satisfied that an application *prima facie* discloses that the respondent is committing, or has committed an act of domestic violence or that there is likelihood of the respondent committing an act of domestic violence. In *Vishal Damodar Patil v. Vishakha Vishal Patil 2009 CRI. L. J. 107,* and in *Abhijit Bhikaseth Auti v. State of Maharashtra 2009 CRI. L. J. 889,* the Bombay High Court has held that separate application is not necessary under Section 23 of the Act and in *P. Chandrasekhara Pillai v. Valsala Chandran 2007 CRI. L. J. 2328*, the Kerala High Court has held to similar effect.

h) *Recording of Evidence*: There have been different views whether the order can be passed only on the basis of affidavits or cross-examination is to be got done. Section 28 provides that the proceedings shall be governed by the provisions of the Cr.P.C. At the same time nothing shall prevent the Court from laying down its own procedure for disposal of an application under Section 12 or under Section 23 (2). Under the Rules of 2006 the applications under Section 12 shall be dealt with and the orders enforced in the same manner as laid down under Section 125 of the Cr.P.C. [*Madhusudan Bhardwaj v. Mamta Bhardwaj 2009 CRI. L. J. 3095 (MP)]*. It has now been held that opportunity for cross-examination has to be given though the burden of proof under the Act is that of 'preponderance of probabilities' except in case of violation of Protection Orders.

h) *Appeal*: An appeal shall lie to the Court of Session within thirty days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, whichever is later *(Section 29).*

i) *Counselling and assistance of experts*: The Magistrate may at any stage of the proceedings direct the parties to undergo counselling. The Magistrate may also secure the services of persons engaged in promoting family welfare for the purpose of assisting him in discharging his functions.

F. Enforcement of Orders

a) Under Rule 6 (5) of The Protection of Women from Domestic Violence Rules, 2006 the orders are to be enforced in the same manner as laid down under Section 125 of the Cr.P.C. In addition:

i) Section 19 (3) provides that the Magistrate may require the respondent to execute a bond with or without sureties, for preventing the commission of domestic violence;

ii) While passing an order under Section 19 the Court may also pass an order directing the officer-in-charge of the nearest police station to give protection to the aggrieved person or to assist her or the person making an application on her behalf in the implementation of the order;

iii) The Magistrate while passing an order under Section may impose on the respondent obligations relating to the discharge of rent and other payments, having regard to the financial needs and resources of the parties;

iv) While passing an order for monetary reliefs, the Magistrate shall send a copy of the order to the in charge of the police station within the local limits of whose jurisdiction the respondent resides;

v) Upon failure of the respondent to make payment of monetary reliefs, the Magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person or to deposit with the Court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent; and

vi) An execution petition can also be filed.

The Court can direct the Protection Officer to assist in the implementation of the order *(Shri Amit Sundra v. Ms. Sheetal Khanna 2008 Cri.L.J. 66; Maya Devi v. State of NCT of Delhi & Anr. MANU/DE/8716/2007).*

b) ***Breach of Protection Order***: A breach of a protection order, or of an interim protection order, by the respondent shall be an offence under the Act. It is punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to Rs.20,000/- or with both. The offence is *cognizable* and *non-bailable*. It is also significant that upon the sole testimony of the aggrieved person, the Court may conclude that an offence under Section 31 has been committed by the accused. Under Rule 15 an aggrieved person may report a breach of the protection order or an interim protection order to the Protection Officer who shall forward it to the concerned Magistrate. The aggrieved person may, if she so desires, make a complaint of breach of the order directly to the Magistrate or the Police. The police can thus also register the complaint and take further proceedings. Rule 15 (9) provides that while enlarging the person on bail, the Court may impose various conditions to protect the aggrieved person and to ensure the presence of the accused before the Court such as an order restraining the accused from threatening to commit or committing an act of domestic violence; preventing the accused from harassing, telephoning or making any contact with the aggrieved person; directing the accused to vacate and stay away from the residence of the aggrieved person or any place she is likely to visit; prohibiting the possession or use of firearm or any other dangerous weapon; prohibiting the consumption of alcohol or other drugs or any other order.

G. **Other Related Laws**

The provisions under IPC which are available have already been referred to. Besides:

i) **Maintenance**

Various other laws contain provisions for maintenance for women and the children such as Section 125 Cr.P.C. Enhancement of maintenance can be sought as also interim maintenance. Even a divorced woman can claim maintenance under it. For Hindus, the Hindu Marriage Act also makes provision for maintenance and alimony both for the wife and the children. Besides the Hindu Adoption and Maintenance Act also contains provisions for maintenance, more importantly it provides for the circumstances in which a woman whose husband is not alive can seek maintenance from the father in law or the estate (property of the joint family, when the late husband is proved to have made a contribution). As regards Muslims, the Muslim Women (Protection of Rights on Divorce) Act gives the option to parties to be governed by the Act or by Section 125 Cr.P.C. The Special Marriage Act, 1954, Indian Divorce Act, 1869 and Maintenance and Welfare of Parents and Senior Citizens Act, 2007 also contain provisions for maintenance.

ii) **Custody**

Various laws deal with custody such as Hindu Marriage Act, 1955, The Hindu Minority and Guardianship Act, 1956, Special Marriage Act, 1954, Hindu Adoption and Maintenance Act, 1956 and Guardians and Wards Act, 1890.

iii) A Hindu married woman can claim maintenance and separate residence from the husband if her living separately is justified such as on ground of cruelty, desertion, bigamy.

*****

(For Aristotle dialectic is useful for three purposes: for training, for conversational exchange, and for sciences of a philosophical sort. Once we have a direction for our inquiry we will more readily be able to engage a subject proposed to us. It is useful for conversational exchange because once we have enumerated the beliefs of the many, we shall engage them not on the basis of the convictions of others but on the basis of their own; and we shall re-orient them whenever they appear to have said something incorrect to us.)

Session VI
2.00 PM – 3.30 PM
Total Time: 1 Hour 30 minutes

MODULE FOR TRAINING OF PANEL LAWYERS ON RIGHTS OF PRISONERS AND LEGAL SERVICES

— *Justice Manju Goel (Retd.)*[1]

— *Rajesh Goel*[2]

SESSION PLAN

Objective

1. To inform the legal services lawyers about the rights of the prisoners.
2. To inform the participants of the responsibilities assigned to the Legal Services Authorities, the jail visiting lawyers and the legal services lawyers engaged in criminal courts.

Expected learning outcome

1. The participants would be sensitised on the rights of the prisoners.
2. The participants would be fully equipped to play a proactive role as legal services lawyers for the prisoners.

Programme

The participants will be asked a day in advance to be ready to share their experience on the points mentioned in the sheet of activity III.

1. Introduction 10 minutes

The resource person will introduce to the participants the subject of Rights of Prisoners drawing from the Internationals Convention, Judgements of the Supreme Court of India, All India Committee on Jail Reforms, etc.

2. Group Discussion/Individual Exercise 10 minutes

The participants can be divided into groups of 5-6 to do the activities I and II and to find answers to the problems posed for them. The participants will jot down the points of consensus and differences.

3. Presentation by groups and whole Group Discussion based on activity I 15 minutes

4. Presentation by groups and whole Group Discussion based on activity II 15 minutes

5. Experience sharing (the participants will share their experience on points mentioned in the sheet of activity III) 15 minutes

6. Lecture by resource person on issues in the short note not covered by the whole group discussion. 15 minutes

[1] Former Judge, Delhi High Court
[2] DHJS, Registrar Supreme Court of India

7. Concluding remarks by one of the participants/resource person/visiting dignitary

10 minutes

Training method

1. Lecture
2. Group Discussion
3. Experience sharing

Note: The resource person will pool the points on the flip chart/white board. He/she may prepare a power point for the lecture.

Tools required

1. Facility for power point presentation
2. Flip chart
3. Pens
4. Blue tack
5. Whiteboard

Activity for Session VI- Rights of Prisoners and Legal Services

Activity I– Group Discussion
Reading

You are a Legal Services Lawyer deputed to visit the jail twice a week. In one such visit prisoner Rakesh seeks your help. Rakesh is serving a sentence of simple imprisonment. He, having worked earlier as a compounder to a doctor, offered to work in the medical room to assist the doctor in the morning hours though he was not required to do any work or labour. He thinks he is entitled to wages for the work done by him.

He also says that he needs the money as his wife is alone at home and is going to deliver her first child in a week's time.

He asks if he can get his wages and be with his wife during the delivery.

Problem for Group Discussion

Can you help him? What will you do?

*****

(***In the Group discussion try to find answers to the questions and jot down the points of consensus and differences.)

Activity- II– Group Discussion
Reading

You are a Legal Services Lawyer and deputed to visit the jail twice a week. In one such visit you come across a father and son duo in jail for over a year, serving a sentence of 10 years for an offence u/S 304 I.P.C. No appeal has been filed against the conviction. You look for the reason and find that the son is too young, looking to be only 18 years and unable to take any serious decision regarding life. The father is incoherent when talked to. The other jail inmates ridicule him by saying that the drugs he consumed have destroyed his brain and no one understands what he says.

Problem for Group Discussion

How will you deal with the case?

*****

(*** In the Group discussion try to find answers to the questions and jot down the points of consensus and differences.)

Activity- III– Experience Sharing

Share your experience of your work in the prison relating to any subject other than filing a bail application or steps taken by you for release of any prisoner detained against the provisions of Section 436 A Cr.P.C. or any other subject which you think should be shared with your fellow lawyers.

*****

SHORT NOTE ON
RIGHTS OF PRISONERS AND LEGAL SERVICES

– Justice Manju Goel (Retd.)[1]
– Rajesh Goel[2]

"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation".

- Article 10 of International Covenant on Civil and Political Rights

1. Introduction

> "*Prisoners have enforceable liberties, devalued may be but not demonetized, and under our basic scheme, Prison Power must bow before Judge Power, if fundamental freedoms are in jeopardy" said the Supreme Court in Sunil Batra v. Delhi Administration, 1978 AIR 1675, 1979 SCR (1) 392.*

1.1 The position of United Nations Conventions regarding the rights of prisoners and their treatment has been fully accepted by the Indian legal system. Stepshave been taken by the Government of India from time to time to ensurehumane conditions in the prisons and to give effect to the universally recognized rights of the prisoners. Prison, as defined in the *Prisons Act, 1894*, means *"any jail or place used permanently or temporarily under the general or special orders of a State Gov-ernment for the detention of prisoners"*. As such prisons are places for detention. Detention in itself is a punishment. While detaining the prisoners in prisons, an attempt to reform and eventually to rehabilitate the prisoners is made. The prison system cannot be used to aggravate the sufferings already inherent in incarceration. As early as 1978 in the case of *Sunil Batra v. Delhi Administration-----,1980 AIR 1579, 1980 SCR (2) 557,* the Hon'ble Supreme Court had asked and affirmed "*Are prisoners persons? Yes, of course. To answer in the negative is to convict the nation and the Constitution of dehumanization and to repudiate the world legal order, which now recognizes rights of prisoners in the International Covenant on Prisoners' Rights to which our country has signed assent".*

1.2 The Hon'ble Supreme Court further declared in *Sunil Batra v. Delhi Administration-----, 1980 AIR 1579, 1980 SCR (2) 557*as under:

> *"It is imperative, as implicit in Art. 21 that life or liberty shall not be kept in suspended animation or congealed into animal existence without the freshing flow of air, procedure.*
>
> *Fair procedure, in dealing with prisoners, therefore, calls for another dimension of access to law-provision, within easy reach, of the law which limits liberty to persons who are prevented from moving out of prison gates.*
>
> *No prisoner can be personally subjected to deprivations not necessitated by the fact of incarceration and the sentence of court.*
>
> *All other freedoms belong to him to read and write, to exercise and recreation, to meditation and chant, to creative comforts like protection from extreme cold and heat, to freedom from indignities like compulsory nudity, forced sodomy and other unbearable vulgarity, movement within the prison campus subject to requirements*

[1] Former Judge Delhi High Court
[2] DHJS, Registrar Supreme Court of India

of discipline and security, to the minimal joys of self-expression, to acquire skills and techniques and all other fundamental rights tailored to the limitations of imprisonment."

1.3 In the aforesaid judgement the Hon'ble Supreme Court observed that the Prison Manual then in force and even the Model Manual, then proposed were out of focus with the healing goals of correction and rehabilitation. A Model Prison Manual was prepared in 2003 after the All India Committee on Jail Reforms asked for consolidated laws on prisons since there was a need for uniformity in the laws relating to prisons that prevailed in different states of India. Very recently the Government of India has come out with the Model Prison Manual, 2016, hereinafter referred to as the Manual 2016, to provide a framework for enabling reforms which could guide the states to modify their own rules and regulations in dealing with prisoners in sync with the Manual 2016.

1.4 The General assembly of the *United Nations Resolution 45/111 of 14th December 1990* enumerated the basic principles for treatment of prisoners as under:

"1. All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.

2. *There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

3. *It is, however, desirable to respect the religious beliefs and cultural precepts of the group to which prisoners belong, whenever local conditions so require.*

4. *The responsibility of prisons for the custody of prisoners and for the protection of society against crime shall be discharged in keeping with a State's other social objectives and its fundamental responsibilities for promoting the well-being and development of all members of society.*

5. *Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.*

6. *All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality.*

7. *Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.*

8. *Conditions shall be created enabling prisoners to undertake meaningful remunerated employment which will facilitate their reintegration into the country's labour market and permit them to contribute to their own financial support and to that of their families.*

9. *Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.*

10. *With the participation and help of the community and social institutions, and with due regard to the interests of victims, favourable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions.*

11. The above Principles shall be applied impartially."

1.5 The prisoners do not cease to be citizens of the country. But for incarceration, they enjoy all rights of the citizens of the country. Yet as a matter of guidance to prison authorities certain rights of the prisoners are required to be recognised. The rights and duties of the prisoners as enumerated by the All India Committee on Jail Reforms 80-83 headed by Justice A.N. Mulla and quoted with approval in the Manual 2016, are as under:

Rights of Prisoners:

(A) Right to Human Dignity

(i) Right to be treated as a human being and as a person; this right has been stressed and recommended by the Supreme Court of India which has categorically declared that prisoners shall not be treated as non-persons;

(ii) Right to integrity of the body; immunity from use of repression and personal abuse, whether by custodial staff or by prisoners;

(iii) Right to integrity of the mind; immunity from aggression whether by staff or by prisoners;

(iv) Right to non-deprivation of fundamental rights guaranteed by the Constitution of India, except in accordance with law prescribing conditions of confinement.

(B) Right to Basic Minimum Needs

Right to fulfilment of basic minimum needs such as adequate diet, health, medical care and treatment, access to clean and adequate drinking water, access to clean and hygienic conditions of living accommodation, sanitation and personal hygiene, adequate clothing, bedding and other equipment.

(C) Right to Communication

(i) Right to communication with the outside world;

(ii) Right to periodic interviews; and

(iii) Right to receive information about the outside world through communication media.

(D) Right to Access to Law

(i) Right to effective access to information and all legal provisions regulating conditions of detention;

(ii) Right to consult or to be defended by a legal practitioner of prisoner's choice;

(iii) Right to access to agencies, such as State Legal Aid Boards or similar organisations providing legal services;

(iv) Right to be informed on admission about legal rights to appeal, revision, review either in respect of conviction or sentence;

(v) Right to receive all court documents necessary for preferring an appeal or revision or review of sentence or conviction;

(vi) Right to effective presentation of individual complaints and grievances during confinement in prison to the appropriate authorities;

(vii) Right to communicate with the prison administration, appropriate Government and judicial authorities, as the case may be, for redressal of violation of any or all of prisoners' rights and for redressal of grievances.

(E) Right against Arbitrary Prison Punishment

Right to entitlement in case of disciplinary violation

(i) to have precise information as to the nature of violation of Prisons Act and Rules,

(ii) to be heard in defence,

(iii) to be communicated the decision of disciplinary proceedings, and

(iv) to appeal as provided in rules made under the Act.

(F) Right to Meaningful and Gainful Employment

(i) Right to meaningful and gainful employment

Note 1: No prisoner shall be required to perform 'begar' and other similar forms of forced labour which is prohibited as a fundamental right against exploitation under Article 23 of the Constitution.

Note 2: Undertrial prisoners volunteering to do work may be given suitable work wherever practicable. Such prisoners should be paid wages as per rules.

Note 3: No prisoner shall be put to domestic work with any official in the prison administration. Such work shall not be considered as meaningful or gainful, even if some monetary compensation is offered.

Note 4: Prisoners shall, in no case, be put to any work which is under the management, control, supervision or direction of any private entrepreneur working for profit of his organisation. This will not apply to open prisons and camps.

(ii) Right to get wages for the work done in prison.

(G) Right to be released on the due date.

Duties of prisoners:

It shall be the duty of each prisoner —

(a) to obey all lawful orders and instructions issued by the competent prison authorities;

(b) to abide by all prison rules and regulations and perform obligations imposed by these rules and regulations;

(c) to maintain the prescribed standards of cleanliness and hygiene;

(d) to respect the dignity and the right to live of every inmate, prison staff and functionary;

(e) to abstain from hurting religious feelings, beliefs and faiths of other persons;

(f) to use Government property with care and not to damage or destroy the same negligently or wilfully;

(g) to help prison officials in the performance of their duties at all times and maintain discipline and order;

(h) to preserve and promote congenial correctional environment in the prison."

1.6 The various Chapters of the Manual 2016 and earlier documents of this nature have attempted to give effect to these rights. **The Right to Access to Law** is a crucial right of the prisoner because it is through law that all other rights can be secured. The legal services lawyers who work for the prisoners as their counsel or as jail visiting lawyers have to appreciate the pivotal role they play in ensuring that the rights given to the prisoners by law become a reality in practice.

1.7 One very important fact that has to be remembered by the Courts, Prosecutors, Defence lawyers and prison authorities is the right of speedy trial which is implicit in Article 21 of the Constitution. Speedy trial is an essential ingredient of ***"reasonable fair and just"*** procedure guaranteed under Article 21 of Constitution and State cannot deny the constitutional right of speedy trial to the accused on the grounds of its financial constraint or administrative inability. The right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can be averted. *(Abdul Rahman Antulay vs. R.S.Nayak (1992) 1 SCC 225).* As soon as a person is apprehended by the police, his/her right of legal representation is initiated.

1.8 The Hon'ble Supreme Court developed the jurisprudence for compensation for torture and death of a person detained in police custody in the case of *Nilabati Behera v. State of Orissa and others 1993 AIR 1960, 1993 SCR (2) 581* and in the case of *D.K Basu v. State of West Bengal 1997(1) SCC 416*. The principles enunciated in these two judgements will apply to prisoners in jail as well.

2. Maximum period for which an undertrial prisoner can be detained

2.1 Apart from speedy trial and humane conditions during incarceration, the law also provides that no person can be detained as an undertrial prisoner for more than half the period for which he could be sentenced if the charge against him was proved. This is provided in Section 436 A of the Cr.P.C, 1973, which is as under:

> *"436A. **Maximum period for which an undertrial prisoner can be detained**.- 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.".*

2.2 In a landmark judgment, the Apex court in *Bhim Singh v. Union of India & Ors, Writ Petition (Crl.) No. 310 of 2005,* has given the following directions to ensure that the undertrial prisoners be released on bail as per the provisions laid down under Section 436A of CrPC:

i. Constitution of Under-trial Sentence Review Committee- A high level Committee consisting of jurisdictional Magistrate/ Chief Judicial Magistrate/ Sessions Judge and others is to be constituted which shall hold regular meetings in prison. The composition of the Under

Trial Review Committee is the District Judge, as Chairperson, the District Magistrate and the District Superintendent of Police as members. The Apex Court in its order 34 dated 7th August, 2015 directed to include Secretary, District Legal Services Authority as one of the members of the Review Committee.

ii. Identification of eligible undertrials- The Committee shall identify under-trial prisoners who have completed half period of the maximum period or maximum period of imprisonment provided for the said offence under the law.

iii. Passing appropriate order for release of under-trial- After complying with the procedure prescribed under Section 436A, the Committee shall pass an appropriate order in jail itself for release of such under-trial prisoners who fulfil the requirement of Section 436A for their release immediately.

iv. Report to Registrar of High Court- A report of such meetings and action taken by them shall be sent to the Registrar of High Court concerned.

2.3 Detailed guidelines were also provided in the judgement for computing half the maximum period prescribed as the punishment for the offence.

2.4 The judgment also allots the following responsibilities to the Legal Services Authorities:

i. The State Legal Services Authorities shall instruct the panel lawyers to urgently meet such prisoners, discuss the case with them and move appropriate applications before the appropriate court for release of such persons unless they are required in custody for some other purposes.

ii. The State Legal Services Authorities to urgently take up the issue with the panel lawyers so that wherever the offences can be compounded, immediate steps should be taken and wherever the offences cannot be compounded, efforts should be made to expedite the disposal of those cases or at least efforts should be made to have the persons in custody released therefrom at the earliest.

3. Rights of prisoner sentenced to death

3.1 Chapter XII of the Manual 2016, deals with prisoners sentenced to death. This chapter contains instructions to the prison authorities regarding confinement, observation of behaviour, interviews with relatives, facilities, mental health, pregnancy, appeal facilities, mercy petition and actual arrangements for execution. Guidelines in this regard were already provided by the Supreme Court in *Shatrughan Chauhan and Anr. V Union of India and ors.* (*Writ Petition (Criminal) no 55 of 2013), (2014) 3 SCC 1.*

4. Mercy petition

4.1 It is the duty of the prison authority to inform the prisoner sentenced to death after completion of the judicial proceedings that in case he so wants, he may make a mercy petition within seven days of the intimation of the final order of the Court. The mercy petition should be addressed to the Governor of the State and to the President of India. The power to commute a sentence of death is provided in Section 433 to 435 of the Cr.P.C., 1973. However, the procedure to be adopted by the prison authorities and the State Government or Central Government are not provided by the Code and the relevant procedure is available in the Prison Manuals of the respective States. Generally speaking, the Governor is required to forward the mercy petition to the Central Government if he/she rejects the mercy petition.

4.2 In case where the sentence of death is for an offence against any law exclusively related to a matter to which the executive power of the Union extends and the Central Government is the appropriate authority, the mercy petition will not be considered by the State Government and has to be forwarded to the Secretary, Ministry of Home Affairs, Government of India. Due expedition is required to be maintained in communication of decisions in this regard to the prisoner and to anyone who may have applied for commutation of the sentence on behalf of such prisoner.

4.3 Legal services is the right of every prisoner. The role of Legal Services Authorities is very important for the death row convicts. The Manual 2016, makes specific mention of legal aid to be provided to such prisoners. Legal services should be provided to these convicts at all stages even after the rejection of the mercy petition. Hence the Superintendent of Jail has been directed to intimate the rejection of the mercy petition to the nearest Legal Aid Centre. Apart from intimating the convict, the Manual 2016, specifically provides that all relevant documents be provided to the prisoner within a week of the conviction to assist in making of the mercy petition and in petitioning the Courts for any relief.

4.4 It is mandatory for the prison authorities to arrange for a final meeting of the prisoner with the family.

5. Remission

5.1 Remission system aims at the reformation of a prisoner. The scheme is intended to ensure prison discipline and good conduct on the part of the prisoners, and to encourage learning and better work culture, with the prospect of their early release from prison as an incentive.

5.2 Remission can be of three types:

(a) firstly, remission under the provisions of the *Prisons Act, 1894* or respective Prisons Act of the States and Rules made thereunder. This can be earned by all eligible prisoners if they fulfil the required conditions provided hereinafter.

(b) secondly, remission in sentence granted by the appropriate Government under *Section 432* of the *Code of Criminal Procedure, 1973*. The appropriate Government may remit the sentence of a prisoner, other than life convict, on case to case basis by following the procedure laid down in *Section 432* of the *Code of Criminal Procedure, 1973*. It cannot deviate from the procedure prescribed under *Section 432* of the *Code of Criminal Procedure, 1973* while remitting the sentence of the prisoner on his request.

(c) thirdly, remission by the Head of the State under Article 72 or 161 of the Constitution of India. The Head of the State has all the powers to grant remission to any prisoner on his request as well as grant general remission to the specified category of prisoners on special occasions on the recommendation of the Council of Ministers. No rules can be laid down for the Head of the State for exercising powers under Article 72 or 161 of the Constitution of India.

5.3 The Rules in this Chapter therefore apply only to remission to be granted by Prison authorities under sub-paragraph (a), that is, the provisions of the Prisons Act, 1894 or respective Prisons Act of the States and the Rules made thereunder.

5.4 The prison authorities can grant:

i) Ordinary remission

ii) Special remission

5.5 Eligibility conditions for ordinary remission are as under:

i) Prisoners having substantive sentences of two months and more,

ii) Prisoners, sentenced to simple imprisonment for two months or more, who volunteer to work,

iii) Prisoners employed on prison maintenance services requiring them to work on Sundays and Holidays, e.g. sweeping, cooking etc., irrespective of the length & nature of their sentence i.e., simple or rigorous imprisonment,

iv) Prisoners admitted for less than one month in hospital for treatment or convalescence after an ailment or injury not caused wilfully. (Those admitted for such purpose for more than one month should be entitled to remission for good conduct only).

Note: It will be the responsibility of the prison administration to provide work to all eligible prisoners. If for any reason the prison administration fails to do so the prisoners who are otherwise eligible for remission for work should be granted it as per their normal entitlement under the orders of the Inspector General of Prisons.

5.6 Meritorious work by inmates should be rewarded by grant of special remission in addition to the annual good conduct remission to create a spirit of healthy competition among prisoners. Such special remission may be granted to prisoners eligible for ordinary remission.

5.7 Eligibility conditions for grant of special remission are as under:

i) Saving the life of a government employee, a prison visitor or an inmate,

ii) Protecting a government employee or prison visitor or inmate from physical violence or danger,

iii) Preventing or assisting in prevention of escape of prisoners, apprehending prisoners attempting to escape, or giving material information about any plan or attempt by a prisoner, or a group of prisoners, to escape,

iv) Assisting prison officials in handling emergencies like fire, outbreak of riots and strike,

v) Reporting of, or assisting in, prevention of serious breach of prison regulations,

vi) Outstanding contribution in cultural activities or education or acquiring an additional education qualification (such as a degree or diploma) or teaching art & craft and special skills to fellow inmates,

vii) Specially good work in industry, agriculture or any other skill development programme, or in vocational training.

5.8 Life Convicts

5.8.1 Life sentence shall be taken as imprisonment for twenty years for the purpose of calculation of remission (as per the logic given in Section 57 of the Indian Penal Code, 1860). In the case of a prisoner serving more than one life sentence, twenty years shall be treated as the total of all his sentences for calculating remission. Grant of remission to a life convict shall not mean actual remission in his sentence. When his case will be examined by the Review Board for pre-mature release, the remission to his credit will be one of the factors on the basis of which the review of his sentence will be considered.

6. Parole and furlough

6.1 While a person is serving a sentence, he or she is entitled to be released for a few days, or for a few weeks by way of parole, furlough and custody parole. The rules under which release is done can be looked into in the rules in force in specific States. The two Acts that govern the field are the Prisoners Act, 1900 and the Prisoners Act, 1894. The two Acts are supplemented by various rules and guidelines framed by the individual States.

6.2 Parole and furlough are generally used words for release of prisoners for temporary periods on various grounds and on different conditions. Parole and furlough are sanctioned by the State Government or by authorities who exercise delegated powers. Although both are temporary release from jail, the consequences and the grounds differ.

6.3 The concepts of parole and furlough have been explained in the Manual 2016, and they are reproduced below.

> *"Parole means temporary release of a prisoner for short period so that he may maintain social relations with his family and the community in order to fulfil his familial and social obligations and responsibilities. It is an opportunity for a prisoner to maintain regular contact with outside world so that he may keep himself updated with the latest developments in the society. It is however clarified that the period spent by a prisoner outside the Jail while on parole in no way is a concession so far as his sentence is concerned. The prisoner has to spend extra time in prison for the period spent by him outside the Jail on parole. Parole may be of the following two types, depending upon the purpose behind it — i) Emergency parole under police protection: to cater to the familial and social responsibilities of emergent nature like death/ serious illness/ marriage of a family member or other close relative.*
>
> *ii) Regular parole: to take care of the familial and social obligations and responsibilities of regular nature as well as for the psychological and other needs of the prisoner to maintain contact with the outside world like house repair, admission of children to school/ college, delivery of wife, sowing and harvesting of crops, etc.*
>
> *Furlough means release of a prisoner for a short period of time after a gap of certain qualified number of years of incarceration by way of motivation for him maintaining good conduct and remaining disciplined in the prison. This is purely an incentive for good conduct in the prison. Therefore the period spent by the prisoner outside the prison on furlough shall be counted towards his sentence.*
>
> *Emergency parole may be granted to the convict by the competent authorities as well as to the under trial prisoners by the trial court concerned, under adequate police protection, for a period extending up to 48 hours, in the following eventualities:*
>
> *i) Death or serious illness of father/ mother/ brother/s/ sister/s/ spouse/ children.*
>
> *ii) Marriage of brother/s/ sister/s/ children/ children of sister/s."*

6.4 Furloughs are granted to prisoners who have already suffered a long period of imprisonment and have been of good conduct in the jail. There may be other conditions for such release depending upon the rules framed by the States. The period of furlough is treated as a part of sentence undergone in jail. If a person sentenced to simple imprisonment needs temporary release, he can be granted only parole and not furlough and such period will not count towards the period of imprisonment. The lawyer will do well to read the guidelines issued in this behalf from time to time.

6.5 The Manual 2016, provides the eligibility conditions for release of the prison inmates on parole and furlough. All the State Governments are expected to frame appropriate rules/guidelines for such temporary release as given in the Manual 2016. But generally speaking, parole and furlough are granted to persons whose work and conduct in the jail has been good and who are not expected to abscond on such temporary release. As per the Manual, 2016 those sentenced with imprisonment not exceeding 5 years can be considered for parole after completion of two years of actual imprisonment. The prisoner sentenced to imprisonment for life can be considered for parole on completion of 3 years of actual imprisonment.

6.6 The procedure to deal with parole and furlough has also been suggested in the Manual 2016. Individual States that have laid their own procedures are expected to remodel their procedure in line with the suggestion of the Manual 2016. However, so far as the legal services lawyer is concerned, in case he is required to make an application for parole or furlough, he may submit an appropriate application to the Superintendent of the prison who is expected to make his own verification and forward it to the competent authority for the orders.

6.7 Constitutionality of the provision prohibiting counting of the period of parole towards sentence period provided in *Haryana Good Conduct Prisoners (Temporary Release) Act 1988* was upheld in *Avtar Singh Vs. State of Haryana (2002) 3 SCC 18*. High Court's order directing release of TADA convict ignoring the regulatory provision was disapproved by the Supreme Court in *State of Gujarat and Anr. Vs. Lal Singh JT 2016 (6) SC 519.*

6.8 Custody parole is granted on the same conditions as for regular parole. In this case the prisoner would be escorted to the place of visit and return thereform, ensuring the safe custody of the prisoner. Such prisoner would be deemed to be in prison for the said period which would also be treated as period spent in prison. *(In the exercise of Activity I, Rakesh can apply for custody/emergency parole to visit his wife who is about to deliver her child).*

7. Mentally ill prisoner

7.1 Machal/Machang Lalung, an undertrial prisoner in Guwahati jail was being produced before the Magistrate since 14th April 1951. He being mentally unfit was being produced before the Board of Visitors for nearly 15 years and on 19.08.1967 when the Board of Visitors found Lalung to be fit to stand trial, they wanted custody of Lalung to be returned to the jail. However, the particulars of this case were not provided when asked for. Thereafter he again was reported to be ill till 03.11.1994 when he was declared fit and a letter accordingly was addressed to Chief Judicial Magistrate, Guwahati. However he was not produced in the case nor was he released from the jail or the mental hospital. He caught the attention of Indian Express when he was 77 years old and was working in the hospital garden, still an undertrial, now mentally fit.

7.2 The news report caught the attention of the Hon'ble Supreme Court who issued notices to Union of India, in the Suo Moto Writ Petition Crl. No. 296 of 2005. In the judgement of the Hon'ble Supreme Court dated 24.10.2007, the Supreme Court issued elaborate instructions to be followed in cases where an under trial prisoner is found to be of unsound mind and in cases where the convict undergoing a sentence becomes mentally ill while in jail. The Hon'ble Supreme Court drew our attention to the provisions contained in Chapter 25 of Cr.P.C regarding accused persons of unsound mind detained in prisons. After considering the provisions- in Section 328-339 of the Cr.P.C., 1973, the Hon'ble Supreme Court issued the following directions for dealing with undertrial prisoners who are of unsound mind and not fit to stand trial :

> *"(i) whenever a person of unsound mind is ordered to be detained in any psychiatric hospital/nursing home under Section 330(2) of the Code, the reports contemplated*

under Section 39 shall be submitted to the concerned Court/Magistrate periodically. The Court/Magistrate shall also call for such reports if they are not received in time. When the reports are received, the Court/Magistrate shall consider the reports and pass appropriate orders wherever necessary. In regard to prisoners covered by sub section (1) of Section 30 of the Prisoners Act, 1900, the procedure prescribed by sub sections (2) and (3) of that Section read with Section 40 of the Mental Health Act, 1987 shall be followed.

(ii) Wherever any undertrial prisoner is in jail for more than the maximum period of imprisonment prescribed for the offence for which he is charged (other than those charged for offences for which life imprisonment or death is the punishment), the Magistrate/Court shall treat the case as closed and report the matter to the medical officer in charge of the psychiatric hospital, so that the Medical Officer incharge of the hospital can consider his discharge as per Section 40 of the Act.

(iii) In cases where, the under trial prisoners (who are not being charged with offence for which the punishment is imprisonment for life or death penalty), their cases may be considered for release in accordance with sub section (1) of Section 330 of the Code, if they have completed five or more years as inpatients.

(iv) As regards the undertrial prisoners who have been charged with grave offences for which life imprisonment or death penalty is the punishment, such persons shall be subjected to examination periodically as provided in sub sections (1), (3) and (4) of Section 39 of the Act and the officers named therein (visitors, medical officer in charge of the hospital and the examining medical officer respectively) should send the reports to the court as to whether the under trial prisoner is fit enough to face the trial to defend the charge. The Sessions Courts where the cases are pending should also seek periodic reports from such hospitals and every such case shall be given a hearing atleast once in three months. The Sessions Judge shall commence the trial of such cases as soon as it is found that such mentally ill person has been found fit to face trial".

7.3 The relevant provisions for prisoners of unsound mind undergoing a sentence are contained in *Section 30* of the *Prisoners Act, 1900*. Other provisions that need to be read with *Section 30* of the *Prisoners Act, 1900*, are *Section 330* of *Cr.P.C.*, *Sections 27, 37, 38* and *39* of the *Mental Health Act, 1987*. Section 30 of *the Prisoners Act, 1900* requires the State Government to order to remove a prisoner to a lunatic asylum where he may be kept for treatment while continuing to undergo the prison term. The provision also requires that on expiry of the term, he can be further detained under medical treatment, if certified by the medical officer that it is necessary for the safety of the prisoner or others, or if he needs medical care and treatment. In case he recovers while his tenure is still incomplete he has to be returned to the jail from where he was brought to the mental asylum.

7.4 *Section 27* of the *Mental Health Act, 1987* provides that an order under *Section 30* of the *Prisoners Act, 1900*, or an order under *Section 330 Cr.P.C., 1973*, directing the reception of a mentally ill prisoner into any psychiatric hospital/nursing home shall be sufficient authority for admitting such persons in psychiatric hospital/nursing home. *Sections 37, 38, 39* of the *Mental Health Act, 1987* prescribe appointment of visitors, monthly inspection by visitors and reports by visitors about the conditions of prisoners detained under *Mental Health act, 1987* to the authority under whose direction the convict was detained. *Section 39* of the *Mental Health Act, 1987*, gives various directions for making special directions for making special report once in six months about the conditions of such persons to the authority detaining the prisoner in the mental hospital. *Section 40* of the *Mental Health Act*, *1987*, empowers the medical officer in charge of a psychiatric hospital/nursing home to discharge

any mentally ill prisoner on reports of a medical practitioner. The Hon'ble Supreme Court lamented that these provisions were not being implemented effectively.

7.5 It is the duty of the legal services lawyer who may come across a convict/undertrial who appears to be of unsound mind to take serious note of the situation and to approach the jail superintendent as well as the Sessions Judge who is one of the visitors of the jails to ensure that appropriate steps are taken for his treatment and rehabilitation.

8. Employment and Wages

8.1 Employment of a prisoner is dealt with in *Section 35* and *Section 36* of the *Prisons Act, 1894*. The regulating provisions of *Section 35* limit only 9 hours of work for a prisoner. Each prisoner sentenced to rigorous imprisonment or imprisonment for life is required to be classified for the purpose of the nature of work which can be provided to him, as is prescribed in the Manual 2016. *Section 35* also provides for regular health check for those who are employed at work. *Section 36* permits prisoners with simple imprisonment to be employed if they want.

8.2 Different states have their own rates of wages and rules about payment of wages. As per Chapter XV of the forward looking Manual 2016, the wages to be paid have to be standardised keeping in view the minimum wages as notified by the State Governments from time to time, but the amount that is disbursed is arrived at by deducting from his wages the cost of his maintenance in prison and a subscription to the victim compensation fund. The safeguards for the prisoners engaged in work are available in paragraph 15.49 of the Manual 2016. The Manual 2016, also provides for compensation to prisoners who meet with accidents, injuries and loss of health due to occupational diseases during the course of their employment. The hours of work and the time table of the prisoners is required to be fixed by the prison authorities.

8.3 A prisoner serving a sentence of simple imprisonment is not required to do any labour. But in case he volunteers and is actually given work, he is entitled to wages just as any other prisoner. The money earned is deposited in the account of the prisoner. Part of the money in deposit may be sent to the family in case of need as per the procedures applicable to an individual jail. *(In Activity I, Rakesh can ask for sending the wages earned by him to his wife)*

8.4 Female prisoners and young offenders, (between the age group of 18-21 years) are required to work only two-thirds of the maximum task for hard and medium labour prescribed in terms of male convicts. No prisoner can be employed for private work of any officer of the prison.

9. Juvenility of a prisoner/young offender

9.1 If the prisoner appears to the jail visiting legal services lawyer to be merely 18 years, he is required to examine the case file of the prisoner and find whether the convicting Court had notice of his young age and whether the Court dealt with the issue of juvenility of the accused. In case the question of juvenility has not been considered by the Trial Court, the lawyer has to examine whether the convict at the time of commission of offence was a child. In case he finds sufficient evidence of the convict having been a child at the time of commission of offence, he has to proceed to appeal against the order of conviction on the ground of juvenility. While filing such an appeal, the lawyer should present to the appellate Court documents of proof of date of birth of the convict. He should also refer to the provisions of appropriate rules for determining the age of the child.

9.2 As per the Manual 2016, a convict below the age of 21 is entitled to special attention. The Manual 2016, suggests that such offenders should be dealt with under the *Probation of Offenders Act, 1958*, and be not sentenced to imprisonment. Such hopes, however, do not create any rule or

mandate. Such offenders between 18 to 21 years (described as young offenders in the manual), are expected to be received in a separate institution called Reception Centres or Kishor Yuva Sadan. The special care to which these young offenders are entitled to include guidance, counselling and support, release and planning after care and follow up. The Manual 2016, also stipulates education including vocational education for young offenders with a view to ensure their rehabilitation after the end of the prison term.

10. Women prisoners

10.1 The Manual 2016, has taken special note of the rights of the women prisoners and have advised the following for them:

10.2 To safeguard against exploitation of women prisoners, women's jails be established. In case such prisons are not established, segregation of male and female prisoners must be done to avoid contact with male inmates. Requisite facilities like security, pregnancy, child birth and family care, health care and rehabilitation must be provided to women inmates. Female prisoners must be granted equal access to work, vocational training and education and the works and treatment programmes be devised to give consideration for their special needs.

10.3 Gender sensitisation training be imparted to prison staff who are assigned to work with women prisoners and the staff must provide appropriate support to such inmates when the inmates are in distress. A lady Medical Officer shall examine the woman prisoner and such examinations shall be conducted on readmission after bail, parole and furlough. In case the woman is suspected to be pregnant, she shall be sent to the District Hospital to carry out a detailed examination. If the woman prisoner is found to be pregnant, arrangements must be made to get her medically examined for ascertaining her state of health. Proper ante-natal and post-natal care shall be provided and adequate and timely food shall be provided to pregnant women, babies, children and breast-feeding mothers.

10.4 A child upto six years shall be admitted to prison with the mother if no arrangement for the upkeep of the child is made. But no child above the age of six shall be admitted or retained with the convicted mother. Such children shall be kept in protective custody till the mother is released or the child attains the age to earn his/her own livelihood.

10.5 Women prisoners can avail the assistance of lady members of the District Legal Aid Committee at the expense of the State Government. Comprehensive, intensive and incessant counselling with focus on emotional and psychological issues of women prisoners shall be carried out by social activists/ N.G.Os.

10.6 A mentally ill female prisoner shall be kept in a mental home/institution and not detained in a prison. Such prisoners shall be accompanied by a female warden while being taken out to a mental home or back to the prison. Continuation of adequate psychiatric treatment must be arranged even after release of such prisoner.

11. Importance of Legal Services

11.1 When Ajmal Kasab, who was one of the terrorists involved in the Mumbai attacks on 26.11.2008 was before the Hon'ble Supreme Court in an appeal against the judgement of the High Court of Bombay, he was represented by no less a person than Mr. Raju Ramachandran, a former Additional Solicitor General of India, whose services were provided at the cost of the State. The Hon'ble Supreme Court was satisfied with the legal aid provided to Ajmal Kasab throughout the trial. In this case*, Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid V State Of Maharashtra (2012) 9 SCC 1*, the Hon'ble Supreme Court took note of its earlier judgement in *Hussainara Khatoon*

(IV) v. Home Secretary, State of Bihar, *(1980) 1 SCC 98*, and observed that right to legal aid to an arrestee/accused begins as soon as he is placed under arrest and continues till the end. The Hon'ble Supreme Court made it mandatory for every Magistrate to inform any person presented before him by the police that he was entitled to free legal aid and that any lapse in this regard on the part of the Magistrate can entail disciplinary action. Thus the contact between an arrestee or an accused and the Legal Services Authorities begins the moment the person is put under arrest.

11.2 The legal services lawyers working with the various Legal Services Authorities must not underestimate the onerous duty that has been placed on their shoulders. The Courts not only have the responsibility to inform the person in custody that he is entitled to be defended by a competent lawyer at the cost of the State but has in addition, the responsibility to provide him a lawyer to defend him during the trial. Only in the case of an informed decision by an accused in custody that he would not be defended by a lawyer that free legal service to such an accused can be withheld.

11.3 The jail visiting lawyers are expected to be more proactive in their work in jail as compared to their work with other clients. They have to ensure that the prisoners get their due even when they are ignorant of the responsibility of the prison authorities towards them. The District Legal Services Authorities are required to hold classes for legal literacy for all the jail inmates to inform them of their rights and duties while in prison. As earlier part of this paper shows at various stages, the legal services lawyers have to work with the prison authorities to ensure that the prisoners get their due. This apart, the legal services authorities have set up legal services clinics inside the prisons and have engaged jail visiting advocates to man those clinics. As mentioned earlier even after the mercy petition of the person sentenced to death is declined, his right to free legal aid continues. It is hoped that all legal services lawyers working for the undertrial prisoners, whether in Courts or in the prison, shall offer their honest and sincere services to fulfil the mandate of reasonable fair just procedure guaranteed under Article 21 of the Constitution of India.

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(According to Plato, faulty upbringing prevents most people from achieving everything of which they are capable, and the promise of easy fame or wealth distracts some of the most able young people from the rigors of intellectual permits.)

Session VII
3.45 PM – 5.15 PM
Time: 1 Hour 30 minutes

MODULE FOR TRAINING OF LEGAL SERVICES LAWYERS ON SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013

— Justice Manju Goel (Retd.)[1]

SESSION PLAN

Objectives

1. To sensitise the participants on issues of gender discrimination.
2. To inform the participants about the salient features of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

Expected learning and outcome

1. The participants will have a better view of gender related issues.
2. The participants will have a fair knowledge of how to handle the allegations of sexual harassment at workplace, whether as complainants or respondents.
3. The participants will know the important elements in drafting a complaint of sexual harassment and thus will be able to assist the complainant as a lawyer.

Programme

1. **Introduction** — 5 minutes

   The resource person will introduce the session by referring to the composition of the group which is overwhelmingly male and make general comments how the society has always been male dominated and continues to be so till date.

2. **Activity 1 (Quiz)** — 10 minutes

   The participants will be asked to answer the questions in the quiz, which is an individual exercise and the resource person will bring out from the answers how the participants have stereotyped the roles of men and women and how stereotyping leads to oppression and harassment.

3. **Lecture by resource person** — 10 minutes

   The resource person shall give the salient features of the Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

4. **Activity 2 and Activity 3 (Group Discussion)** — 20 minutes

   The participants will be divided in groups of 5-6 and some will be asked to do the activity 2 and others activity 3

5. **Presentation based on the group discussion and whole group discussion** — 30 minutes

6. **Concluding remarks by one of the participants/ the visiting dignitary if any** — 15 minutes

[1] Former Judge, High Court of Delhi

Training method

1. Lecture
2. Quiz
3. Group Discussion

Note: The resource person will pool the points on the flip chart/white board. He/she may prepare a power point for the lecture.

Tools required

1. Facility for power point presentation
2. Flip chart
3. Pens
4. Blue tack
5. Whiteboard

*****

Activity for Session VII- Sexual Harassment at Workplace

QUIZ

Activity 1

1. Neutralisia is a country in which men and women enjoy equal political powers. The Cabinet of Ministers has an equal number of men and women. Which amongst the following portfolios could have been held by women?

   a. Home
   b. Defence
   c. Social Welfare
   d. Education
   e. Finance

2. Will it be gender discrimination if in a co-ed school there is no toilet?

3. You are invited by the family of your friend to a dinner. On arriving at their house, you find the food laid out on the table and a beautiful flower decoration in the corner of the room. A set of glasses alongside a bottle of wine is placed on the table.

   Q. Who in the family do you think:

   1. Cooked the food.
   2. Laid the food on the table.
   3. Made the flower decoration.
   4. Bought the wine.
   5. Placed the wine bottle and glasses on the table.

4. Tick the correct answer:

i. **Clients prefer male lawyers for handling criminal cases.**
   a. True b. False

ii. **Patients prefer male doctors for treatment of heart diseases.**
   a. True b. False

iii. **Men cannot be good gynaecologists.**
   a. True b. False

iv. **Women who drink are women of easy virtue.**
   a. True b. False

v. **Men as administrators are better than women**
   a. True b. False

*****

Reading for Activity- 2

G is the regional operation manager of an organisation of which the complainant C is a sub-ordinate member. G along with his team including C plans a visit for 2 days to a nearby town where he books himself and the complainant in a good hotel whereas the other members are accommodated at a lesser hotel. At night G invites C to his hotel room for dinner as he had called for dinner to his room. C reluctantly accepts the invitation. G takes the key of the complainant's room on some pretext and forces the complainant to stay in his room and threatens to outrage her modesty. C is able to leave the room, get another key and goes to her room. On returning from the trip, she makes a complaint of sexual harassment which is referred to the Internal Complaint Committee. The Internal Complaint Committee records statements of C as well as other women in the organisation regarding G's actions on similar and earlier occasions. G is served with the copy of the complaint as well as the statement of other witnesses including the statements of those who had accompanied her on the trip and had noticed her distressed condition and G replies to the same which is considered by the Complaints Committee. The Internal Complaint Committee finds G guilty of sexual harassment. G challenges the finding on the ground that he was not allowed to cross-examine the witnesses and therefore, the enquiry was violative of principles of natural justice and hence bad.

In a group discussion find answers to the following questions

Activity

1. What are the principles of natural justice? Have the principles of natural justice been violated in this case?
2. Can the management take action on the complaint on the finding of the Internal Complaint Committee without holding its own inquiry?

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Reading for Activity- 3

S and V are co-workers in an organisation where the employees are governed by the Central Civil Services (Conduct) Rules. V lodged a complaint of sexual harassment against S on the allegations that on the given day there was a scuffle between them in which S had held both her arms. S in his reply stated that during the quarrel V caught him by his collar and when she was about to slap him on the face, he caught hold of her hands. A departmental inquiry committee was constituted to look into the charges from the vigilance angle also. The departmental enquiry committee asked the petitioner to appear before it without serving the copy of the order of constitution of the committee. The departmental enquiry committee returned the findings holding that the alleged incident in this case was not of sexual harassment. Nonetheless both S and V were served with notice to show cause as to why disciplinary action should not be taken against them for breach of office decorum, etc. V made a representation against the finding of the departmental enquiry committee. Eventually the matter was forwarded to the State Women's Commission which is the State Inquiry Committee. Before the Women's Commission V made certain improvements in her case which led to a finding of the Women's Commission against S holding him guilty of sexual harassment and asking the organisation in question to take action as per rules. S was served with a memorandum along with a copy of the report of the Women's Commission as forwarded by the State Women's Commission. It was mentioned in this notice that as per the Vishaka's Judgement, the complaint committee has to be treated as Inquiry Committee under CCS (Conduct) Rules, 1964 and therefore the disciplinary committee could act on the basis of the report. S was called upon to send his representation against this report for being considered for a final decision in the matter. The petitioner challenged the finding in a Writ Petition. While the Writ Petition was pending, the petitioner was served with an order of dismissal from service.

The petitioner challenged the order and argued that the punishment is based on the CCS (Conduct) Rules which provide for a procedure beginning with a memorandum of charges and thereafter proceeding with enquiry as per rules which provided inter alia the right to representation by a colleague, cross-examination of the witnesses and other similar privileges which was denied to him by the State Women's Commission.

Activity- In the group discussion, find answers to the following questions

1. What is the appropriate procedure to deal with a public servant against whom there are allegations of misconduct of sexual harassment?
2. If the complainant were your client, how should you have drafted the complaint made by her?
3. On the facts mentioned in the reading is there any element of sexuality?

*****

SHORT NOTE ON SEXUAL HARASSMENT AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013

– Justice Manju Goel (Retd.)[1]

1. Introduction

1.1 In any study of law related to gender issues it is important to understand the distinction between sex and gender, sex being a biological construct while gender is a social construct. On account of natural physical differences between men and women, traditionally women have been seen in all societies performing a specified role. Beginning with child birth and continuing with rearing of children, the women are seen as persons who keep the household and bring up the children. Stereotyping the roles for men and women becomes oppressive when men and women are not allowed to step out of the stereotypes and remain or are forced to continue within the social construct of their respective roles. Thus discrimination has origins in stereotyping.

1.2 There are societies where women are freely accepted at a workplace without violating the stereotypes. In societies where the stereotyping requires the women to remain indoors, they are not viewed favourably at a place of work in which many of the workers are men. Apart from stereotyping of women's roles as homemakers there is further stereotyping that women are weak and can be oppressed. When male sexuality is expressed in an unwelcome fashion towards a woman it becomes harassment. Harassment is a generalised and mild term. Unwelcome expression of sexuality can take different forms from simple harassment to molestation and to rape. Sexual harassment combines power with misuse of one's sexuality. If allowed to be perpetrated at a place of work it will deter the women from performing to their best of ability and to enjoy the gains of their talent and work.

1.3 In order to understand the significance of safe and gender friendly workplace one has to understand the concepts of equality and discrimination. There can be formal equality alongside inequality or discrimination in substance. The comprehensive definition of discrimination against women available in the Convention for Elimination of All forms of Discrimination Against Women helps us to understand the subject of equality between genders. Discrimination is defined therein in Article 1 of the Part I as under:

1.3.1 "For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

1.4 In order to provide equality with men in the matter of exercise of fundamental freedoms in political, economic, social, cultural, civil or any other field it is necessary that women get access to the workplace without any restriction or hindrance of any kind as much as is available to the men. Any apprehension that the workplace is not safe for a woman to work with dignity will cause hindrance and obstacles for the woman to enjoy equality at work and hence would amount to discrimination.

1.5 In some degree or the other, sexual harassment at workplace has been noticed in all places leading to a concern for taking remedial steps. There being no statute to address the evil, the Hon'ble Supreme Court in an unusual exercise of its powers gave certain guidelines for dealing with sexual harassment at workplace, in *Vishaka and others v. State of Rajasthan and others* (1997) 6 *SCC 241.* It led to amendments in various service regulations and to the enactment of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

[1]Former Judge, High Court of Delhi

2. Vishaka's Case

2.1 A PIL was moved before the Hon'ble Supreme Court of India following the tragic incident of the brutal gang rape of a social worker in Rajasthan. The petitioner in Vishaka's case brought out that the violence against the social worker was related to her work and it focussed the attention to finding suitable methods of implementation of the concept of gender equality and to prevent sexual harassment of working women in all work places by a judicial process since there was no formal legislation preventing sexual harassment at workplace. The Hon'ble Supreme Court drew extensively from the International Conventions and provided the guidelines for dealing with sexual harassment at workplace. The Court defined sexual harassment and directed preventive steps to be taken in case of any incident of sexual harassment at workplace. It inter alia prescribed that a complaint mechanism would be in place so as to deal with sexual harassment on an urgent basis. It directed that whether or not the alleged conduct amounted to sexual harassment and misconduct should be examined by a Complaints Committee and that the Complaints Committee should treat complaints in a time bound manner. It further directed that the Complaints Committee should be headed by a woman and not less than half of the members should be women and further that a third party/ NGO should also be included in order to prevent any possibility of any undue pressure of any kind. Where any conduct or any misconduct of sexual harassment was found to have been committed, appropriate disciplinary action was to be taken. The judgement also ordered that apart from disciplinary action every employer should take steps to prevent any sexual harassment in the workplace, inter alia, by publishing such prohibition and by including penalties in the rule book. Finally the Hon'ble Supreme Court directed that the guidelines and norms prescribed in the judgement should be strictly observed in all workplaces for the preservation and enforcement of rights to gender equality of working women and that such directions would be binding and enforceable in law until a complete suitable legislation was enacted to occupy the field. Although the judgement was delivered on 13.08.1997, the enactment came in April 2013.

3. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

3.1 The Legislature has borrowed the definition of sexual harassment as given in the judgement which is as under:

> *"sexual harassment" includes any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely:—*
>
> *(i) physical contact and advances; or*
>
> *(ii) a demand or request for sexual favours; or*
>
> *(iii) making sexually coloured remarks; or*
>
> *(iv) showing pornography; or .*
>
> *(v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature;"*

3.2 The Act also provides for the Internal Complaints Committee as prescribed in the judgement with certain added details. Further, the Act prescribed that there would be a Local Complaints Committee to receive complaints of sexual harassment from establishments where the Internal Complaints Committee has not been constituted or if the complaint was against the employer himself. The Internal Committee or the Local Committee, as required by Section 11 of the Act, has to make the inquiry in accordance with the Services Rules applicable to the respondent and when no such rules exist, in such manner as maybe prescribed or in case of a domestic worker, the Local Committee shall, if prima facie case exists, forward the complaint to the police, within a period of seven days for registering the case

under Section 509 of the Indian Penal Code, and any other relevant provisions of the said Code where applicable.

3.3 During the pendency of the inquiry, the Internal Committee or Local Committee can recommend transfer of aggrieved women or of the respondent or grant of leave to the aggrieved woman or other relief that maybe prescribed. The leave granted under this provision, namely Section 12, was to be in addition to other leaves to which she maybe entitled.

3.4 Section 13 of the Act prescribes that on completion of the inquiry a copy of the inquiry report has to be provided to the employer as well as to other concerned parties. The Internal Committee or the Local Committee has been given the power to recommend to the employer that action be taken in accordance with the Service Rules applicable to the respondent as well as a deduction from the salary of the respondent of such sum as maybe appropriate to be paid to the aggrieved woman in accordance with Section 15 of the Act by way of compensation. The Act also prescribes, by Section 14 that if the complaint is found to be malicious or to be based on forged or misleading documents, the Internal Committee or the Local Committee may recommend to the employer action to be taken against the woman or the person who has made the complaint of sexual harassment. However, Section 14 adds a proviso that a mere inability to substantiate a complaint or to provide adequate proof need not attract an action under this section. Section 16 of the Act prohibits publication of the complaint, identity and address of the aggrieved woman or respondent/ witness and all other information including the finding of the Internal Committee or the Local Committee as the case maybe.

3.5 Thus while providing a mechanism for addressing the evil of sexual harassment at workplace, this Act has also taken care of providing the women the required privacy to encourage them to take the benefit of the Act by protecting their dignity against social exposure of the alleged misconduct.

4. Case Law

4.1 While the law has to protect the women from indignity of sexual harassment it has taken care of all human, constitutional and other legal rights of the respondent against whom such harassment is alleged. The allegationof service misconduct has been taken seriously. While under the Indian Penal Code, sexual harassment may appear to be a minor offence, the same becomes a major service misconduct because it may attract the maximum penalty of dismissal from service. Soon after the judgment in Vishaka's case, the Hon'ble Supreme Court in the case of *Apparel Export Promotion Council V A. K. Chopra 1999(1) SCC 759* held that a superior officer who tried to sit close to and touch the female employee and did not stop despite her reprimands was guilty of sexual harassment and that the opinion of the High Court that the senior officer had only attempted to molest and thus should not be removed from service, was not correct. The Hon'ble Supreme Court upheld the punishment of dismissal from service awarded to the delinquent officer by the employer.

4.2 Whether sexuality is involved in a particular behavior maybe a subtle issue at times. While touching by itself may not be of sexual nature, acts short of touching may have elements of offending the modesty of a woman in one way or the other and can then be treated as sexual harassment. So the sensitivity on the part of the prosecution as well as of the defence would be of utter importance. The case of *Mrs. Rupan Deol Bajaj and Anr. V. Kanwar Pal Singh Gill and Anr. (decided on 12.10.1995) 1995 SCC 6 194* is often cited to understand the subtelty of the concept. The respondent at the relevant time was the Director General of Police, Punjab and the complainant belonged to the Punjab cadre of the Indian Administrative Service. The account given by the complainant/ victim was as under:

> "*Around 10.00 P.M. Dr. P.N. Chutani and Shri K.P.S. Gill walked across to the circle of the ladies and joined them occupying the only two vacant chairs available, almost*

on opposite sides of the semi-circle. Shri K.P.S. Gill took a vacant chair about 5 to 6 chairs to the left of where I was sitting. Slowly, all the ladies sitting to the right and left of him, got up, and started leaving and going into the house. I was talking to Mrs. Bijlani and Mrs. K.P. Bhandari, sitting on my right, and did not notice, or come to know, that those ladies were getting up and vacating their chairs because he had misbehaved with them. Shri K.P.S. Gill called out to me where I was sitting and said, "Mrs. Bajaj come and sit here, I want to talk to you about something." I got up from my chair to go and sit next to him. When I was about to sit down, he suddenly pulled the cane chair on which I was going to sit close to his chair and touching his chair. I felt a little surprised. I put the chair back at its original place and about to sit down again when he repeated his action pulling the chair close to his chair. I realised that something was very wrong and without sitting down I immediately left and went back and sat in my original place between the other ladies. Mrs. Bijlani, Mrs. K.P. Bhandari, Mrs. Paramjit Singh and Mrs. Shukla Mahajan were occupying seats on my right and Mrs. Nehra was sitting to the left of me at that time.

After about 10 minutes Shri K.P.S. Gill got up from his seat and came and stood straight but so close that his legs were about four inches from my knees. He made an action with the crook of his finger asking me to stand and said, "You get up. You come along with me." I strongly objected to his behaviour and told him, "Mr. Gill How dare you! You are behaving in an obnoxious manner, go away from here". Whereupon he repeated his words like a command and said, "You get up! Get up immediately and come along with me." I looked to the other ladies, all the ladies looked shocked and speechless. I felt apprehensive and frightened, as he had blocked my way and I could not get up from my chair without my body touching his body. I then immediately drew my chair back about a foot and half and quickly got up and turned to get out of the circle through the space between mine and Mrs. Bijlani's chair. Whereupon he slapped me on the posterior. This was done in the full presence of the ladies, and guests."

Rejecting the defence contention that the incident was trivial, the Supreme Court said:

"If we are told, on the face of such allegations that, ignominy and trauma to which she was subjected to was so slight that Mrs. Bajaj as a person of ordinary sense and temper, would not complain about the same, sagacity will be the first casualty."

The Supreme Court held that the complaint made out an offence under Section 509 as well as under Section 354, as the law stood then, which are more serious in nature than sexual harassment.

4.3 In this context, one may also study the Criminal Law Amendment Act, 2013 whereby Section 354A has been added to Indian Penal Code as an offence punishable with imprisonment which may be for three years or one year depending upon the severity of the offence. Section 354A defines 'sexual harassment' as the following acts:

"(i) physical contact and advances involving unwelcome and explicit sexual overtures; or
(ii) a demand or request for sexual favours; or
(iii) showing pornography against the will of a woman; or
(iv) making sexually coloured remarks."

If the offence is covered by clause (i), (ii) or (iii) above, the punishment prescribed is rigorous imprisonment for three years or fine or both while for the act covered by clause (iv), the punishment prescribed is one year or fine or both.

4.4 Apart from this, the amendment also includes as specific offence an attempt to disrobe a woman (Section 354B), voyeurism (Section 354C) and stalking (Section 354 D).

4.5 The law on sexual harassment is an interface of the right of the aggrieved woman given by The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and the service regulations governing the conduct of the employees. The Central Civil Service (Conduct) Rules which govern the services of a public servant were amended earlier to coming into operation of the Act. Sexual harassment was included in the Rules as a misconduct which could entail major penalty.

4.6 In the case of *Sandeep Khurana V Delhi Transco Ltd. & Ors. (2006) DLT346*, the question for determination was whether the inquiry into the allegations of sexual harassment without following the procedure given in the CCS (Conduct) Rules could lead to dismissal of a public servant. The alleged incident took place in the office where Sandeep Khurana misbehaved and scuffled with a female employee of the same organisation which caused bleeding injuries. The petitioner on his part made a brief report in respect of the incident on the same day contending that there was a quarrel between the two and during the quarrel respondent No.2 caught him by his collar and when she was about to slap him on his face, he caught hold of her hands. He added that in the scuffle his gold buttons were broken and that respondent No.2 also threatened to assault him in future. The respondent No. 2 demanded action against the petitioner for sexual harassment on the plea that the action of Sandeep Khurana was not only physical assault but also an act of sexual harassment.

4.7 A departmental committee was constituted to inquire into the allegations of sexual harassment. The committee issued a notice to the petitioner. No copy of the complaint or any statement of articles of charges was enclosed with the notice. It was only one sentence notice asking the petitioner to appear before the departmental inquiry committee on the stipulated date and time. The petitioner was not called upon to file a written reply. The statement of the petitioner was taken down during the inquiry. The committee also examined certain witnesses. No opportunity for cross examination of the witnesses was given to the petitioner. The committee eventually returned a finding that it was not a case of sexual harassment. Nonetheless both the complainant and the petitioner were directed to show cause as to why action should not be taken against them for violating the decorum of the office, etc. The complainant/ respondent No.2 was not satisfied with the finding of the committee. On her demand the Secretary of NCT, Delhi forwarded the matter to the Chairperson, Delhi Commission for Women for taking further necessary action in the matter. The Women's Commission acting as the State Complaint Committee issued a notice directing the petitioner to "Explain your point of view". It was not revealed to the petitioner that the State Complaints Committee was also to act as a disciplinary committee. During the proceedings before the Women's Commission the petitioner admitted to have given a blood written card to the respondent No.2. The complainant also added that the petitioner followed her to the desk and holding her hands said "Why are you not talking to me". On the basis of this finding the petitioner was served with a notice to send his representation if any against the report of the State Women's Commission. The notice also mentioned that the report of thecomplaint committee, as envisaged by the Hon'ble Supreme Court in the Vishaka's case would be deemed to be an inquiry for the purpose of CCS (Conduct) Rules, 1964 and disciplinary action would be taken on the basis of the report. The petitioner filed the writ petition challenging the action. While the writ petition was pending the petitioner was dismissed from service.

4.8 The question that was posed before the High Court was whether the action taken could be sustained in view of the provisions of Rule 14 of the CCS (CCA Rules). Although sexual harassment is a major service misconduct the fact remains that for taking any disciplinary action of any kind the service regulations dealing with minor and major penalties need to be adhered to. It was found in this case that the provisions of Rule 14 of CCS (CCA Rules) were given a total go by while inquiring into

the alleged misconduct. The CCS (CCA Rules) provide a procedure which requires appropriate notice containing the charges to be served on the delinquent followed by an opportunity to file a written reply and thereafter an inquiry in which the department has to produce its witnesses who are to be cross examined by the delinquent employee. This is not only a question of natural justice but a question of statutory rights of a public servant whose service is protected by Article 311 of the Constitution of India and the CCS Rules. As per this Article no person who is a member of a Civil Service of the Union or an All India Service or a Civil Service of a State or holds a civil post under the Union or a State shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity to be heard in respect of those charges. Rule 14 of the CCS (CCA Rules) gives effect to the protection. Rule 14 specifically prescribes that no order imposing any of the penalties prescribed in Rule 11 shall be made except after an inquiry held in the manner provided in the Rules. It was submitted on behalf of the respondent No.2 that although specific charges were not framed, the petitioner was never unaware of the allegations against him in as much as the copy of the complaint was given to him and the witnesses had been examined in his presence and it was for him to ask for the witnesses to be cross-examined. Accordingly, the respondent No.2 submitted that Rule 14 had been followed in spirit. This contention was not accepted by the Court as the facts suggested that the procedure adopted was entirely different from the procedure mentioned in Rule 14 particularly because the first initial notice itself was missing apart from the subsequent violations of the public servant's right protected by Rule 14 in such disciplinary proceedings.

4.9 The same view was taken by the High Court of Delhi in the case of *Dr. Pushkar Saxena v. Govt. of NCT Delhi & Ors.* decided on 16.05.2012. In that case the inquiry was conducted in disregard of the mandatory provisions of CCS (CCA) Rules which were applicable to the inquiry held against the petitioner and the court said:

> *"3. The case before us is not a case of a Disciplinary Authority dispensing with the inquiry under Rule 19 of CCS (CCA) Rules or any other rule of similar nature. To dispense with an inquiry, the Disciplinary Authority, for reasons to be recorded, has to be satisfied that it is not reasonably practicable to hold an inquiry. Hence, it cannot be disputed than an inquiry was necessary, before imposing a major penalty upon the petitioner.*
>
> *4. There is no material on record to show that some special procedure for inquiry into complaints of sexual harassment had been prescribed by the respondents. This is also not the case of the respondents that CSS (CCA) Rules did not apply to the petitioner. Therefore, the inquiry was required to be conducted in accordance with the procedure prescribed in Rule 14 of the said Rules, for imposing major penalties. A Proviso has been added to Sub Rule (2) of Rule 14 of the said Rules by a notification dated 01.07.2004 published on 10.07.2004. The only modification made by the Proviso is that where there is a complaint of sexual harassment, the complaint committee established to inquire into such complaints shall be deemed to be the Inquiry Authority appointed by the Disciplinary Authority and if a separate procedure has not been prescribed for the complaint committee for holding an inquiry into complaints for sexual harassment, the inquiry, as far as practicable, shall be held in accordance with the procedure laid down in the said Rules. Though the Proviso was not in the statute book when the inquiry against the petitioner was conducted, but, it is relevant to the extent, that it indicates that even now the inquiry into complaints of sexual harassment is required to be conducted, as far as practicable, in terms of the procedure prescribed in CCS*

(CCA) Rules, unless a separate procedure is prescribed for holding such inquiry by the complaints committee. Since, there is no material or even an averment that any special procedure had been prescribed for holding an inquiry into sexual harassment, at the time the inquiry was held against the petitioner, the Inquiry Officer was required to hold the inquiry, at last substantially, in accordance with the procedure prescribed in CCS (CCA) Rules."

4.10 In the case of *Gaurav Jain V Hindustan Latex Family Planning Promotion Trust & Ors. 2015 Indlaw DEL 72,(HLFPPT) MANU/DE/2337/2015, (DB)* the question was whether the Principles of Natural Justice were followed during the inquiry of charges of sexual harassment. Gaurav Jain, the Regional Operation Manager had taken a group of subordinates to an official trip to another town. There he called a female subordinate to his hotel room, took her keys on some pretext to prevent her from leaving, blew cigarette smoke on her face and threatened to outrage her modesty. He could not actually touch her since she managed to escape. On complaint made by the female employee, the Internal Complaint Committee found Gaurav Jain to be guilty of sexual harassment and recommended termination of his service. In the Writ Petition challenging the action of termination, the Gaurav Jain pleaded that he was not allowed to cross-examine the witness and that there was, as such, no evidence and violation of the principle of natural justice. He also pleaded that the Internal Complaints Committee (ICC) had no jurisdiction to carry out the enquiry as only the employer could have done an enquiry. All the contentions were rejected. On principles of natural justice, it was held that strict rules of evidence did not apply to domestic enquiry and that having made his response on receiving the copies of statements of witnesses, the principles of natural justice were also adhered to. The Court relied upon the oft quoted judgement of the Hon'ble Supreme Court in the case of *State of Haryana and Anr. V Rattan Singh (1977) 2 SCC 491* which runs as under:

"4. It is well settled that in a domestic enquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. All materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. It is true that departmental authorities and Administrative Tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Indian Evidence Act. For this proposition it is not necessary to cite decisions nor text books, although we have been taken through case-law and other authorities by counsel on both sides. The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice. Of course, fairplay is the basis and if perversity or arbitrariness, bias or surrender of independence of judgment vitiate the conclusions reached, such finding, even though of a domestic tribunal, cannot be held good. However, the courts below misdirected themselves, perhaps, in insisting that passengers who had come in and gone out should be chased and brought before the tribunal before a valid finding could be recorded. The 'residuum' rule to which counsel for the respondent referred, based upon certain passages from American Jurisprudence does not go to that extent nor does the passage from Halsbury insist on such rigid requirement. The simple point is, was there some evidence or was there no evidence — not in the sense of the technical rules governing regular court proceedings but in a fair commonsense way as men of understanding and worldly wisdom will accept. Viewed in this way, sufficiency of evidence in proof of the finding by a domestic tribunal is beyond scrutiny. Absence of any evidence in support of a finding is certainly available for the court to look

into because it amounts to an error of law apparent on the record. We find, in this case, that the evidence of Chamanlal, Inspector of the Flying Squad, is some evidence which has relevance to the charge levelled against the respondent. Therefore, we are unable to hold that the order is invalid on that ground."

4.11 In the *SLP 23060/2009 Bidyog Chakraborty Vs. Delhi University*, arising out of a judgment of the Delhi High Court, the Supreme Court, while holding that the petitioner was entitled to hearing and to cross examine the witnesses produced against him, observed that in an inquiry of sexual harassment, the identity of the witnesses need not be revealed to the respondent or to his counsel and so the respondent would be entitled to submit a questionnaire which would be put to the witnesses for their answers in writing (see para 9 of the judgment in *Pushkar Saxena's supra*).

5. Conclusion

5.1 The definition of sexual harassment requires a subtle understanding of the import of the alleged unwelcome conduct. All physical contacts are not of sexual nature. Hence in the case of *Sandeep Khurana (supra)* mere holding of hands could or could not have sexual connotation. The complainant in this case further brought out during the inquiry before the State Women's Commission that the petitioner Sandeep Khurana had earlier attempted to woo her by writing a card in his blood. She further alleged that the petitioner had followed her to her desk and while holding her hands said, *"Why are you not talking to me?"*. Addition of these two facts in the complaint changes the entire impact of the first alleged fact that the petitioner Sandeep Khurana had held both her hands.

5.2 The important facts of any case must be brought out at the first occasion itself for otherwise they could appear to be an afterthought. While drafting a complaint the lawyer should take care that the sexuality of the act is sufficiently brought out in the complaint submitted to the Internal Committee or to the Local Committee as the case maybe.

5.3 The definition of sexual harassment includes a demand or request for sexual favours. How the demand was made and whether the demand was for sexual favour would depend upon how the act of the accused was perceived by the complainant. In case the lawyer is drafting the complaint he should include the language used by the accused in very explicit terms.

5.4 What is a sexually coloured remark? What is unwelcome conduct of sexual nature? It is the duty of the complainant to say things clearly and categorically to show how the alleged conduct was of sexual nature.

5.5 The inquiring authority again has to perceive the things from a neutral standpoint and must justify the findings on a rational basis. Much of the assessment here would be subjective in nature. However, subjective conclusions must be based on objective criterion, which has to be kept in mind by the inquiring authorities.

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Session VIII
9.30 AM – 11.30 AM
Total Time: 2 Hours

MODULE FOR TRAINING OF PANEL LAWYERS ON

Topic 1: CHILD SEXUAL ABUSE AND THE POCSO ACT

Topic 2: CHILD MARRIAGE

— Bharti Ali[1]

SESSION PLAN

Objectives:

1. To provide the young lawyers grounding in concept and law relating to child sexual abuse and child marriage and the role of legal aid lawyers in such matters.
2. To give them clear perspective of topics such as various forms of sexual abuse, including sexual harassment, child marriage as an offence and validity of a child marriage, and how to use the law constructively.
3. To give them an understanding of the rights of the victims under the Protection of Children from Sexual Offences Act, 2012 (The POCSO Act) and the Prohibition of Child Marriage Act, 2006 (the PCMA) and reliefs that can be sought under these laws.

Expected learning outcomes:

1. Participants will be understand their role better and be inspired to help their clients at all stages of a legal case relating to sexual abuse of children and child marriage.
2. Participants will understand the importance of reducing the vulnerability of a child victim of sexual abuse and child marriage during the judicial proceedings and will be better equipped to provide necessary legal assistance for the same.
3. Participants will be able to use the laws creatively and constructively while drafting pleadings for their clients.
4. Participants will be able to argue for and against a prayer for orders under the POCSO Act and the PCMA.
5. Participants will also get an idea of the other laws under which relief can be sought.

Programme

Topic 1: Child Sexual Abuse and the POCSO Act

1. Introduction 20 minutes

Trainer will use a power point presentation to familiarise the participants with the social scenario and the gravity of the problem of child sexual abuse, a brief history of the POCSO Act, the social and legal understanding of child sexual abuse leading to an introduction to the scheme of the Act. He/she can introduce various relevant terms under the stated laws, offences and punishment prescribed, rights of the victims and the reliefs which can be sought under the Act. The role of legal aid lawyers at different stages in a case of child sexual abuse may be highlighted throughout the presentation. Important judgements may be sighted for reference the need and importance of victim protection and witness assistance.

[1]Co-Director, HAQ: Centre for Child Rights

2. Group Discussions/Role Plays 15 minutes

Participants will be divided in groups of 4-6 and they will be asked to discuss a case study and find the answers to the questions relating to each case study.

3. Presentation of Group Work/Role Plays 20 minutes

Each group will present its case study and views on the related questions to the whole group for a whole group discussion. The presentations can be oral, on flip charts, in the form of role plays or such other medium of expression that helps present the case and communicate the group's view point effectively.

The resource person/trainer will sum up the group discussions with additions where needed in order to present a wholesome view on the topics.

4. Concluding Remarks 10 minutes

Before concluding the first session, Question and Answers may be encouraged to help the participants clarify their doubts if any.

The concluding remarks can be made at the end by the trainer or by one of the participants.

Topic 2: Child Marriage

1. Introduction to the topic 10 minutes

Trainer will use a power point presentation to familiarise the participants with the social scenario and the gravity of the problem of child marriage in India, a brief history of the PCMA, the concept and legal definition of child marriage leading to an introduction to the scheme of the Act. He/she can introduce various relevant terms under the stated laws, offences and punishment prescribed, rights of the victims and the reliefs which can be sought under the Act. The role of legal aid lawyers at different stages in a case of child marriage may be highlighted throughout the presentation. Important judgements may be sighted for reference to the question of validity, voidability and annulment of child marriages.

2. Group Discussions/Role Plays 20 minutes

Participants will be divided in groups of 4-6 and they will be asked to discuss a case study and find the answers to the questions relating to each case study.

3. Presentation of Group Work/Role Plays 15 minutes

Each group will present its case study and views on the related questions to the whole group for a whole group discussion. The presentations can be oral, on flip charts, in the form of role plays or such other medium of expression that helps present the case and communicate the group's view point effectively.

The resource person/trainer will sum up the group discussions with additions where needed in order to present a wholesome view on the topics.

4. Concluding Session 10 minutes

Before concluding the first session, Question and Answers may be encouraged to help the participants clarify their doubts if any.

The concluding remarks can be made at the end by the trainer or by one of the participants or by the visiting dignitary.

Training methods:

1. Lecture
2. Power point Presentation
3. Group Discussions / Role Plays based on case studies
4. Quiz (optional)

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Activity for Session VIII- Child Sexual Abuse and the POCSO Act

– Bharti Ali[1]

Case Study 1

Group Work: POCSO Act

A child was under severe trauma after being kidnapped into the nearby jungle and sexually abused by the kidnapper. Since the child was recovered from the jungle after a day, a medical examination was carried out immediately and a case of kidnapping and sexual assault was registered by the police. However, the child's statement before a Judicial Magistrate could not be recorded soon after as the child was under severe trauma for several days after the incident, and had stopped talking to people. Slowly, with the help of some counselling, the child started interacting and sharing more about the incident with his family, the support person provided to him and the police. One day, it was mutually agreed that the child was ready for getting his statement recorded before a Judicial Magistrate. When the day came, the child was unable to narrate the incident as he had been sharing with his parents, the support person and the Investigating Officer.

What should the legal aid lawyer do in such a case?

a) File an application for recording the statement again?
b) File an application requesting recording of the child's statement through videography?
c) Forgo the recording of the child's statement before a Judicial Magistrate?
d) Any Other (Please specify)

*****

[1] Co-Director, HAQ: Centre for Child Rights

Case Study 2

A three year old is sexually assaulted by the manager of the play school she attends. She is made the complainant in the case and taken for a medical examination. Her parents inform the doctor that the child had been treated for mouth ulcers some time ago, which they now discovered to be a result of forced penetration of private parts by the accused into the victim's mouth. This fact does not figure anywhere in the medical examination report of the doctor.

Since the three year old is made the complainant by the police, she has to testify in the court. To assess her ability to testify, the court asks certain common questions like her name, her age etc. She is then asked to write her name. As a three-year old she somehow manages to write her name in capital letters spread in different directions. There are about four lawyers present in the court room and some court staff, all crowding around the child. The child's mother is allowed to be present in the court room, but is asked to stand at a distance.

When it comes to her testimony, the child forgets what she has to say and keeps staring at the people surrounding her.

As a legal aid representing the child answer the following questions:

a) List out the various violations you notice in this case study?

b) Who should have been made the complainant in the case – the three year old child or her parent?

c) As the child's lawyer, do you think you could make a request to the court to direct the police to make her parent the complainant and file a fresh FIR?

d) How should the court proceed with a three year old child's evidence?

e) What interventions would you make to ensure protection of the victim's rights?

*****

Case Study 3

A child is subjected to sexual abuse by a relative repeatedly. Initially, it started by her uncle luring her to a room on the pretext of showing her some interesting films, which were basically pornographic films. This was supposed to be a secret between the child and her uncle, who had told her so and subsequently, also threatened her of dire consequences if she broke the secret. Gradually, the child was coaxed into stripping and posing like the actors in the film. One day, the uncle tried to fondle with the child's private parts, managing to insert his fingers into her vagina to some extent. Somehow, the child managed to run out of the room naked. Finding her in that condition, her mother scolded her and asked her to dress up. The child broke down and shared the story with her mother. The mother took her to the police station to file a complaint, where she was advised not to do so since it was their family matter. On insistence, the police took the child for a medical examination. Medicine was given to the child for redness around her vagina. The doctor told the police that there was no hymen tear and rape could not be confirmed. The police once again tried to convince the child's mother to avoid filing a case on the grounds that the child had not been raped as per the medical examination. However, on much insistence, an FIR was filed under Section 6 and 7 of the POCSO Act for sexual assault.

Please answer the following questions based on the above case study.

a) As a lawyer do you think the case was booked under appropriate sections of the POCSO Act?

b) Which provisions of the POCSO Act should have been used to book such a case?

c) Can any action be taken against the police for initially refusing to file the FIR or if the police had not filed the FIR? Explain.

d) List out the rights of the victim vis-à-vis medical examination?

e) How can it be ensured that appropriate charges are framed against the accused?

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Case Study 4

A child confides in her school teacher about being sexually abused by her father. The teacher seeks assistance from an NGO. The NGO counsels the child and finds out that her mother knows about the abuse but is not willing to take any action against her husband as she is financially and socially dependent on him. Possibilities of legal action are discussed with the child, but she is not ready to be the cause for bringing a bad name to the family. The option of moving out of the house is also rejected by her as she is not comfortable about staying in a home for girls and also fears that once she is gone, her younger sister would be the next target. One night, when the father again tries to sexually assault her, unable to bear it any more, she runs away from home and goes to a school friend's house, from where she calls her teacher and informs her about her action. Since it was late in the night, the teacher advises her to spend the night at the school friend's house. Next morning, before the child could be taken to the police station to file a complaint, her father reaches out to the police with a complaint against a boy in their neighbourhood for kidnapping her daughter. To save himself, he uses the opportunity to accuse his daughter for having a love affair with the boy. However, with intervention of the school teacher and the NGO, an FIR is filed against the child's father. The child and her father are taken for a medical examination in the same vehicle. The medical examination confirms rape and her statement is recorded under Section 164 Cr.P.C. The child is sent to a home for girls since her family does not support her for the action taken her father. During trial, The Defence Counsel asks her questions about her love affair and sexual relationship with her boyfriend and tries to attack her character. The defence takes the plea that child is falsely implicating her father because the father opposed her love affair. Since there was no fresh sexual assault, DNA and other forensic examination could not prove that her father was the abuser.

Please answer the following questions based on the above case study.

a) Who all can be a witness in a case like this?

b) Should the child and her accused father be taken for a medical examination in the same vehicle?

c) Are there any victim protection measures laid down under the POCSO Act for the pre-trial stage?

d) Can the Defence lawyer directly out questions to the victim? What is the procedure prescribed under the POCSO Act?

e) List out the victim protection measures laid down under the POCSO Act during the trial.

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SHORT NOTE ON
LEGAL AID FOR CHILD VICTIMS OF SEXUAL OFFENCES
USING THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

– Bharti Ali[1]

Background

Child sexual abuse includes a wide range of actions between a child and an adult or older child. The child victim may be a girl or a boy. Incidences of child sexual abuse cuts across all socio-economic categories- caste, class, religion or ethnicity. Children of any age can be abused. Reported incidents show that even infants have been sexually abused.

The abuse may involve body contact, but not always- for example exposing one's genitals to children or pressuring them for sex is also sexual abuse as is the use of a child for pornography or even showing a child pornographic materials.

Most sexual abusers know the child they abuse and have the trust of the child, his/ her families and have access to the home. They may be family friends, neighbors or babysitters. About one-third of abusers are related to the child. Most abusers are men, although there are also women who are abusers.

All children are vulnerable to sexual abuse. Research has proven that differently abled children are in fact more likely to be abused because of their increased vulnerabilities.

A study conducted by the Ministry of Women and Child Development, Government of India in the year 2007 revealed that -

- 53.22% children reported one or more forms of sexual abuse
- 20.9% suffering severe forms of sexual abuse
- Children on street, children at work and children in institutions, highest incidence of sexual assault
- 50% abusers are persons known to children or in position of trust or responsibility

The study also highlighted that sexual crimes against children seldom get reported. And when children muster the courage to report their abuse, they are disbelieved or told to forget the incident. Over the years, several attempts have been made to draw attention to child sexual abuse and break the conspiracy of silence surrounding it.

Enactment of the Protection of Children from Sexual Offences Act, 2012 (POCSO) is one such attempt.

Introduction to the Pocso Act

The POCSO Act came into existence on 19 June 2012 and was implemented with effect from 14 November 2012 with the notification of the Protection of Children from the Sexual Offences Rules, 2012. For the first time a separate law came into existence to deal with sexual offences against children. Until then provisions of IPC were used to deal with sexual offences against children (Section 376 of IPC in case of rape and Section 377 of IPC in case of sexual assault of boys). Recognising the many ways that a child may be abused, the Act has broadened the concept of sexual abuse of children to include sexual acts that involve physical contact as well as those that do not.

[1] Co-Director, HAQ: Centre for Child Rights

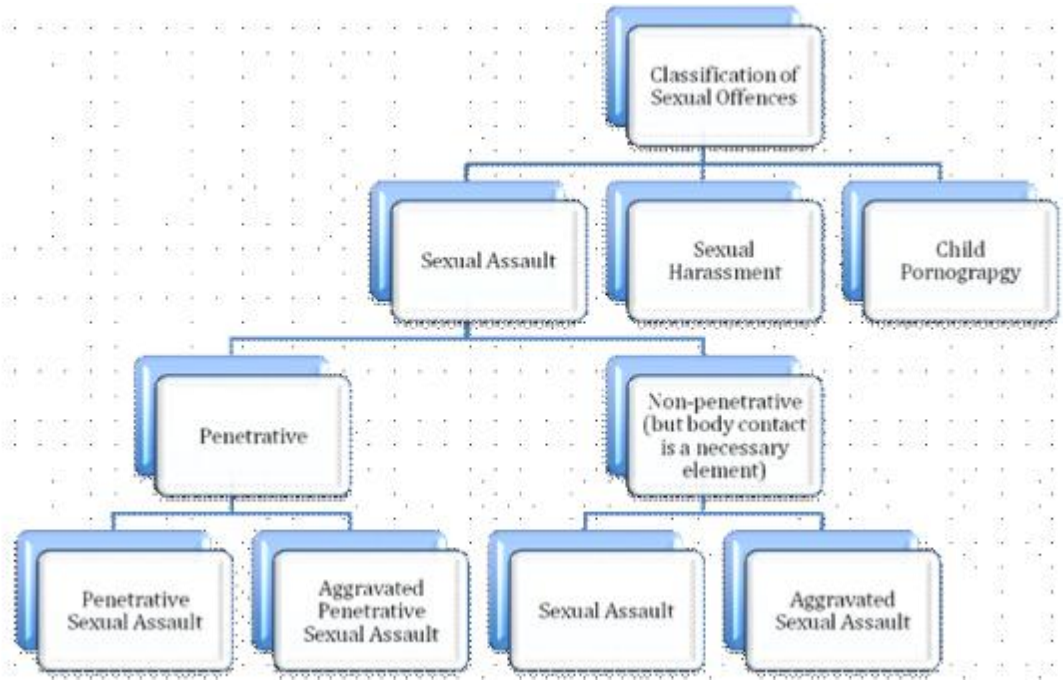
Salient Features of the Act

- *Children are defined as persons below the age of 18 years.*
- *The law is gender neutral i.e. the law recognises that the victims and the perpetrators can be both girls and boys.*
- *It raises the age of sexual consent to 18 years by making all sexual activity with a child a statutory sexual offence.*
- *The POCSO Act broadens the understanding of rape from mere peno-vaginal penetration to other forms of penetration of a private part into different parts of the body of a child and penetration to any extent.*
- *The law recognizes that sexual abuses that abuse may or may not involve bodily contact. It categorizes the offence as 'sexual assault' and 'sexual harassment'.*
- *Anal penetration is no longer looked at as 'unnatural sex', but a form of sexual assault deserving equal attention.*
- *Reporting is mandatory under the law for everybody, and the law includes a penal provision for non-reporting.*
- *The law requires privacy and confidentiality of the victims to be protected.*
- *It provides for constitution of special courts and special public prosecutors to deal with offences listed under the Act.*
- *Children can be provided other special support in the form of supports persons and victim compensation.*

Most importantly, **children are entitled to legal representation by a lawyer of their choice.**

Types of sexual violence and abuse covered under the POCSO Act

A. Penetrative Sexual Assault [Section 3 and 4]
B. Aggravated Penetrative Sexual Assault [Section 5 and 6]
C. Sexual Assault [Section 7 and 8]
D. Aggravated Sexual Assault [Section 9 and 10]
E. Sexual Harassment [Section 11 and 12]
F. Child Pornography [Section 13 and 14]
G. Storage of Child Pornography [Section 15]



For details regarding sexual offences under the POCSO Act and punishments prescribed see **Annexure 1.**

Other Offences under the Act

- Abetment of an offence under the Act [Section 16 and 17]
- Attempt to commit any of offence under the Act or cause such offence to be committed [Section 18]
- Failure of all adults to report or failure of the police to record an offence [Section 21 (1), (2) and (3)]
- Filing a false complaint or giving false information, except when done by a child is also an offence [Section 22 (1), (2) and (3)]

Failure of any media or a studio or photographic facility to protect the privacy, dignity and confidentiality of victims [Section 23 (3) and (4)]

Points to Remember - ·

- **Section 42** of the POCSO Act makes it clear that for **an act or omission that constitutes an offence** under this Act as well as under any other law in force, the punishment shall be that which is greater in degree. ·
- The POSCO Act is a special law and it has not specified which offences are cognizable and, therefore, to determine which of the POCSO Act offences are cognizable and bailable, reliance are must be placed exclusively on Part II ("Classification of Offences Against Other Laws"), First Schedule of the Code of Criminal Procedure, 1973. -

  Whenever the punishment is less than 3 years of imprisonment, the offence would be non-cognizable and bailable. Any higher term of **imprisonment beginning from 3 years and above would make such offence cognizable and non-bailable**. Hence **all sections are cognizable, with the exception of section 21 and 22** which are non-cognizable and bailable offences.

Special Mechanisms for trying Offences under the POCSO Act

Special Courts [Section 28 and 34 of the POCSO Act]

A Court of Sessions is to be designated as a Special Court [Section 28(1)] to try the following cases:

- Offences under the POCSO Act [Section 28(1)],
- Other offences that the accused may be charged with in the same trial [Section 28 (2)],
- Offences under Section 67 B of the Information Technology Act [Section 28(3)], and
- Age determination of the accused that may arise before such court in the course of its proceedings [Section 34(2)].

Where Children's Courts have been notified under the Commissions for Protection of Child Rights Act, such courts are to also function as the Special Courts under the POCSO Act.

Any other Special Court set up for similar purposes under any other law may also be designated as a Special Court to try offences under the POCSO Act. For example the Special Court set up under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act can be designated as a Special Court under the POCSO Act also.

Courts and trials

Speedy trial – an important function of the Special Court

Special Courts are provided for as special mechanism to ensure speedy trial in cases involving children.

Under Section 35 (1) of the POCSO Act, the Special Court is required to complete recording of evidence of the child within 30 days of such Court taking cognizance of the offence. Any extension in this period must be recorded in writing, with reasons.

Section 35 (2) further requires the Special Court to complete the trial within one year from the date of taking cognizance of the offence.

In case the offender is minor - Juvenile Justice Boards [Section 34 (1) of the POCSO Act]

When the offence is alleged to have been committed by a minor, the case is supposed to be inquired into and disposed off by the Juvenile Justice Boards as per the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (as amended in 2006).

Special Public Prosecutors [Section 32 of the POCSO Act]

For conducting a prosecution in a case registered under the POCSO Act, the state government is required to provide Special Public Prosecutors with minimum 7 years' experience as an advocate to every Special Court.

Rights of the victims

Right to receive assistance of various experts pre-trial and during trial [Section 38 of POCSO Act and Rules 2 and 3 and 4(7) of POCSO Rules]

An 'Expert' includes a person trained in mental health, medicine, child development or other related discipline, who may be required to facilitate communication with a child whose ability to communicate has been affected by trauma, disability or any other vulnerability.

Under the Integrated Child protection Scheme (ICPS) of the Central Government, District Child Protection Units (DCPUs) are set up in every district. These DCPUs are supposed to maintain a list of such experts with their contacts and make such list available to the Special Juvenile Police Units set up to deal with crimes relating to children in every district under the Juvenile Justice (Care and Protection of Children) Act, 2000, local police, Magistrates or Special Courts under the POCSO Act.

The experts include:

- **Translator and Interpreter** for children who speak their regional language or mother tongue or a local dialect, which is not the language understood by the court, or children with disabilities.
- **Special educator** for children with special needs, which include challenges with learning and communication, emotional and behavioural disorders, physical disabilities, and developmental disorders.
- **Person familiar with the manner of communication of the child,** which includes a parent or family member of a child or any person trusted by the child , who is familiar with the child's unique manner of communication, and whose presence may be required for more effective communication with the child.
- **Mental health expert** to provide psychotherapy and help reduce the trauma experienced by the victim child.
- **Support person** assigned by a Child Welfare Committee to assist the child through the process of investigation and trial.

Role of Child Welfare Committee

A support person may not be made available to every child victim of sexual crime listed under the POCSO Act. This is because the Child Welfare Committee can provide the assistance of a support person to a victim [Rule 4(7) of POCSO Rules].

Not ALL child victims are to be produced before the Child Welfare Committee by the police. Rule 4(3) of POCSO Rules clarifies that **only the following child victims of sexual crimes are to be produced before the Child Welfare Committee:**

(i) a child who has been abused or is likely to be abused by a person living in the same household as the child or a child's family member

(ii) a child living in a child care institution and without parental support

(iii) a child without any home or parental support

Right to legal representation by a lawyer of one's choice [Section 40]

The family or guardian of a child victim has the right to take assistance of a legal counsel oftheir choice or from the Legal Services Authority.

Unfortunately, although the victim may need it from the very stage of filing a complaint with the police, this right however often comes into effect in the course of trial. This is an area that needs to be addressed

Always remember ...

The advocate should know the criminal justice system well.
As far as possible, the same advocate should be present through the course of the trial till the end of the case.

The role of a lawyer in a POCSO case is not confined to merely representing in court. The child's lawyer is to advise the child and her/his family members about their legal rights, prepare them for the trial and assist them in all legal procedures throughout the case.

In many cases, the lawyer of the child will/ may also have to act as the child's support person.

Role of legal aid lawyer in the pre-trial stage

Legal representation is needed by the victims from the very first stage of filing an FIR. This is to ensure that the victims do not suffer any violation of their rights.

Important pre-trial stages in a case include:

Medical Examination of the victim –

The support of a lawyer familiar with the medical examination procedures and protocols is critical to the protection of victim's rights in the course of medical examination.

Past experience shows that many children have been denied justice because of lack of adequate medical evidence or poor recording of medical evidence.

The guidelines laid down for medical examination of victims of sexual assault by the Ministry of Health and Family Welfare must be duly followed. For example, the new guidelines on medical examination of victims of sexual assault ban the two-finger test. In fact, in the case of children, there

should be no question of considering the two-finger test relevant. The Supreme Court of India has held in *State of Uttar Pradesh v. Pappu, (2005) 3 SCC 594, State of Uttar Pradesh v. Munshi, (2008) 9 SCC 390, State of Punjab v. Ramdev Singh, (2004) 1 SCC 421, Narayanamma v. State of Karnataka, (1994) 5 SCC 728,* and*State of Punjab v. Ramdev Singh, (2004) 1 SCC 421*, that the results of the two finger test cannot be used against the prosecutrix and whether the victim is habituated to sexual intercourse is not relevant for the purposes of rape.

The Court has also repeatedly held that in cases of rape and other sexual offences, conviction can be made on the sole evidence of the prosecutrix, if her evidence inspires confidence[*State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC550* and*State of Punjab v. Ramdev Singh, (2004) 1 SCC 421*].

Non-negotiable Procedures when conducting the Medical Examination of a rape victim

[Section 164 A of the Cr.P.C, Section 27 of the POCSO Act and Rule 5 of the POCSO Rules read with Guidelines issued by the Ministry of Health and Family Welfare from time to time]

- A female police officer must escort the victim to the hospital for medical examination.
- The police should see to it that a psychiatrist is available to the child victim before the medical examination at the hospital itself.
- Medical examination in a case of sexual assault can be conducted by a Registered Medical Practitioner in a government hospital or a private facility.
- In the case of a girl child victim, a female doctor must conduct the medical examination.
- Emergency medical care and treatment must be provided where necessary. If a child victim is brought to a private nursing home, the child must be given immediate medical attention. Non-treatment of victims of sexual crimes is a punishable offence under Section 166 B of the Indian Penal Code (IPC).
- The consent of the victim or of a person competent to give consent on her/his behalf must be taken before the medical examination.
- A parent or other person trusted by the child may be present for the medical examination. If such a person is unavailable, the head of the medical institution can nominate a woman to be present.
- The child victim must be given preventive medical treatment against sexually transmitted diseases, Human Immunodeficiency Virus (HIV), including prophylaxis for HIV.
- Any previous medical history of the victim must be recorded by the examining doctor and made part of the medical examination report.

FIR and Recording of Statement of the victim under Section 161 of the Cr.P.C.

- It is important to ensure that the FIR and any statement of the victim recorded under Section 161 is read out to the victim.
- FIR should be registered in the presence of the parents of the child or any other person whom the child trusts.
- Every victim has a right to get a copy of the FIR. Unfortunately, even today this right is violated.
- Often statement recorded under Section 161 Cr.P.C. is made available to the victim and her/

his family only on the day she/he is required to appear in the court for recording of examination-in-chief or a day or so before the date of hearing. Since there is often a time lapse between the statement recorded under Section 161 Cr.P.C. and the recording of examination-in-chief, the child may miss out on some very vital details, which will impact the trial process and delivery of justice.

- Under **Section 24 of the POCSO Act**, for recording the statement of child, the police is required to reach the child at her/his residence or any other place convenient for the child and her/his family, and that too in civil dress.
- While under the POCSO Act, the police officer recording the statement of the child should be a woman as far as possible, the Criminal Law Amendment Act of 2013 makes it mandatory for the statement under Section 161 Cr.P.C. as well as the FIR under Section 154 Cr.P.C. to be recorded by a woman police officer if the victim is a girl child.
- Recording of FIR of a child who is physically or mentally disabled can be videographed. Use of audio-video electronic means is for recording a statement of a child victim of sexual crimes is encouraged under **Section 26 (4) of the POCSO Act** and is also allowed under **Section 161 Cr.P.C.**
- While FIR has to be signed by the victim [**Section 154 (1) Cr.P.C.**], statements given to the police under Section 161 CRPC are not supposed to be signed by the victim [**Section 162 (1) CrPC**].

Please Note

When a violation of any of these rights and provisions take place, it is a duty of the legal aid lawyer to inform the court. This is because most often the victims face stern opposition and questioning from the defence counsel in the court if their evidence varies from the FIR or the statement under Section 161 Cr.P.C. Despite the law requiring the police to record all information and statements provided by the victim as spoken by the child, experience shows that there is always a discrepancy in the final documents which affect the trial process

Recording of Statement of the victim under Section 164 of the Cr.P.C.

Sexual abuse has severe mental and sometimes even physical consequences on a child. The child is traumatised by the experience of the violence and this can affect the mental condition of the child. Many a times there are sever physical consequences including perineal injury which requires surgical interventions and long-term treatment and care.

We also know that any variation in the statement of the victim recorded by a Judicial Magistrate under Section 164 of the Cr.P.C. FIR and statement under Section 161 of Cr.P.C. provides fodder to the defence counsel to question the authenticity of the victim's statements during her/his cross examination, thereby confusing the victim in the court. In the case of children, it is far easier to confuse them.

Under these circumstances the lawyer's role in ensuring that the child is able to make a statement without fear and with confidence is critical. It is imperative that the child's lawyer takes appropriate steps to ensure that the child's statement before a Judicial Magistrate is recorded properly. This too may require counselling and preparing the child for the court.

- Statement before the Judicial Magistrate should not be delayed in the case of children, especially if they are very young. This is because they may not be able to recall everything the way it happened if there is a delay.

- But there may also be cases where children are not in a mental or physical condition (in case the abuse has led to severe medical condition) to have such a statement recorded. In such cases, where the child is in trauma, it is only prudent to wait until the child is ready for it.
- It is also possible that a child is scared to go to court, or uncomfortable about it, or physically unfit to be taken to court. In such cases the child's statement before a Judicial Magistrate of First class can be recorded through audio-video electronic means. When the victim is a child, presence of the advocate of the accused cannot be allowed at the time of recording such statement [**Proviso to Section 25 (1) of the POCSO Act**].

Further, a video graphed statement made before a Judicial Magistrate by a victim who is temporarily or permanently physically or mentally challenged can be used as the examination-in-chief in the course of trial [**Section 164 (5A) (a) and (b) of CrPC**].

Case Study

A child was under severe trauma after being kidnapped into the nearby jungle and sexually abused by the kidnapper. Since the child was recovered from the jungle after a day, a medical examination was carried out immediately and a case of kidnapping and sexual assault was registered by the police. However, the child's statement before a Judicial Magistrate could not be recorded soon after as the child was under severe trauma for several days after the incident, and had stopped talking to people. Slowly, with the help of some counselling, the child started interacting and sharing more about the incident with his family, the support person provided to him and the police. One day, it was mutually agreed that the child was ready for getting his statement recorded before a Judicial Magistrate. When the day came, the child was unable to narrate the incident as he had been sharing with his parents, the support person and the Investigating Officer.

What should the legal aid lawyer do in such a case?

(a) File an application for recording the statement again

(b) File an application requesting recording of the child's statement through videography

(c) Forgo the recording of the child's statement before a Judicial Magistrate

(d) Any Other (Please specify)

Framing of charges –

The FIR and the final report filed by the police may not contain necessary provisions under which the accused ought to be tried. The accused will only be tried for the charges finally framed by the court. Therefore it is important to ensure that appropriate charges are framed. A critical role is played by the lawyers in ensuring that a case is booked under all the relevant provisions relating to sexual crimes contained in different laws. This will help ensure that the person found guilty of committing a sexual offence is punished appropriately.

- If at the time of framing of charges, the lawyer is not satisfied on the charges framed by the court, an application can be moved for insertion of relevant sections through the Special Public Prosecutor or the child's lawyer as the case may be.
- This application will have to be argued on merit and available evidence, so that appropriate sections of the law get inserted into the case and the trial is carried out on those charges.

- Every lawyer representing a victim of sexual crime must therefore be well versed with the facts of the case and what constitutes an offence under the POCSO Act as well as the Indian Penal Code, the Information Technology Act and such other laws that deal with different kinds of sexual crimes.

List of key witnesses –

It is often seen that people mentioned by the victim or her family in their narration of the incident do not figure anywhere in the list of witnesses. On the other hand the list of witnesses may be carrying some unnecessary names, which is bound to delay completion of evidence and hence delay in completion of trial and justice to the victim.

A child's lawyer can play a key role in seeking deletion of unnecessary witnesses and ensuring finalisation of a list of key witnesses only.

Opposing Bail of the accused and cancellation of bail –

It is well known that child victims and their families are threatened and intimated by the abusers. Hence if the accused is out on bail, this may have repercussions on the trial process including the witnesses turning hostile out of fear or pressure. It may therefore be necessary to oppose the bail of the accused in certain circumstances. These include:

- If there is reasonable apprehension of the victim and/or her/his family being in danger from the accused or under threat from the accused and there is evidence to support such threat.

Threats received from the family of the accused, if recorded or complaints of such threats given to the police in writing can be used to oppose bail.

- Bail may also be opposed if there is reasonable apprehension of tampering of evidence by the accused if released on bail.

Even if bail is granted, it can be cancelled if the victim receives any threats and documentation of such threats in the form of written complaints made to the police or in the form of video or audio recording is available.

Role of legal aid lawyer at the time of trial

As per Section 40 of the POCSO Act, a legal aid lawyer's role in the prosecution is subject to the proviso to sections 24 (8) and 301(2) of the Code of Criminal Procedure (CrPC). In other words, a private lawyer or a legal aid lawyer can only -

a) assist the prosecution after taking permission of the Special Court
b) act under the instructions of the Special Public Prosecutor
c) submit written arguments only after the evidence of all the witnesses is recorded in the case

The general responsibilities and obligations of public prosecutor will apply to a private or legal aid lawyer only in the particular case where she/he has been permitted by the Special Court to assist the prosecution. This is because under section 2(u) of the CrPC, any person acting under a public prosecutor must be considered a public prosecutor.

For a legal aid lawyer assisting in prosecution the following stages are critical:

Preparing the victim for Examination-in-chief and cross examination of victims –

- Children are not familiar with court or court procedures. In fact they are most intimated by it. Hence, a child requires preparation to face a trial in the court. This is true for both smaller and older children. However, preparation does not imply tutoring the child. It simply means training the child in a manner that the child is confident to face a court environment and is able to express herself/himself to explain the incident.

- A child should be allowed to use her/his own vocabulary, language and expressions to explain the circumstances of offence and the incident. For example, some children may refer to rape as 'rape', while some others may call it 'ganda kaam', referring to the act of sexual assault as something bad done to the child by the accused. Children have a language and vocabulary of their own to explain such acts in detail if required. However, effective communication of facts and circumstances of the incident by a child is possible only when the lawyer familiarizes herself/himself with the child's way of expression and levels of comfort and accordingly make a request to the Special Public Prosecutor or the Court as the case may be, to use appropriate tools and create an enabling environment for the child at the time of recording her/his evidence. Assistance may be taken from various experts provided for under the POCSO Act and Rules at the stage of preparation itself.

Different children will have different ways of expressing themselves
Here is what one child said …
"he took off my clothes and also took off his own clothes and put his 'Haddi' into my 'Sushu'

- Children often have a strong sense of fighting against injustice and a lawyer must be able to reiterate this emotion by explaining to the child the importance of participating in the trial for seeking justice. Instilling confidence in the victim to face a trial and making the child realize that she/he can do it is all that matters. Once this is achieved getting the child to recall the incident becomes less traumatic. This may be done by the lawyer directly or with the help of the support person that may have been assigned to the child by the Child Welfare Committee, or with the help of a person trusted by the child.

One of the biggest challenges that a lawyer faces when she/he works with a child survivor of sexual abuse is the long time gap between the time of the incident and the hearings. While on one hand, parents and all concerned with the children are working and trying to make the child forget the trauma, the lawyer has the difficult role of reminding the child of the event as it took place and urge the child to repeat it in detail.

- One or two prior visits to the court may help in familiarizing the victim with the court environment. This however, would depend on the child's self-confidence and healing process. POCSO courts or Special Courts trying POCSO offences are meant to be child-friendly courts. Since the law is relatively new, it may take state governments some time to build the requisite infrastructure to make these courts child-friendly. In some states such efforts have already begun.
- Preparing the family of the child is equally important. The family tends to influence the child's thinking more than any other person. Therefore any negative thoughts of family members vis-a-vis the police and the court process may get transferred to the child. Help may be taken from the support person to make the family understand this and avoid expressing any signs of despair, which may affect the confidence of the child.
- The best way to keep the confidence of the family high is to keep them informed about the court process and the next stage in the case. Only when the family feels lost or confused on how the courts function and have questions and curiosity about what is going to happen next that negative thoughts start seeping in. If meanwhile, the accused is released on bail, the family gives up on any hope for justice. It is important to explain to the family that release on bail does not mean that the accused will get no punishment.

- The family is in trauma and also often very anxious. Hence they tend to have many queries and concerns. While, it may become very tiring for a lawyer to keep answering a family or a child's questions, this is very important to win the trust of the family and the child. When that happens, even release of the accused on bail does not really affect the family, as the family has an explanation to that from the lawyer and they are assured assistance when in need. They feel somewhat protected.
- Explaining the victim her/his rights enshrined under the POCSO Act takes care of many other apprehensions. For example a child is bound to feel relaxed if she/he knows that there will be a screen between her/him and the accused and this a requirement of the law. Informing the child that there will be no direct questioning by the defence counsel brings further relief.

Examination-in-chief and cross examination of victims –

The effort should be to make the process of trial as easy and non-traumatic as possible for the child. Therefore,

- As far as possible, efforts should be made to ensure that examination-in-chief and cross examination of the victim are concluded on the same day so that the child is not required to be called repeatedly to the court [**Section 33 (5 of the POCSO Act**].

A child may be a school going child and hence it may not be possible for her/him to miss school every time for recording of evidence. Even if the child is not a school going child, to avoid further distress, and in the interest of the child, it is imperative to request for completion of the child's evidence the same day**.** In some circumstances however, it may only be prudent to seek another date for cross-examination, especially if the victim looks uncomfortable or tired. This may also be an option where the victim resides in the same city/town where the court is located.

Victim and the family member accompanying the child to the court are entitled to reimbursement of cost of travel to the court. The lawyer must therefore inform them about this right and ask them to keep their train/bus tickets carefully to seek travel reimbursement.

If necessary, the lawyer representing the child may request the court to allow frequent breaks for the child in the course of recording of evidence or the court may do so on its own [**Section 33 (3) of the POCSO Act**]. Another date may be sought if the child continues to express discomfort.

Sometimes, despite all preparation, the child may still be uncomfortable at the time of her/his examination-in-chief. This must be brought to the notice of the court and appropriate alternative should be suggested if possible. It may require requesting a change in the court environment or requesting the evidence to be recorded in the presence of the support person or the child's parent/guardian or person that the child is comfortable with [**Section 33 (4) of the POCSO Act**], or examination at a place other than the court [**Section 37 of the POCSO Act**]. In-camera trials in cases of sexual offences are mandatory under the POCSO Act as well as the Code of Criminal Procedure. Use of Testimonial Aids such as screens, single visibility mirrors or curtains, use of video conferencing and such other technical devices may be sought where possible to reduce the victim's stress of testifying in a court [**Section 36 of the POCSO Act**].

- If a child needs the assistance of interpretation into a language or mode that the child understands, the court must be informed of the same so that arrangements can be made. Such services have to be made available to the victims free of charge [**Section 38 of the POCSO Act and Rule 3 of POCSO Rules**].

- If, in view of the child's age, level of maturity or special individual needs, which may include disabilities if any, the child requires special assistance measures in order to testify or participate in the justice process, such measures may also be sought through the court free of charge, as an entitlement of the victim [**Section 38 of the POCSO Act and Rule 3 of POCSO Rules**].
- It must be ensured that there is no direct questioning to the victim by the defence counsel. As required by law, the defence counsel should give the questions in writing to the presiding judge, who shall then in turn put those questions to the victim and may eliminate those thought to be unnecessary [**Section 33 (2) and 33 (6) of the POCSO Act**].
- Character based evidence should not be allowed [**Section 33 (6) of the POCSO Act**]. It would for instance be gross injustice if the defence counsel is allowed to cast aspersions on the victim's character simply because the victim is familiar with the word 'rape'. Access to television and other forms of media have exposed children to the vocabulary of crime and hence any such attempts by the defence counsel must be objected to.

1. Facilitating Victim Compensation [Section 33 (8) of the POCSO Act and Rule 7 of thePOCSO Rules 2012] -

- Rules framed under the POCSO Act provide for victim compensation to victims of sexual offences in line with the provisions of sub-sections (2) and (3) of Section 357 A of the Code of Criminal Procedure.
- The Special Court may provide compensation on its own or on an application made by the child's lawyer.
- A child's lawyer need not wait for the court to take up the issue of and may accordingly file an application in this regard. Every state is supposed to develop its own victim compensation scheme.
- Victim compensation does not depend on conviction of the accused.
- Two types of compensation may be provided by the court -

  (i) interim compensation to meet the immediate needs of the child

  (ii) final compensation on completion of trial taking into account the loss or injury caused to the victim as a result of the offence.
- Interim Compensation ordered by the court must be released to the victim within 30 days of order.
- The interim compensation is to be adjusted against the final compensation awarded by the court, unless the court decides not to award any final compensation.

2. Using the Right to information for documents pertaining to one's case [Section 25 (2) and Section 40 of the POCSO Act, and Rule 12 of the POCSO Rules] –

The very fact that a child is entitled to be represented by her/his lawyer under Section 40 of the POCSO Act gives the child a right to have access to documents and information pertaining to her/his case. Only when the child's lawyer has access to relevant documents can he/she represent the child or assist in prosecution.

Even today victims and their families remain unaware of the police investigation, the stage at which their case is in the court, various court procedures etc. They are almost always living in anxiety as to what is going to happen next.

There are explicit provisions under the POCSO Act and Rules casting a duty on the Police and the Court to provide certain information and documents pertaining to the case to the victim child.

Rule 12 requires the police or the child's support person to make the following information available to the child victim of a sexual crime under the POCSO Act:

- information about public and private crisis services
- procedures and steps involved in the process of criminal prosecution
- victim compensation
- status of investigation of the crime, to the extent necessary, so that it does not lead to interference with the investigation
- arrest of the alleged offender
- filing of charges against the alleged offender
- schedule of court proceedings
- status of bail, detention or release of the alleged or guilty offender
- court's verdict after completion of trial
- sentence imposed on the offender

Section 25 (2) requires the Court to provide the child victim and her/his parents or representative, a copy of the following documents after the police files its final report (i.e. the charge sheet):

- police report
- FIR recorded under section 154 Cr.P.C.
- statements recorded under section Section 161 (3) Cr.P.C.
- statements recorded under Section 164 Cr.P.C.
- any other document or relevant extract of such document forwarded to the Court by the police along with the police report

The Court may also allow file of the inspection if the documents are voluminous.

Can a victim enjoy these rights if the accused is a juvenile (below the age of 18 years)?

Section 34 of the POCSO requires application of provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (as amended in 2006) in cases where a sexual offence is alleged to have been committed by a child (now it is the Juvenile Justice (Care and Protection of Children) Act, 2015. One of the critical principles of this juvenile justice law is protection of privacy and confidentiality of the accused child. This principle is clearly laid down in the rules framed by the Central Government in 2007 under the Juvenile Justice (Care and Protection of Children) Act.

The question however, is whether a victim or her/his lawyer can be denied access to certain information and documents and inspection of file despite clear provisions under the POCSO Act in this regard, including the right to be legally represented by a lawyer of one's choice?

Using other Enabling provisions under the POCSO Act

- **Burden of proof [Section 29 of the POCSO Act] -**

  During the trial for an offence of penetrative or non-penetrative sexual assault under the POCSO Act or its abetment, or attempt to commit such an offence, the child-victim will give evidence first and then shall be cross-examined by the lawyer of the accused.

  Thereafter, the medical and forensic evidence should be led by the prosecution and it should plead in such prosecution that under section 29 of the POCSO Act, there is a presumption that the accused committed the offence and the burden to prove the innocence is upon the accused. Only if this burden is discharged by the accused would the prosecution be obliged to lead rest of the evidence to prove its case.

- **Presumption of culpable mental state [Section 30 of the POCSO Act] -**

  Section 30 of the POCSO Act presumes existence of "culpable mental state" on the part of the accused for committing the offence he/she is charged for.

  The presumption includes presumption as to the existence of motive, intention, knowledge etc. can be rebutted by the accused.

  Under Section 30 (2) of the Act, a fact must be proved, like in all criminal prosecutions, beyond reasonable doubt.

Case Study

A three year old is sexually assaulted by the manager of the play school she attends. She is made the complainant in the case and taken for a medical examination. Her parents inform the doctor that the child had been treated for mouth ulcers some time ago, which they now discovered to be a result of forced penetration of private parts by the accused into the victim's mouth. This fact does not figure anywhere in the medical examination report of the doctor.

Since the three year old is made the complainant by the police, she has to testify in the court. To assess her ability to testify, the court asks certain common questions like her name, her age etc. She is then asked to write her name. As a three-year old she somehow manages to write her name in capital letters spread in different directions. There are about four lawyers present in the court room and some court staff, all crowding around the child. The child's mother is allowed to be present in the court room, but is asked to stand at a distance.

When it comes to her testimony, the child forgets what she has to say and keeps staring at the people surrounding her.

As a legal aid representing the child answer the following questions:

1) List out the various violations you notice in this case study?
2) Who should have been made the complainant in the case – the three year old child or her parent?
3) As the child's lawyer, do you think you could make a request to the court to direct the police to make her parent the complainant and file a fresh FIR?
4) How should the court proceed with a three year old child's evidence?
5) What interventions would you make to ensure protection of the victim's rights?

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Annexure 1

SEXUAL OFFENCES AND PUNISHMENTS
PENETRATIVE SEXUAL ASSAULT (PSA) - SECTION 3

Penetrative Sexual Assault is defined to include:

1. **Penetration of penis to any extent** into any of the following body parts of a child -
    - vagina
    - mouth
    - urethra
    - anus
2. **Insertion of an objector a part of the body other than the penis to any extent**, into any of the following body parts of a child -
    - vagina
    - urethra
    - anus
3. **Manipulation of any part of the body of the child to cause penetration** into any of the following -
    - vagina
    - urethra
    - anus
    - any other part of body of the child
4. **Applying mouth to any of the following body parts** of a child -
    - penis
    - vagina
    - anus
    - urethra
5. **Making a child do any of the acts listed in Section 3 of the POCSO Act (points (1) to (4) mentioned above) amounts to penetrative sexual assault.**

PUNISHMENT FOR PSA - SECTION 4

- Imprisonment of 7 years to life; and
- Fine

AGGRAVATED PENETRATIVE SEXUAL ASSAULT (APSA) - SECTION 5

Aggravated penetrative sexual assault is penetrative sexual assault committed on a child on account of the powerful position enjoyed by the perpetrator, trust vested by the child in the perpetrator, vulnerability of the child, causing additional bodily harm or mental torture, repeated crime, or crime by a gang of one or more persons.

I. A person of authority includes:

- Police Officer [Sec. 5 (a)]
- Officer of the Armed Forces or Security Forces [Sec. 5 (b)]
- Public Servant [Sec. 5 (c)]
- Management or staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection [Sec. 5 (d)]
- Management or staff of a government or private hospital [Sec. 5 (e)]
- Management of staff of an educational or religious institution [Sec. 5 (f)]

II. A person trusted by the child includes:

- Relatives of the child or a family member [Sec. 5 (n)]
- Adoptive parent or a foster carer [Sec. 5 (n)]
- Person in a domestic relationship with a parent of the child [Sec. 5 (n)]
- Person living in the same shared household [Sec. 5 (n)]
- Owner, or management, or staff, of any institution providing services to the child [Sec. 5 (o)]

III. Vulnerability of the child includes situations where:

- use is made of deadly weapons, fire, heated substance or corrosive substance [Sec. 5 (h)]
- advantage is taken of the child's physical / mental disability [Sec. 5 (k)]
- the child is pregnant [Sec. 5 (q)]
- the child is below the age of 12 years [Sec. 5 (m)]
- penetrative sexual assault is committed by a person trusted by the child inside the institution or home of the child (Sec. 5 (p)]
- the offence is committed in the course of communal or sectarian violence [Sec. 5 (s)]

IV. Causing additional bodily harm or mental torture includes:

- Grievous hurt or bodily harm and injury to the sexual organ of the child [Sec. 5 (i)]
- Physical/mental incapacitation, impairment or illness [Sec. 5 (j) (i)]
- Pregnancy [Sec. 5 (j) (ii)]
- STD/HIV/Other life threatening disease or infection [Sec. 5 (j) (iii)]
- Attempt to murder[Sec. 5 (r)]
- Making the child strip or parade naked in public [Sec. 5 (u)]

V. Repeated crime includes:

- when the offence is committed more than once i.e. repeatedly [Sec. 5 (l)]
- when the offence is committed by a person who has been previously convicted of a sexual offence under the POCSO Act or any other lawfully [Sec. 5 (t)]

VI. Gang penetrative sexual assault includes:

- Penetrative sexual assault by a group of one or more persons acting in furtherance of a common intention [Sec. 5 (g)]

PUNISHMENT FOR APSA - SECTION 6

- Rigorous Imprisonment of 7 years to life; and
- Fine

Note: In case of Gang Penetrative Sexual Assault, each person who is part of the gang shall be liable to same punishment.

SEXUAL ASSAULT (SA) – SECTION 7

1. **Touching any of the following body parts of a child -**
    - vagina
    - penis
    - anus
    - breast
2. **Making the child touch one's body parts**
3. **Any other act with sexual intent which involves physical contact without penetration**

PUNISHMENT FOR SA - SECTION 8

- Imprisonment of 3 to 5 years; and
- Fine

AGGRAVATED SEXUAL ASSAULT (ASA) – SECTION 9

The scheme of provisions under Section 9 of the POCSO Act dealing with 'Aggravated Sexual Assault' is the same as the provisions contained in Section 5 on "Aggravated Penetrative Sexual Assault". Hence it is easy to understand and use.

The only difference is:

a) Section 9 is related to non-penetrative forms of sexual assault

b) Unlike Section 5 (j), Section 9 (j) covers only two types of physical or mental harm caused to the victim in addition to sexual assault. These are:

- Physical/mental incapacitation, impairment or illness [Sec. 9 (j) (i)]
- STD/HIV/Other life threatening disease or infection [Sec. 9 (j) (ii)]

PUNISHMENT FOR ASA - SECTION 10

- Imprisonment of 5 to 7 years; and
- Fine

SEXUAL HARASSMENT (SH) – SECTION 11

1. Sexual harassment includes sexual acts carried out without any physical contact with the victim. These include:
    - Uttering any word or making any sound or gesture, or exhibiting any object or part of body [Sec. 11 (i)]
    - Making a child exhibit his body or any part thereof [Sec. 11 (ii)]

- Showing any object to a child for pornographic purposes [Sec. 11 (iii)]
- Repeatedly or constantly following or watching or contacting a child [Sec. 11 (iv)]
- Threatening to use real or fabricated depiction of any part of the body of the child or depiction of involvement of a child in a sexual act [Sec. 11 (v)]
- Enticing a child for pornographic purposes [Sec. 11 (vi)]

2. Sexual intent is a necessary and sufficient condition to make out a case of sexual harassment. It is to be determined on the basis of facts of a case.

PUNISHMENT FOR SH - SECTION 12

- Imprisonment up to 3 years; and
- Fine

USE OF CHILD FOR PORNOGRAPHY – SECTION 13

Section 13 of the POCSO Act makes the following acts a punishable offence:

1. Use of a child in any form of electronic, digital or print media for the purpose of sexual gratification a punishable offence, including -
   - Representation of sexual organs of a child
   - Usage of a child engaged in real or stimulated sexual acts (with or without penetration)
   - Indecent or obscene representation of a child
2. Involving a child through electronic, digital, print medium or any form of technology for -
   - preparation of pornographic material,
   - production of pornographic material,
   - offering pornographic material,
   - transmitting pornographic material,
   - publishing pornographic material,
   - facilitation and distribution of pornographic material.

PUNISHMENT FOR USE OF CHILD FOR PORNOGRAPHY – SECTION 14

First Offence: Imprisonment up to five years and fine [Sec. 14 (I)]

Subsequent Conviction: Imprisonment up to seven years and fine [Sec. 14 (1)]

Punishment for direct participation in other sexual offences listed under the Act while using a child for pornographic purposes is higher.

Participating in PSA: Imprisonment of 10 years to life, and fine [Sec. 14 (2)]

Participating in Aggravated PSA: Rigorous Imprisonment for life and fine [Sec. 14 (3)]

Participating in Sexual Assault: Imprisonment of 6 to 8 years, and fine [Sec. 14 (4)]

Person participating in Aggravated Sexual Assault: Imprisonment of 8 to 10 years, and fine [Sec. 14 (5)]

PUNISHMENT FOR STORAGE OF PORNOGRAPHIC MATERIAL INVOLVING CHILDREN – SECTION 15

- Imprisonment up to 3 years; or
- Fine; or
- Both.

ABETMENT OF AN OFFENCE – SECTION 16

Abetment is defined to include:

- **Instigating a person to commit the offence** by wilful representation of concealment of a material fact that ought to be disclosed
- **Engaging with one or more persons in a conspiracy to facilitate the commitment of the offence** through action or omission prior to or after the act of offence
- **Intentionally aiding the commitment of offence** by trafficking a child or procuring a child for the purpose of commission of the offence. This includes:
- employing, harbouring, receiving or transporting a child by using threat, force, other forms of coercion, abduction, fraud, deception, or abuse of one's power or position or the child's vulnerability, or through exchange of monetary and other benefits to achieve consent of a person having control over the child.

PUNISHMENT FOR ABETMENT – SECTION 17

- Imprisonment and/or fine equal to that provided for the offence committed as a result of abetment.

PUNISHMENT FOR ATTEMPT TO COMMIT ANY OF OFFENCE UNDER THE ACT – SECTION 18

Attempt to commit any offence under the Act or cause such offence to be committed is punishable with either of the following:

- imprisonment that may extend to one half of imprisonment for life, or
- one-half of the longest term of imprisonment provided for that offence, or
- Fine, or
- Both imprisonment and fine

FAILURE TO REPORT OR RECORD A CASE – SECTION 21

Section 19 (1) of the Act requires everybody to report any apprehension about an offence likely to be committed under this Act or an offence that has been committed under this Act.

Section 19 (2) requires the police to record such reports or information received in writing with a proper entry number

Section 20 casts additional responsibility on the management and staff of media, hotels, lodges, hospitals, clubs, studios or photographic facilities to report about sexually exploitative materials and objects using children that they may come across.

1. Violation of the provisions of Section 19 (1) and (2) and Section 20 entails a punishment [Section 21 (1)] of:
    - Imprisonment up to 6 months, or
    - Fine, or
    - Both
2. Non-reporting or failure to report by the in-charge of a Company or an Institution a sexual offence committed against a child by their subordinate staff is also a punishable offence [Section 21 (2)], liable with a punishment of -

- Imprisonment up to 1 year, and
- Fine

3. Children cannot be punished for non-reporting [Section 21 (3)]

PUNISHMENT FOR FALSE REPORTING – SECTION 22

1. Punishment for false reporting by any person done with the intention to humiliate, extort, threaten or defame the person implicated for sexual offence under the Act [Section 22 (1)] -
   - Imprisonment up to 6 months, or
   - Fine, or
   - Both
2. Punishment for false reporting by any person, knowing it to be false [Section 22 (3)] -
   - Imprisonment up to 1 year, or
   - Fine, or
   - Both
3. Children cannot be punished for false reporting [Section 22 (2)]

RESPONISIBILITY OF THE MEDIA AND PHOTOGRAPHY STUDIOS/FACILITIES TO PROTECT THE PRIVACY, DIGNITY AND CONFIDENTIALITY OF VICTIMS – SECTION 23

It is a punishable offence if the media or any studio or photographic facility does any of the following acts -

1. Makes a report or presents comments that may lower the child's character or infringe upon his privacy, without having complete and authentic information and without taking the consent of the child or his parents or guardian [Section 23 (1)]
2. Discloses the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child, without permission from the Special Court [Section 23 (2)]
3. Punishment prescribed for (1) and (2) [Section 23 (4)] -
   - Imprisonment of 6 months to 1 year, or
   - Fine, or
   - Both
4. The publisher or owner of media or studio or photographic facility is liable for the acts and omissions of his employees, jointly and severally. [Section 23 (3)]

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Activity for Session VIII- Child Marriage

– Ms. Bharti Ali[1]

Case Study 1

Group Work: PCMA

16 year old Geeta was married off by her parents to 23 year old Ram. Geeta wanted to study further and was not interested in the marriage. However, she was unable to resist her wedding and had to give in to the wishes of her parents. In her community, mostly girls get married by the age of 16 years. And if parents find a good groom, they do not think about waiting too long. After her marriage, Geeta is unable to handle the responsibilities that come with it. She finds it very difficult to adjust in her new role and wants to get out the marriage. Being a minor she is unable to file a petition seeking annulment of marriage and her parents do not support her wish to annul her marriage.

Please answer the following questions based on the above case study.

a) Is Geeta's marriage a valid marriage under the PCMA?

b) Who can be punished in a case like this?

c) What can Geeta do in such a situation?

d) What are her rights underthe PCMA for seeking annulment of marriage?

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[1]Co-Director, HAQ: Centre for Child Rights

Case Study 2

A 16 year old Muslim girl elopes with her 17 year old Muslim boyfriend and the two get married with the help of a Qazi. Subsequently, they go the Office of the Marriage Registrar and also get their marriage certificate. Meanwhile, the father of minor girl files a case of kidnapping and rape against the boy. The girl in her affidavit states that she had fallen in love and she ran away from home because her father objected to it and was forcing her to get married to someone else.

Please answer the following questions based on the above case study.

a) Whether a marriage contracted by a minor Muslim boy with a minor Muslim girl could be said to be a valid marriage?

b) Would such a marriage be valid if the boy and the girl were Hindu by religion?

c) Who can be punished under the PCMA for solemnizing such a marriage?

d) Is such a marriage voidable or null and void under the PCMA?

e) Whether the father of the girl can get her custody? Explain.

f) What will happen if the boy is arrested and the girl refuses to go in the custody of parents?

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Case Study 3

15 year old Meena's marriage is arranged by her parents with 28 year old Ramesh. Meena wants to study further, but is unable to convince her parents to postpone till she completes her class 12. Meena's friends come to know about this and want to stop the marriage. They try to convince her parents, but fail. With the help of their school teacher, they write to the Legal Services Authority to find out what action can be taken in such a situation.

a) As a legal aid lawyer, what would you suggest?

b) Who can prevent such a marriage and how? What is the role of a legal aid lawyer in preventing a child marriage?

c) What action can be taken if the marriage is solemnized and against whom?

d) Will such a marriage be legally valid?

e) Will it be voidable or null and void?

f) Suppose due to action taken by Meena's friends to report the marriage to the authorities, Meena's husband and in-laws are subjected to harassment from the police. Unhappy with the situation they decide to get rid of Meena and ask her to leave the house. Meanwhile the marriage is also consummated. In such a situation, what kind of protection can Meena get to under the PCMA?

   i. Does Meena have a right to maintenance under the PCMA?

   ii. Will the child born from such a marriage be a "legitimate" child?

   iii. What rights are guaranteed under the PCMA to children born out of a child marriage?

   iv. If Meena wants to get out of the marriage, will she have to seek divorce from her husband or annulment of marriage?

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SHORT NOTE ON
LEGAL AID FOR CHILDREN AFFECTED BY CHILD MARRIAGE USING THE PROHIBITION OF CHILD MARRIAGE ACT, 2006

– Bharti Ali[1]

Background

Percentage of Girls and Boys married below the legal age		
Child Marriage as per District Level Health Surveys	**DLHS II (2002-04)**	**DLHS III (2007-08)**
Girls	28.8	22.1
Boys	20.7	23.4

More than 40% of the world's child marriages take place in India. In fact recent statistics show a higher percentage of boys marrying below the legal age than girls. But most child marriages do not get reported as a crime.

The first ever law restraining child marriages was enacted in 1929 as a result of social reform movement and came to be known as the Sarda Act, later referred to as the Child Marriage Restraint Act of 1929 (CMRA). The minimum legal age for marriage at that time was 15 years for girls and 18 for boys. In 1978, after several amendments, the minimum legal age of marriage was raised to 18 years for females and 21 for males. The law was replaced by the Prohibition of Child Marriage Act (PCMA), 2006 since the CMRA confined itself to merely preventing a child marriage from taking place, punishment for offenders was negligible, procedures for stopping a child marriage were cumbersome and child marriages were not prohibited as a crime.

Unfortunately, despite enabling provisions in the PCMA, use of law to prevent, prohibit and prosecute child marriages remains poor. Highest number of cases registered under the child marriage law has been 222, in the year 2013.

Introduction to the Prohibition of Child Marriage Act, 2006 (PCMA)

Provisions contained in the Prohibition of Child Marriage Act, 2006 (PCMA) can be broadly classified into three categories:

1. Prevention of child marriage i.e. stopping it from taking place
2. Prohibition of child marriage as an offence
3. Prosecution of offenders

Protection and rehabilitation of children affected by such marriage

Salient Features of the Act

- The Act received the President's assent on 10 January, 2007 and came into effect from 1 November, 2007
- It is a secular law and applicable to all citizens, except people of the State of Jammu and Kashmir and the category of people called Renoncants of the Union Territory of Pondicherry, who renounced their personal laws and opted to be governed by the French laws. The descendants of the Renoncants have continued to be governed by the French Code Civil even after the Treaty of Cession and they could be Hindus, Christians or Muslims.

[1]Co-Director, HAQ: Centre for Child Rights

- For the first time, PCMA made child marriages "Voidable" at the option of either party.
- As an exception to the rule, some child marriages are declared null and void.
- The Act does not allow the question of consent in case of minors and treats child marriage as a punishable offence.
- Offences under PCMA are cognizable and non-bailable.
- The Act increased the punishment up to 2 years and a fine up to INR 1 Lakh.
- In an emergency situation i.e. when it is important to act fast due to paucity of time, the law allows ex-parte interim injunction to stop a child marriage.
- Children born out of a child marriage are legitimate for "all purposes" and have a right to maintenance from their biological father, even if the marriage is annulled.

Minor girl whose marriage is solemnized is also entitled to maintenance from her husband until remarriage.

Authorities responsible for implementing the law

1. **Police –** for reporting, registering and investigating into a case of child marriage that is likely to take place or has already taken place and carrying out necessary arrests.
2. **Child Marriage Prohibition Officer –** to prevent a child marriage from taking place; collect evidence for effective prosecution of offenders; dissuade people from promoting, aiding or allowing a child marriage; spread awareness about the provisions of the Act and evils of such practices; seek injunction order to stop a child marriage; and seek orders from the court for maintenance of the married minor girl and her child(ren) born out of the child marriage [**Sections 16 (3) and 16 (4) of the Act].**
3. **District Magistrate –** for preventing solemnization of child marriage in general, and acting as the Child Marriage Prohibition Officer with additional powers in particular to stop mass child marriages that take place on occasions such as Akshaya Tritiya.
4. **Judicial Magistrate of First Class or Metropolitan Magistrate–** to issue an injunction to prohibiting a child marriage from taking place; take suo moto cognizance of any reliable report or information or complaint about a child marriage likely to take place; nullify or alter an injunction order prohibiting child marriage; try all offences under the Act and order appropriate punishment **[Section 13 of the Act].**
5. **District Court–** for granting a decree of annulment of child marriage, ordering both parties in a child marriage to return the money, valuables and gifts exchanged between the at the time of marriage; granting a decree of maintenance for the girl and order allowing her to reside in her marital home until remarriage; granting maintenance for children born out of child marriage and making an order for their custody **[Sections 3, 4 and 5 of the Act].**
6. **Any person (s) or organization called upon by the State Government** to assist the Child Marriage Prohibition Officer **[Section 16 (3) of the Act]**.

Role of legal aid in implementation of the PCMA

Poor use of the child marriage law is not only because it is still acceptable and the society fails to recognise it as a crime. It is also because children are not seen as individuals with rights, and because children often do not know how to exercise their rights, whom to approach for assistance if they do not want to get married, or if they want to get out of their marriage. They also do not know that they can receive legal help if needed. The role of Legal Services Authorities and legal aid lawyers thus becomes critical in terms of reaching out to children who need help and enable them live their childhood.

1. Preventing a child marriage

When the Child Marriage Prohibition Officer or the National or State Commission for Protection of Child Rights receives information about a child marriage likely to be solemnized, they may approach the Legal Services Authority seeking assistance in filing a complaint and stopping the marriage from being solemnized.

A child going to be affected by such a marriage may also approach the Legal Services Authority directly.

Injunction prohibiting a child marriage [Section 13 of the Act]

In such a situation, a legal aid lawyer can immediately file an application before the Court of a Judicial Magistrate of First Class or a Metropolitan Magistrate, as the case may be, seeking an injunction against persons responsible for arranging the marriage.

The Act mandates issuance of an injunction order against parties solemnizing the child marriage [**Section 13 (1) of the Act**]. However, the injunction order can only be given after the Court has issued a written notice to the concerned parties and given them adequate opportunity to explain their point of view and why such an injunction should not be issued against them [**Section 13 (6) of the Act**]. This gives an opportunity to the contracting parties to realize that their action is illegal, that now the matter is in the knowledge of the court and they have got an opportunity to reconsider their decision and call off the child marriage.

Sometimes an injunction order may be required on an emergency basis. The PCMA empowers the Courts to issue an interim injunction in such situations. An interim injunction can be issued without giving any notice to the concerned parties i.e. they can be ex parte injunctions [**Proviso to Section 13 (6) of the Act**].

An injunction can be confirmed, vacated, nullified or altered by the Court [**Sections 13 (7) and 13 (8) of the Act**]

2. Prosecution of Offenders

Prosecution of offenders in cases of child marriage is important to ensure that it gets treated as a crime than only a social evil.

The PCMA is a very positive departure from the earlier laws against child marriage since it broadens the range of people who can be booked and tried in a case of child marriage. This includes not just the families of the parties arranging and solemnizing the marriage, but also priests and guests who attend a child marriage, knowing that the person(s) being married off is/are child(ren).

Burden of proof for offence under Section 10 of the Act – In order to escape punishment, a person charged for the offence of performing, conducting, directing, or abetting a child marriage will have to prove that he/she had reasons to believe that the marriage was not a child marriage.

Presumption of negligence and failure to prevent marriage under Section 11 (1) of the Act – Person(s) having charge of the minor whose marriage is solemnized or contracted are presumed to have negligently failed to prevent it, unless the contrary is proved.

Prohibition of Child Marriage Act, 2006			
Offence	**Cognizable/Non-Cognizable**	**Bailable/Non-Bailable**	**Punishment/Penalty**
Section 9 A male adult i.e. above 18 years of age marrying a minor	Cognizable	Non-bailable	**Section 9** • Rigorous imprisonment up to two years, or • Fine up to one lakh rupees, or • Both
Section 10 Performing, conducting, directing or abetting any child marriage	Cognizable	Non-bailable	**Section 10** • Rigorous imprisonment up to two years, and • Fine up to one lakh rupees
Section 11 (1) • Promoting a child marriage • permitting it to be solemnised negligently failing to prevent it from being solemnised • attending or participating in a child marriage	Cognizable	Non-bailable	**Section 11** • Rigorous imprisonment up to two years, and • Fine up to one lakh rupees *Exception:* No woman can be punished with imprisonment

Section 13 (10) Disobeying an injunction order of a Judicial Magistrate of First Class obtained under Section 13 (1) restraining or prohibiting a child marriage	Cognizable	Non-bailable	**Section 13 (10)** • Rigorous imprisonment up to two years, or • Fine up to one lakh rupees, or • Both *Exception:* No woman can be punished with imprisonment
Note: **All offences listed above are triable in the court of a Judicial Magistrate of First Class**			

Burden of proof for offence under Section 10 of the Act – In order to escape punishment, a person charged for the offence of performing, conducting, directing, or abetting a child marriage will have to prove that he/she had reasons to believe that the marriage was not a child marriage.

Presumption of negligence and failure to prevent marriage under Section 11 (1) of the Act – Person(s) having charge of the minor whose marriage is solemnized or contracted are presumed to have negligently failed to prevent it, unless the contrary is proved.

1. Protection and rehabilitation of children affected by child marriage

Before passing the Prohibition of Child Marriage Act, 2006, Parliamentary debates on the proposed law brought forth important concerns regarding legal status of a child marriage, what will happen to girls whose marriage is solemnized and consummated if such a marriage is declared null and void, what will happen to children born out of a child marriage, etc. In a society like ours, it is not easy for children to prevent their marriage or opt out of it. And if the marriage is consummated, it becomes even more difficult for girls to walk out of the marriage. The fear of their child being treated as "illegitimate" and getting no rights looms large. The PCMA addresses all such concerns, thus empowering girls to make their choice of opting out of a child marriage if they wish to do so. The Act provides various protection and rehabilitation measures for girls and boys married off before their legal age.

Annulment of a Child Marriage

- **Child Marriages are Voidable**

16 year old Geeta was married off by her parents to 23 year old Ram. Geeta wanted to study further and was not interested in the marriage. However, she was unable to resist her wedding and had to give in to the wishes of her parents. In her community, mostly girls get married by the age of 16 years. And if parents find a good groom, they do not think about waiting too long. After her marriage, Geeta is unable to handle the responsibilities that come with it. She finds it very difficult to adjust in her new role and wants to get out the marriage. Being a minor she is unable to file a petition seeking annulment of marriage and her parents do not support her wish to annul her marriage.

Qs. What can Geeta do in such a situation?

Ans. A child marriage is voidable at the option of the person who got married as a child or a minor. A petition seeking annulment of marriage is to be filed in a District Court. The District Court includes a Family Court and Principal Civil Court of

Original Jurisdiction and any other civil court specified by the State Government for such matters [**Sections 3 (1) and 2 (e) of the Act**]. However, being a minor, Geeta cannot file the petition herself.

In that case, Geeta has the following options under the law:

1. The petition can be filed by her parents **[Section 3 (2) of the Act].**
2. In a case like this, where her parents are not supporting her, she can file the petition through an adult friend along with the Child Marriage Prohibition Officer, if her parents do not wish to do so **[Section 3 (2) of the Act].**
3. If this is also not possible, Geeta will have to wait until she turns 18 years and becomes a major to be able to file the petition. But she must file it within two years of attaining majority, otherwise she will lose the opportunity to opt out of marriage and instead of a decree of nullity, she will then have to file for a decree of divorce **[Section 3 (3) of the Act].**

- **Some Child Marriages are null and void**

  PCMA declares some child marriages are null and void. These are child marriages where -

  - the marriage is solemnised despite an injunction order passed under section 13 to prevent the child marriage from taking place **[Section 14 of the Act],** or
  - the child is kidnapped or taken away from her/his lawful guardian by enticement for the purpose of marriage **[Section 12 (a) of the Act],**or
  - the child is forced or induced by use of deceitful means to go to another place for marriage **[Section 12 (b) of the Act]**, or
  - the child is sold for the purpose of marriage**[Section 12 (c) of the Act]**, or
  - the marriage is used as a means to sell or traffic the child for immoral purposes **[Section 12 (c) of the Act].**

Validity of a Child Marriage

Although child marriage is an offence, it is a valid marriage in the eyes of law unless a petition is filed for its annulment. If no petition is filed for annulment, the marriage becomes valid from the date of its solemnization.

The other exceptions to the rule are child marriages declared null and void or void ab initio i.e. invalid from the time of their solemnization, under sections 12 and 14 of the PCMA [child marriages solemnized in violation of an injunction, those solemnized using means such as force, deceit, inducement or enticement to kidnap, traffic or sell a person for marriage, or child marriages which become a means to traffic a child for immoral purposes].

Legal status of under-age self-choice marriages

Not all child marriages are a result of customs and traditions or forced marriages. Many young boys and girls elope and get married before attaining their legal age of marriage. Often enough the

parents of the girl file a case against the boy for kidnapping and rape. Time and again courts have been compelled to think as to what should be done in cases where marriage is by mutual consent and willingness of both the contracting parties.

Several questions arise - should the boy should be criminalised for his action? If that happens, who gets the custody of the girl when her husband is arrested and kept in judicial custody? Can such a marriage be a legally valid marriage? Should it be voidable or null and void?

In addressing such situations, reliance will have to be laid on the Protection of Children from Sexual Offences Act (POCSO Act), provisions relating to rape in the Indian Penal Code and provisions relating to children in need of care and protection under the Juvenile Justice (Care and Protection of Children) Act, 2000.

Until recently, the courts were relying on the 'age of consent' as 16 years and the 'age of discretion' for girls and hence in cases of elopement girls were between the age of 16 and 18 years, courts would look at the possibility of quashing the FIR against her husband.

Minor girl if above 16 years of age is assumed to have the 'age of discretion' and has been allowed by the courts to refuse to stay with their parents. In such a situation, the question of "custody" of minor girl has been dealt with differently by different courts, depending on the facts of the case, maturity and understanding of both the parties and their social background.

Important Cases

"In *Jitender Kumar Sharma vs. State and Another [2010 (171)DLT 543],* both Poonam and Jitender were minors, who eloped and married under the HMA. The Delhi High Court, in deciding the validity of such marriages, stated that "merely on account of contravention of Section 5(iii) of the HMA, Poonam's marriage with Jitender is not void under HMA or the Child Marriage Act, 2006. It is, however, voidable, as now all child marriages are." Similarly, in deciding the custody of Poonam, the courts read together Sections 17, 19, 21 of the Guardians and Wards Act, 1890, and Sections 6 and 13 of the HMGA and took a broad, tolerant view that the welfare of the minor (who is old enough to make an intelligent preference) is paramount. Talking about Poonam's guardianship, the court held that Poonam's natural guardian was now her husband and not her father, and that no one else can take that place until and unless her husband is found to be unfit to take that responsibility. The court upheld the girl's right to life and liberty in allowing her to choose her guardian and categorically stated that she cannot be forced to live in NariNiketans or with her parents just because she is a minor.

In *T Sivakumar vs (1) Inspector of Police, Thiruvallur Town Police Station; (2) Anbu; (3) Samandan [HCP No 907 of 2011],* Sivakumar, father of minor girl, Sujatha, 17 years old, filed a petition of habeas corpus demanding custody of the child. Sujatha in her affidavit stated that she had fallen in love with Anbu and that she was being forced by her parents to marry her uncle. The full bench of the Madras High Court revisited the issue of runaway/elopement marriages and addressed five pivotal questions:

(1) Whether a marriage contracted by a person with a female of less than 18 years could be said to be a valid marriage and the custody of the said girl can be given to the husband (if he is not in custody)?

(2) Whether a minor can be said to have reached the age of discretion and thereby walk away from the lawful guardianship of her parents and refuse to go in their custody?

(3) If yes, can she be kept in the protective custody of the state?

(4) Whether in view of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the JJ Act), a minor girl, who claims to have solemnised her marriage with another person, would not be a juvenile in conflict with law, and whether in violation of the procedure mandated by the JJ Act, the court dealing with a writ of habeascorpus has the power to entrust the custody of the minor girl to a person who contracted the marriage with the minor girl and thereby committed an offence punishable under Section 18 of the HMA and Section 9 of the Child Marriage Act, 2006?

(5) Whether the principles of Sections 17 and 19(a) of the Guardians and Wards Act, 1890, could be imported to a case arising out of the alleged marriage of a minor girl, admittedly in contravention of the provisions of the HMA?

The division bench held that marriage contracted with a minor girl is voidable until it is annulled by a competent court under Section 3 of the Child Marriage Act, 2006. The court said that the marriage is not valid in a strict sense but it is not invalid either. The male contracting party shall not enjoin all the rights which would otherwise emanate from a valid marriage, but only limited ones. The court held that the adult male contracting party to a marriage with a female child shall not be the natural guardian of the female child, in keeping with the provisions of the Child Marriage Act, 2006; nor will he be entitled the custody of the female child, even if she expresses her desire to go to his custody. However, as an interested person in the welfare of the minor girl, he can apply to the court to set her at liberty if she is illegally detained by anybody. In habeas corpus proceedings, while granting custody of a minor girl, her welfare and safety is paramount, notwithstanding the legal right of the person who seeks custody.

Talking about the "age of discretion", the court held that this is a question of fact which each court has to decide based on the facts and circumstances of the case. Most importantly, the court stated that if the girl expresses her desire not to go with her parents, provided, in the opinion of the court, she has the capacity to determine, the court cannot compel her to go to the custody of her parents and instead may entrust her in the custody of a fit person subject to her volition.

While the court did not allow her to cohabit with her adult husband, it also upheld the minor girl's decision to not stay with her parents. Employing the "age of discretion" to decide in the best interest of the child, the court held that in such habeas corpus petitions the decision of the minor would be taken into account.

In cases involving Muslims too courts have taken a similar view. In *Mrs Tahra Begum vs. State of Delhi and Ors [WP(CRL) 446/2012],* the Delhi High Court held that a Muslim minor girl could marry in accordance with the principle of the "Option of Puberty" or khiyar-ul-bulugh. However, in accordance with this very principle, the minor girl may also choose to repudiate the marriage upon attaining majority. In this case, the minor girl clearly expressed her choice to reside with her husband and the court upheld her agency and choice, over age and minority status".

Source: Pallavi Gupta, *Child Marriages and the Law: Contemporary Concerns*, Published in Economic & Political Weekly EPW October 27, 2012 VolxlviI No.43.

Most of these judgements are prior to enactment of the POCSO Act, which has increased the 'age of consent' to 18 years as sexual activity with a child below the age of 18 years is statutory sexual assault. In such circumstances, the husband of the under-aged girl is bound to face trial for sexual assault, if their marriage is consummated. Until then the girl may be given back to her

parents if she is willing, or will have to be treated as a child in need of care and protection and produced before the Child Welfare Committee to provide her shelter, care and state protection.

Under PCMA, a marriage resulting from taking a minor out of the keeping of her lawful guardian through enticement is null and void. Most cases of elopement and marriage could be said to fall in this category. In that case, such marriages would be null and void as per Section 12 of the PCMA.

Rights of females affected by child marriage and children born out of child marriage

- If a minor girl is married off to an adult before attaining the age of 18 years, she is entitled to receive maintenance from her adult husband until her re-marriage. In case the husband is a minor at the time of marriage, his guardian is liable to pay maintenance [**Section 4 (1) of the Act].**
- The District Court can also pass an order allowing her the right to residence in her marital home until she remarries [**Section 4 (4) of the Act**].
- Children born from a child marriage are legitimate for all purposes even after the marriage is annulled [**Section 6 of the Act].**
- A district court can make appropriate orders for the custody of a child born out of a child marriage. The other party may be allowed access to the child. In making such decisions the courts are required to give paramount consideration to the best interest of the child [**Section 5 of the Act**].
- A District Court is empowered to add to, modify or revoke any order relating to maintenance and custody of children born from a child marriage any time even after disposal of the petition, if there is a change in the circumstances [**Section 7 of the Act].**

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Session IX
11.45 AM – 1.15 PM
Total Time: 01 Hour 30 minutes

MODULE FOR TRAINING OF PANEL LAWYERS

ON JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015, WITH REFERENCE TO CHILDREN IN CONFLICT WITH LAW

— *Geetanjli Goel*[1]

SESSION PLAN

Objective

1. To provide the young lawyers grounding in law relating to children in conflict with law including the key concepts and the case law on the subject.
2. To give them clear perspective of the nature of inquiry before the Juvenile Justice Board and steps for rehabilitation of children in conflict with law.
3. To give them an understanding of the proceedings before the Juvenile Justice Board and the rights of the children.
4. To familiarize them with the institutions provided under the Act for children in conflict with law.
5. To sensitize them so that they can effectively interact with and represent the children.

Expected learning outcome

1. Participants will be able to interact with children in conflict with law keeping in mind the objectives of the Act and with the required sensitivity.
2. Participants will be able to argue for and against declaration of a person as a child under the Act.
3. Participants will be able to draft application for bail on behalf of the child under the Act.
4. Participants will be able to defend the child in an inquiry against him before the Juvenile Justice Board and argue on the dispositional order to be passed.
5. Participants will be able to take up proceedings pertaining to 'children in regular courts, as and when the occasion arises.

Programme

1. Introduction 10 minutes

The resource person will familiarise the participants with the objectives behind having a separate legislation for children in conflict with law and introduce the scheme of the Act. He/she can introduce the important terms under the Act, institutions provided under the Act and discuss the scope of inquiry before the Juvenile Justice Board and how the provisions of the Act can enable the rehabilitation of the children and their reintegration in the society and inform the participants about the case law on the subject.

2. Group Discussions: Presentation and group discussions 1 hour

- **Group discussion** 20 minutes

[1] Director, National Legal Services Authority and Officer of Delhi Higher Judicial Service.

- **Presentation and whole group discussion** 40 minutes

Participants will be divided in groups of 4-6. Each group will be asked to find the answers to the questions in one of the readings of the cases. Each group will present its views to the whole group for a whole group discussion. The resource person will provide the points missed by the participants and will present a wholesome view of the topics.

3. Quiz 15 minutes

This is not a competitive or evaluative quiz but only questions raised to evoke previous experience and to generate a discussion/ confirm the learning that happened during the group discussion. This is an individual exercise. The participants will be given 10 minutes time to answer the questions. This will be followed by the trainer compiling/asking for the answers and raising a discussion giving the law on the subject.

4. Concluding Remarks: 05 minutes

The remarks can be made at the end by the trainer or by one of the participants or by the dignitary, if any, invited to inspire the participants.

Training methods and Tools:

1. Lecture
2. Group Discussion & presentation
3. Quiz

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Activity for Session IX- Juvenile Justice (Care and Protection of Children) Act, 2015, With Reference to Children in Conflict with Law

Reading for Group Discussion-I

The case of the prosecution is that Mohan had committed robbery on 1.10.2010. However Mohan was not arrested and was declared PO. Subsequently Mohan was arrested and produced before the court on 2.7.2015.

On interviewing Mohan you find the following facts which he can allege:

1. He was 15 years old as on 1.10.2010 and on the date of his production before the court he was 20 years old.
2. He did not have any document to show his age as he had never studied in school.
3. His younger brother, who was two years younger to him was in school and his school documents were available.
4. He had been sent to the village by his parents after the incident and as such he did not know about the court proceedings.

Questions for group discussion

1. Can Mohan claim juvenility?
2. Can the documents pertaining to the age of the younger brother of Mohan be of relevance?
3. Can he seek a direction to be examined by a Medical Board as there is no document available in respect of his age?
4. Can he seek the transfer of his case to Juvenile Justice Board?
5. What points would you raise to make out the case in favour of juvenility of Mohan?
6. Would you also move an application for bail on the ground of juvenility, and if so what would be the frame of such an application?

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Reading for Group Discussion-II

The prosecution case is that Atul had kidnapped a four year old boy. He allegedly murdered the boy and disposed of the body. Thereafter he started making ransom calls to the parents of the boy spread over one month. On the date of kidnapping the boy Atul was a child but on the date of the alleged murder and making the ransom calls, he was an adult.

On interviewing Atul you find the following facts which he can raise:

1. Atul was a child when he kidnapped the boy.
2. He took the boy to several places and when the boy became demanding, Atul fired from a country made revolver and the boy died.
3. Atul was studying in class 10.
4. He states that he had only wanted to kidnap the boy to teach his parents a lesson who had scolded him once.
5. Atul only intended to threaten the kidnapped boy to silence him but did not intend to kill him.

Questions for group discussion

1. Can Atul raise the plea of juvenility and if so, how would you proceed with the matter?
2. What factors would you argue in support of the plea of juvenility?
3. Would you also move an application for bail?

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Reading for Group Discussion-III

Rohit, who is 15 years old is alleged to have committed robbery and also to have murdered the victim. He is apprehended by the police and produced before the Juvenile Justice Board.

The case has been assigned to you for moving bail application.

On interacting with Rohit you find the following facts which he can raise:

1. He wanted money for buying a motorcycle for himself as all his other friends had motorcycles.
2. He murdered the victim out of fear that he would recognise him.
3. He was studying in class X.
4. He was remorseful of his conduct.
5. He came from a stable family.

Questions for group discussion

1. Can Rohit seek bail under the Act?
2. What would be the frame of your application?
3. What factors would you plead before the JJB so that Rohit gets bail?
4. What factors would you keep in mind while interacting with Rohit?
5. Would it make a difference to the plea for bail if Rohit were 17 years old on thedate of commission of offence? And in that case, what would you argue before the JJB at the time of preliminary assessment so that Rohit gets treated as a child?

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Reading for Group Discussion-IV

Subhash is a 13 year old boy who is found to have raped a 4 year old girl. The matter is fixed for arguments on the dispositional order.

The case has been assigned to you.

On interacting with Subhash you find the following facts:

1. He was from a poor background and was living in a one room tenement with his parents and three siblings.
2. His mother was working and after his mother left for work, his neighbour would call him to his house and they would watch pornographic material.
3. He had seen the brother of the victim doing the same thing with another girl.
4. His curiosity was aroused and he felt that there was nothing wrong in doing it.
5. He found the victim playing in the park and he took her to a corner and did it with her.
6. He had studied till class IIIrd and thereafter he had not gone to school.

Questions for group discussion

1. What would be your prayer before the JJB?
2. What factors would you put forth for a lenient view in the case?
3. Would you suggest some rehabilitative steps that could be taken for the child?
4. What would be the impact of the Social Investigation Report in the case?

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Reading for Group Discussion-V

Sumit, aged about 17 years is apprehended by the police on allegation that he had stolen the mobile of his employer. However the mobile is not traced from him. The police take him to the police station and keep him in the lock up there. In between they take him out of the lock up and beat him up several times to find out where the mobile is. But Sumit continuously maintains the stand that he had not stolen the mobile. He also keeps asking to be allowed to meet his parents. Not having succeeded in getting him to 'tell' where the mobile is, the police make him write a 'confession' to the effect that he had stolen the mobile and sold it to someone for Rs.500/-. After one day he is kept in a children's home for the night and thereafter produced before the JJB.

Questions for group discussion

a. Are there any violations of the rights of Sumit that you notice?

b. What would you do for Sumit as a legal services lawyer?

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Solutions to the Readings for Group Discussion

Reading for Group Discussion-I

– *Geetanjli Goel*[1]

Answers to Questions for Group Discussion

1. Can Mohan claim juvenility?

Yes, Mohan can claim juvenility as on the date of the commission of the offence, i.e. 1.10.2010, he was 15 years of age.

2. Can the documents pertaining to the age of the younger brother of Mohan be of relevance?

Though the documents are themselves not relevant if Section 94 of the Act of 2015 is strictly looked at but they can be the base for conducting further inquiry regarding the age of Mohan.

3. Can he seek a direction to be examined by a Medical Board as there is no document available in respect of his age?

Yes. In fact, since there is no documentary evidence of the age of Mohan, the JJB would have to direct examination of Mohan by a medical board.

4. Can he seek the transfer of his case to Juvenile Justice Board?

Yes Mohan can seek transfer of his case to JJB but unless something cogent comes on record, the court will transfer the case to JJB only on arriving at a finding that Mohan was a child on the date of commission of the offence.

5. What points would you raise to make out the case in favour of juvenility of Mohan?

The fact that his younger brother who was two years younger to him was in school and his school documents were there. Further even from physical appearance he did not appear to be more than 20 years when produced before the court. Moreover, in view of the directions of the Supreme Court in Gopinath Ghosh's case, the court is bound to conduct age inquiry where the age is stated to be upto 21 years. (for more detailed discussion please refer to Part E of the short note)

6. Would you also move an application for bail on the ground of juvenility, and if so what would be the frame of such an application?

An application for bail can be filed on the ground that on the date of commission of the offence, Mohan was a juvenile. All the points in favour of Mohan as stated by him would be incorporated in the same as also that he could not be denied bail under the provisions of the JJ Act. (Please refer to Part G of the short note).

Reading for Group Discussion-II

Answers to Questions for Group Discussion

1. Can Atul raise the plea of juvenility and if so, how would you proceed with the matter?

Atul can raise the plea of juvenility as he was less than 18 years old at the time of kidnapping the boy. However the plea may not ultimately succeed in view of the judgment of the Supreme Court in *Vikas Chaudhary v. State of NCT of Delhi (2010) 8 SCC 508.* (Please see Part D of the short note)

2. What factors would you argue in support of the plea of juvenility?

(Please see Part E of the short note)

[1] Director, National Legal Services Authority and Officer of Delhi Higher Judicial Service.

3. Would you also move an application for bail?

(Please see Part G of the short note)

Reading for Group Discussion-III

Answers to Questions for Group Discussion

1. Can Rohit seek bail under the Act?

Yes, Rohit can seek bail under the Act.

2. What would be the frame of your application?

All the factors in favour of Rohit would be included in the same as also the legal position under the JJ Act. (Please see Part G of the short note)

3. What factors would you plead before the JJB so that Rohit gets bail?

That he came from a stable family and he was remorseful of his conduct. Further he was studying in school. You would also plead that gravity of offence is immaterial and a child has a right to bail under the Act.

4. What factors would you keep in mind while interacting with Rohit?

(Please see Fundamental Principles contained in Part A and Part O of the short note).

5. Would it make a difference to the plea for bail if Rohit were 17 years old on thedate of commission of offence? And in that case, what would you argue before the JJB at the time of preliminary assessment so that Rohit gets treated as a child?

Even if Rohit was 17 years old on the date of the commission of the offence, it would make no difference to the plea for bail.

For the arguments at the time of preliminary assessment, please refer to Part H of the short note and you would stress that Rohit did not have the mental capacity to commit such offence or the ability of the child to understand the consequences of the offence. You would also emphasise the circumstances in which Rohit allegedly committed the offence i.e. he murdered the victim out of fear that he would recognize him and also that Rohit was remorseful of his conduct.

Reading for Group Discussion-IV

Answers to Questions for Group Discussion

1. What would be your prayer before the JJB?

That a lenient view should be taken and he should not be sent to special home. Further that the child be allowed to reform and rehabilitate himself and it was his circumstances which led him to commit the offence.

2. What factors would you put forth for a lenient view in the case?

All the factors referred to above which came out during interaction with him. Further the legal position is also to be argued that the purpose of JJ Act is reformation and rehabilitation and sending to Home should be the last resort.

3. Would you suggest some rehabilitative steps that could be taken for the child?

Yes. Such as his family could be directed to enroll him in a school and he could be released on probation with the probation officer monitoring his conduct and sending regular reports about the child to the Board.

4. What would be the impact of the Social Investigation Report in the case?

A positive SIR would favour the case of the child as the Board is to obtain SIR before passing the dispositional order and consider it at the time of passing the order.

(Please refer to Part I of the short note)

Reading for Group Discussion-V

Answers to Questions for Group Discussion

1. Are there any violations of the rights of Sumit that you notice?

2. What would you do for Sumit as a legal services lawyer?

(For detailed discussion please refer to Parts F, N and O of the short note).

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Time: 10 minutes

QUIZ ON JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015

– Geetanjli Goel[1]

Please tick the correct answer:

1. Does the Juvenile Justice (Care and Protection of Children) Act, 2015 violate the guarantee of equality under the Constitution of India?

a) Yes b) No.

2. As per the figures of the National Crime Records Bureau, the percentage of IPC crimes committed by children to total IPC crimes reported in the country in 2013 was:

a) Less than 1% b) 1% to 2%

c) 3% to 5% d) 6% to 10%

3. Which of the following documents can be considered by the Juvenile Justice Board/ court for the purpose of age inquiry?

a) Janam patri (horoscope) b) Voter identity card

c) Matriculation certificate d) Affidavit of the father of the child given before the Board regarding the date of birth.

4. On which of the following grounds bail cannot be denied to a child?

a) Release of the child is likely to bring him into association with any known criminal.

b) Release is likely to expose him to moral, physical or psychological danger.

c) His release would defeat the ends of justice.

d) The child has committed the offence of murder.

5. Can a child be tried together with the adult accused for an offence?

a) Yes b) No

6. A child who attains majority during the pendency of the proceedings, if found to have committed an offence, can be sent to:

a) Observation Home b) Special Home/ Place of Safety

c) Jail d) None of the above

7. A person who on the date of commission of offence of murder was less than 18 years but on the date of his arrest/ apprehension is more than 18 years would be produced before:

a) Juvenile Justice Board

b) Child Welfare Committee

c) Court of Judicial Magistrate/ Metropolitan Magistrate

d) Sessions Court

[1] Director, National Legal Services Authority and Officer of Delhi Higher Judicial Service.

8. In an offence other than a heinous offence which is alleged against a child, an FIR is to be registered:

a) in every case

b) only where an adult accused is involved

c) against the adult accused but the child is to be let off

d) in none of the cases

9. In case of a petty or serious offence, the final report (charge sheet/ challan) against a child is to be filed before the Juvenile Justice Board within:

a) two months of the date of information to the police

b) six months of the date of commission of offence

c) as per the limitation prescribed under Cr.P.C.

d) any time.

10. When a child of 15 years is found to have committed an offence of murder, the Juvenile Justice Board may impose:

a) life imprisonment

b) death penalty

c) allow the child to go home after advice or admonition

d) commit the matter to the Sessions Court.

11. On finding the involvement of the child in an offence, the Juvenile Justice Board may:

a) treat the child as child in need of care and protection and direct his production before the Child Welfare Committee

b) direct the child to be released on probation of good conduct

c) direct the child to be sent to special home

d) order the child to perform community service

e) all the above.

12. A child who was found to have committed the offence of robbery by the Juvenile Justice Board can apply for a government job.

a) True b) False

13. On production of a child aged 17 years who is alleged to have committed rape, the Board is bound to send the child before the Children's Court immediately.

a) True b) False

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KEY TO THE QUIZ ON JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015

– *Geetanjli Goel*[1]

Please tick the correct answer:

1. Does the Juvenile Justice (Care and Protection of Children) Act, 2015 violate the guarantee of equality under the Constitution of India?

a) Yes b) No.

Ans. b) No. This Act manifests the recognition the world over that children need to be treated differently as their mental faculties are still at the developing stage and they may not be in a position to take mature decisions and it is because of this immaturity that they are not supposed to be treated as adult offenders (judgment of High Court of Delhi in **Court on its Own Motion** v. **Department of Women and Child Development & Ors.** WP (C) No.8889 of 2011 dated 11.5.2012; **Salil Bali** v. **Union of India** (2013) 7 SCC 705). The Act is not only a beneficient legislation but also a remedial one (**Pratap Singh** v. **State of Jharkhand** (2005) 3 SCC551). The contention that the Act be read down so as to exclude juvenile from the operation of the Act taking into consideration the mental and intellectual maturity of the offender and the gravity of the offence was rejected having regard to the intention of the legislature in **Subramanian Swamy** v. **Raju** (2014) 8 SCC 390.

In the Indian context, clause (3) of Article 15, Article 21, Article 21A, clauses (1) and (2) of Article 22, Articles 23, 24, clauses (e) and (f) of Article 39, Article 39A, Articles 45, 47 and 51A (k) of the Constitution of India impose on the State the primary responsibility of ensuring that all the needs of the children are met and their basic human rights are fully protected. They also enable the State to make special provision for children. Further India is a signatory to various international conventions and covenants such as the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20.11.1989 and ratified by India on 11.12.1992.

2. As per the figures of the National Crime Records Bureau, the percentage of IPC crimes committed by children to total IPC crimes reported in the country in 2013 was:

a) Less than 1%

b) 1% to 2%

c) 3% to 5%

d) 6% to 10%

Ans. b). Contrary to the popular belief and projection by the media, the percentage of crimes committed by the juveniles/ children to the total IPC crimes committed in the country remains extremely low. Over the years the percentage of crimes committed by children has not varied much though the actual number of crimes by children has gone up. As per the report of the National Crime Records Bureau for the year 2013, 'the share of IPC crimes committed by juveniles to total IPC crimes reported in the country during 2003-2005 remained static at 1.0% which marginally increased to 1.1% in 2006 and remained static in 2007. This share increased marginally to 1.2% in 2008 thereafter decreased to 1.1% in 2009. This share further decreased to 1.0% in 2010 and thereafter marginally increased to 1.1% in 2011 and 1.2% in 2012 and remained static at 1.2% in 2013'. However the juveniles/ children in conflict with law (IPC crimes) in 2013 have increased by 13.6% over 2012 as 27,936 IPC crimes by juveniles/ children were registered during 2012 which increased to 31,725 cases in 2013.

[1] Director, National Legal Services Authority and Officer of Delhi Higher Judicial Service.

3. Which of the following documents can be considered by the Juvenile Justice Board/ court for the purpose of age inquiry?

a) Janam patri (horoscope)

b) Voter identity card

c) Matriculation certificate

d) Affidavit of the father of the child given before the Board regarding the date of birth.

Ans. c). Section 94 of the Juvenile Justice Act of 2015 lays down a definite ordering of documents to be considered for determining the age, irrespective of who is conducting the age inquiry whether it is the court or the JJB.

4. On which of the following grounds bail cannot be denied to a child?

a) Release of the child is likely to bring him into association with any known criminal.

b) Release is likely to expose him to moral, physical or psychological danger.

c) His release would defeat the ends of justice.

d) The child has committed the offence of murder.

Ans. d). Gravity of offence is immaterial in deciding the bail application.

Institutionalization of a child in conflict with law has to be the last resort and the aim has to be rehabilitation of the child and his reintegration in the society. Section 12 of the Act provides for release on bail of a person accused of a bailable or non-bailable offence, and apparently a child when he is arrested (apprehended) or detained or appears or is brought before a Board. The child has a right to bail which is one of the most important rights of the child and if bail is declined, a reasoned order has to be given by the Board. Bail of a child cannot be rejected in a routine manner. Grounds on which bail can be refused are expressly stated i.e. if there appear reasonable grounds for believing that the release is:

-likely to bring him into association with any known criminal (**Devesh** v. **The State** MANU/DE/8693/2006; **Dattatray G. Sankhe** v. **State of Maharashtra** MANU/MH/0490/2003; bail rejected as the juvenile, if released on bail, may again mix up with other adult co-accused who were absconding **Fawaad Nasir @ Ziya** v. **State** MANU/DE/8845/2007; **Jaif Ahmed Sheikh** v. **State of Rajasthan** 2004 Cri.L.J. 3272); or

-expose him to moral, physical or psychological danger (**Sandeep Kumar** v. **State** 2005 Cri.L.J. 3182: 119 (2005) DLT 398); or

-that his release would defeat the ends of justice.

The child is to be kept in the institution only if it is in his interest and not as a mark of punishment or because it is felt that he may repeat the act (**Abdul Rab** v. **State of Bihar** (2008) 17 SCC 475; **Jitendra Singh** v. **State of UP** (2013) 11 SCC 193).

The offence alleged against the child or the gravity thereof or the role of the child in the same or even the interest of the victim is not the consideration but whether it would be in the interest of the child to keep him in protective custody (in **Master Niku Chaubey** v. **State** 129 (2006) DLT 577; **Prakash** v. **State of Rajasthan** 2006 Cri.L.J. 1373; **Vijendra Kumar Mali** v. **State of UP** 2003 Cri.L.J. 4619; **Bharat @ Bharat Ram** v. **State** MANU/RH/0078/2008).

5. Can a child be tried together with the adult accused for an offence?

a) Yes b) No

Ans. b) No. As per the law, child shall be charged with or tried for any offence together with a person who is not a child.

6. A child who attains majority during the pendency of the proceedings, if found to have committed an offence, can be sent to:

a) Observation Home b) Special Home/ Place of Safety

c) Jail d) None of the above

Ans. b). The children in conflict with law are not to be kept in jail or lock-up and the Act provides for setting up of **observation homes, places of safety** and **special homes** for children in conflict with law.'Observation home' means a home established by a State Government or by a voluntary organization and certified by that State Government under Section 47 of the Act of 2015 as an observation home for the child in conflict with law (Section 2(40) of the Act of 2015). They are meant for temporary reception of any child in conflict with law during the pendency of any inquiry regarding them under the Act. Provision is also made for the classification of the children according to the age group.

'Special home' means an institution established by a State Government or by a voluntary organization and certified by that Government under Section 48 of the Act of 2015 as defined in Section 2 (56) of the Act of 2015. The special homes are meant for reception and rehabilitation of children in conflict with law. Classification and separation of children in conflict with law has to be done on the basis of age of the children and the nature of offences committed by them and their mental and physical status. The Act also makes provision for a '**place of safety**' which means any place or institution (not being a police lock-up or jail), the person in charge of which is willing temporarily to receive and take care of the child alleged or found to be in conflict with law, by an order of the Board or the Children's Court, both during inquiry and ongoing rehabilitation after having been found guilty (Section 2(46) of the Act of 2015).

7. A person who on the date of commission of offence of murder was less than 18 years but on the date of his arrest/ apprehension is more than 18 years would be produced before:

a) Juvenile Justice Board

b) Child Welfare Committee

c) Court of Judicial Magistrate/ Metropolitan Magistrate

d) Sessions Court

Ans. a). A 'juvenile' or 'child' means a person who has not completed the eighteenth year of age [Section 2(k) of the Act of 2000 and as per Section 2 (35) of the Act of 2015, 'juvenile' means a child below the age of eighteen years]. A 'juvenile in conflict with law' is a juvenile who is *alleged to have committed an offence* and *has not completed the eighteenth year of age as on the date of commission of such offence* [Section 2(l) of the Act of 2000 though the said definition has been done away by the Act of 2015]. Section 2 (13) of the Act of 2015 defines a 'child in conflict with law' as a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence.

The material date for determination of juvenility even under the Act of 2015 remains the date of commission of offence. A person may be apprehended when he is more than 18 years old but if on the date of the offence he was less than 18 years old he would be treated as a juvenile/ child (**Hari Ram** v. **State of Rajasthan** (2009) 13 SCC 211; **Dharambir** v. **State** (2010) 5 SCC 344; **Daya**

Nand v. **State of Haryana** (2011) 2 SCC 224; **Subodh Nath** v. **State of Tripura** (2013) 4 SCC 122**).** This is made clear by Section 6 of the Act of 2015 which lays down that 'any person, who has completed eighteen years of age, and is apprehended for committing an offence, when he was below the age of eighteen years, then, such person shall be treated as a child during the process of inquiry.In case of a continuing offence, the relevant date would be the last date of the offence **(Vikas Chaudhary** v. **State of NCT of Delhi** (2010) 8 SCC 508 where a child was kidnapped and murdered and ransom was demanded, it was held that the last date of demand would be relevant for determining the juvenility of the accused). Further it has been held that date of birth is to be excluded for determining juvenility **(Eerati Laxman** v. **State of UP** (2009) 3 SCC 337).

8. In an offence other than a heinous offence which is alleged against a child, an FIR is to be registered:

a) in every case

b) only where an adult accused is involved

c) against the adult accused but the child is to be let off

d) in none of the cases

Ans. b). No FIR is to be registered except where a heinous offence is alleged to have been committed by the child or when such offence is alleged to have been committed jointly with adults or if it was not in the knowledge of the IO that the person involved is a child and the said information regarding commission of an offence is to be recorded in the general diary only [Rule 8(1) of the Model Rules of 2016 and Rule 11 (1) of the Model Rules of 2007]. This information along with the Social Background Report is to be forwarded to the Juvenile Justice Board before the first hearing.

9. In case of a petty or serious offence, the final report (charge sheet/ challan) against a child is to be filed before the Juvenile Justice Board within:

a) two months of the date of information to the police

b) six months of the date of commission of offence

c) as per the limitation prescribed under Cr.P.C.

d) any time.

Ans. a). In **Sheela Barse** v. **Union of India** AIR 1986 SC 1773 a direction was issued by the Supreme Court that investigation in all cases related to juveniles, where the punishment prescribed for adults is less than seven years, should be completed within three months and the final report forwarded to the Board. The said direction was to be followed strictly and where the final report in such cases was not filed within the period of 3 months the case was to be treated as closed. Under Rule 10(6) of the Model Rules of 2016, in cases of petty or serious offences, the final report has to be filed before the Juvenile Justice Board at the earliest and in any case not beyond the period of two months from the date of information to the police, except in those cases, where it was not reasonably known that the person involved in the offence was a child, in which case extension of time may be granted by the Juvenile Justice Board for filing the final report.

10. When a child of 15 years is found to have committed an offence of murder, the Juvenile Justice Board may impose:

a) life imprisonment

b) death penalty

c) allow the child to go home after advice or admonition

d) commit the matter to the Sessions Court.

Ans. c). No child in conflict with law can be sentenced to death or imprisonment for any term which may extend to imprisonment for life or committed to prison in default of payment of fine or in default of furnishing security. Further the Juvenile Justice Board cannot commit the matter to Sessions Court as is understood in Cr.P.C. on the ground of gravity of the offence but in case of heinous offences, alleged to have been committed by a child between the age of 16 to 18 years, the Board after conducting a preliminary assessment may transfer the case to the Children's Court.

11. On finding the involvement of the child in an offence, the Juvenile Justice Board may:

a) treat the child as child in need of care and protection and direct his production before the Child Welfare Committee

b) direct the child to be released on probation of good conduct

c) direct the child to be sent to special home

d) order the child to perform community service

e) all the above.

Ans. e). After the conclusion of inquiry, if the Board is satisfied that the child is involved in the alleged offence, it may pass one of the dispositional orders enumerated in Section 18 of the Juvenile Justice Act of 2015.

12. A child who was found to have committed the offence of robbery by the Juvenile Justice Board can apply for a government job.

a) True b) False

Ans. a). A child who has committed an offence and has been dealt with under the provisions of the Act shall not suffer disqualification, if any, attaching to a conviction of an offence under such law (Section 24(1) of the Act of 2015 and Section 19(1) of the Act of 2000). However if the child has completed the age of sixteen years and is found to be in conflict with law by the Children's Court under Section 19(1)(i), the said provisions would not apply. The Board is also to make an order directing that the relevant records of such conviction shall be removed after the expiry of the period of appeal or a reasonable period as prescribed under the rules [under Rule 14 of the Model Rules of 2016, the records of conviction in respect of a child in conflict with law shall be kept in safe custody till the expiry of the period of appeal or for a period of seven years, and no longer, and thereafter be destroyed]. However, in case of a heinous offence, where the child is found to be in conflict with law under Section 19(1)(i) of the Act of 2015, the relevant records of conviction of such child shall be retained by the Children's Court. Thus, if a child, except as provided in Section 24 of the Act of 2015 is found to be involved in an offence that would not be a bar to his seeking a government job. Section 74 of the Act of 2015 further provides that the police shall not disclose any record of the child for the purpose of character certificate or otherwise in cases where the case has been closed or disposed of and violation of the same would amount to an offence.

13. On production of a child aged 17 years who is alleged to have committed rape, the Juvenile Justice Board is bound to send the child before the Children's Court immediately.

a) True b) False

Ans.b). The Juvenile Justice Board has to first conduct a preliminary assessment and only if it comes to a finding that the child be treated as an adult that the case would be sent to the Children's Court.

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SHORT NOTE ON
THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015 WITH REFERENCE TO JUVENILES IN CONFLICT WITH LAW

– *Geetanjli Goel*[1]

A. Background

A.1 The Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as the Act of 2015) has been brought into force with effect from 15.1.2016 and it replaces the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the Act of 2000). Just like the earlier Act, this Act provides a separate adjudicating and rehabilitating machinery, distinct from that for adults, for handling matters concerning children (except in some cases). It stresses the need for child-friendly legal procedures and seeks to lay them down. It is the **only** legislation in the world which contains provisions both for children in conflict with law (the Act of 2015 uses the term child in conflict with law instead of 'juvenile' used earlier) and for children in need of care and protection. The Act manifests the recognition the world over that children need to be treated differently as their mental faculties are still at the developing stage and they may not be in a position to take mature decisions. It is because of this immaturity that they are not supposed to be treated as adult offenders (judgment of High Court of Delhi in **Court on its Own Motion** v. **Department of Women and Child Development & Ors.** WP (C) No.8889 of 2011 dated 11.5.2012; **Salil Bali** v. **Union of India** (2013) 7 SCC 705). The Act is not only a beneficent legislation but also a remedial one (**Pratap Singh** v. **State of Jharkhand** (2005) 3 SCC551). The contention in respect of the Act of 2000 that it be read down so as to exclude juveniles from the operation of the Act taking into consideration the mental and intellectual maturity of the offender and the gravity of the offence was rejected having regard to the intention of the legislature in **Subramanian Swamy** v. **Raju** (2014) 8 SCC 390 (however, in the present Act, certain provisions have been incorporated in that respect).

A.2 In the Indian context, clause (3) of Article 15, Article 21, Article 21A, clauses (1) and (2) of Article 22, Articles 23, 24, clauses (e) and (f) of Article 39, Article 39A, Articles 45, 47 and 51A (k) of the Constitution of India impose on the State the primary responsibility of ensuring that all the needs of the children are met and their basic human rights are fully protected. They also enable the State to make special provision for children. Further India is a signatory to various international conventions and covenants such as the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20.11.1989 and ratified by India on 11.12.1992 which lays down the standards to be adhered to by all the State parties in securing the best interests of the child and it emphasizes social reintegration of juveniles and care and protection of vulnerable children; United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (popularly known as the Beijing Rules or Beijing Declaration), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) and SAARC Convention on Regional Arrangements for Promotion of Child Welfare adopted in 2002 which recognizes the family as the best place for the well-being of children and lays down the primary objective of promoting the child's reintegration in the family and society.

A.3 The Act of 2000 replaced the Act of 1986 and it was extensively amended in 2006 and now it has been replaced by the Act of 2015. The Act of 2015[2] seeks to cater to the basic needs of the

[1]Director, National Legal Services Authority and Officer of Delhi Higher Judicial Service.

[2] The Preamble of the Act of 2015 reads:

"An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, herein under and for matters connected therewith or incidental thereto."

children alleged and found to be in conflict with law and children in need of care and protection through proper care, protection, development, treatment, social re-integration by adopting a child friendly approach in the adjudication and disposal of matters in the best interest of children and for their ultimate rehabilitation.

A.4 Subsequent to the amendment of the Act in 2006, the Central Government framed the Juvenile Justice (Care and Protection of Children) Rules, 2007 which are also popularly known as the 'Model Rules'. Some of the States had adopted the Model Rules while some other States had framed their own rules with certain modifications. At the time the Module was prepared, the process of drafting the rules was still underway and the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 (hereinafter referred to as the Model Rules of 2016) have now been notified with effect from 21.9.2016.The Act and the Rules have to be read together. Though the provisions of Cr.P.C are applicable, the Act together with the Rules, more or less, constitute a complete Code for dealing with cases of children in conflict with law.

A.5 The new Act brings about significant changes in the law relating to children in conflict with law. While in the present note the provisions of the Act of 2015 have been referred to, the relevant provisions of the Act of 2000 have also been mentioned and the changes have also been discussed. The Rules referred to are the ModelRules of 2016 framed under the Act of 2015 though the Rules of 2007 have also been referred to. Moreover, the case law as has developed over the years would still hold good subject to the new provisions that have been incorporated in the Act of 2015.

Fundamental Principles

A.6 What is most significant in the Act of 2015 is that it incorporates certain principles (earlier found in the Model Rules of 2007) which shall, *inter alia* be fundamental to the application, interpretation and implementation of the Act. These Basic or Fundamental Principles have to be kept in mind by all the stakeholders who come in contact with children in conflict with law or children in need of care and protection be they the Juvenile Justice Boards (Board) or Child Welfare Committees (CWC) or police persons or lawyers or voluntary organizations or other functionaries under the Act. The lawyers, police personnel or even the Boards have to, *inter alia,* keep in mind the fundamental principles incorporated in Section 3 of the Act of 2015 which are:

1. The *best interest of the child* which means that all decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and will help the child to develop his/her full potential[3].
2. Principle of repatriation and restoration which seeks to ensure rehabilitation and reintegration of the child in the society. Every child has the right to be re-united with his family and restored back to the same socio-economic and cultural status that such child enjoyed before coming within the purview of the Act unless such restoration and repatriation is not in his best interest. Coupled with this is the principle of *institutionalization as a measure of last resort* i.e. a child shall be placed in institutional care as a step of last resort after making a reasonable inquiry.
3. Equally important is the principle of presumption of innocence i.e. a child is presumed to be innocent of any mala fide or criminal intent upto the age of eighteen years. This also incorporates the right of the children to legal representation and legal aid has to be provided to them. Further it includes the principle of *participation* i.e. every child shall have a right to be heard and to participate in all the processes and decisions affecting his interest and the child's views shall be taken into consideration

[3] 'Best interest of child' under section 2 (9) of Act of 2015 has been defined to mean the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development.

with due regard to his/her age and maturity. The Act of 2015 also incorporates the principle of *natural justice* i.e. basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies, acting in a judicial capacity under the Act.

4. Treatment of a child consistent with his sense of dignity and worth which is a fundamental principle of juvenile justice and has to be protected throughout the entire process of dealing with the child coupled with the right to privacy and confidentiality.

These principles have to be adhered to by everyone dealing with children in conflict with law at every stage irrespective of the gravity of the offence or other circumstances.

Statistics relating to juvenile crime

A.7 Contrary to the popular belief and projection by the media, the percentage of crimes committed by the juveniles/ children to the total IPC crimes committed in the country remains extremely low. Over the years the percentage of crimes committed by juveniles/ children has not varied much though the actual number of crimes by juveniles/ children has gone up. As per the report of the National Crime Records Bureau for the year 2013, 'the share of IPC crimes committed by juveniles/ children to total IPC crimes reported in the country during 2003-2005 remained static at 1.0% which marginally increased to 1.1% in 2006 and remained static in 2007. This share increased marginally to 1.2% in 2008 thereafter decreased to 1.1% in 2009. This share further decreased to 1.0% in 2010 and thereafter marginally increased to 1.1% in 2011 and 1.2% in 2012 and remained static at 1.2% in 2013'. However, the juveniles/ children in conflict with law (IPC crimes) in 2013 have increased by 13.6% over 2012 as 27,936 IPC crimes by juveniles/ children were registered during 2012 which increased to 31,725 cases in 2013.

B. Terminology

Flowing from the principles which are enshrined in the Rules and the basic objective of having a separate legislation dealing with children in conflict with law, more particularly the principle of non-stigmatizing semantics, adversarial and accusatory words, such as, arrest, remand, accused, charge sheet, trial, prosecution, warrant, summons, conviction, inmate, delinquent, neglected, custody or jail are not used. Instead words such as apprehension, person alleged to be involved or found to be involved (instead of accused or convict), final report or police investigation report (rather than charge sheet), order for production of child/ juvenile or order for apprehension of child/ juvenile (instead of bailable warrants or non-bailable warrants), found involved (rather than convicted), observation home etc. are used. These should be scrupulously followed in all the processes.

Even process under Section 82 Cr.P.C. should not be resorted to against the juveniles/ children as it is contrary to the right of privacy of the juveniles/ children since it requires public reading in a conspicuous place in town or village and affixation of the process in a conspicuous place in the town or village or house of the children. Instead resort can be had to Section 26 of the Act of 2015 (Section 22 of the Act of 2000) which deals with escaped children and the Child Welfare Police Officers/ SHOs of police stations can be directed to produce the children as and when found. Rule 10(3) of the Rules of 2016 specifically provides that when the child alleged to be in conflict with law, after being admitted to bail, fails to appear before the Juvenile Justice Board, on the date fixed for hearing and no sufficient ground is shown for the exemption of the child, the Juvenile Justice Board shall issue to the Child Welfare Police Officer and the Person-in-charge of the Police Station directions for the production of the child. Rule 10(4) further clarifies that if the Child Welfare Police Officer fails to produce the child before the Juvenile Justice Board even thereafter, the Board shall instead of issuing process under Section 82 of the Cr.P.C. pass orders as appropriate under Section 26 of the Act of 2015.

C. Adjudicating Machinery under the Act for juveniles/ children in conflict with law

C.1 Under the Act, the cases of children in conflict with law are to be adjudicated by **Juvenile Justice Boards** (hereinafter referred to as the Board) constituted under Section 4 of the Act of 2015 and such Boards are to be set up in every district (the setting up of Boards is being monitored by Supreme Court in **Sampurna Behura**; also **Bachpan Bachao Andolan** v. **Union of India** (2011) 5 SCC 1). A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of the first class, as the case may be, with at least three years' experience and two social workers of whom at least one shall be a woman, forming a Bench. A child in conflict with law may be produced before an individual member of the Board, when the Board is not sitting, though at the time of final disposal of the case or in making an order under sub-section (3) of Section 18, there shall be at least two members including the Principal Magistrate present. The proceedings of the Board are to be held in the premises of an Observation Home or, at a place in proximity to the observation home or at a suitable premise in any Child Care institution meant for children in conflict with law run under the Act but not within any court or jail premises. The procedures have to be child-friendly and the venue should not be intimidating to the child and should not resemble regular courts. The Board is also to ensure that no person unconnected with the case remains present when the case is in progress and that only those persons are present in whose presence the child feels comfortable.

C.2 A Board shall have the power to deal exclusively with proceedings under the Act relating to children in conflict with law, notwithstanding anything contained in any other law for the time being in force, and the powers conferred on the Board may also be exercised by the High Court and the Children's Court, when the proceedings come under Section 19 or in appeal, revision or otherwise (Section 8 of the Act of 2015). Thus all offences whether under IPC or any local or special law allegedly committed by a juvenile/ child have to be first brought before the Board and except as specified can be inquired into by the Board exclusively [**Raj Singh** v. **State of Haryana** (2000) 6 SCC 759; **Union of India** v. **Ex-GNR Ajeet Singh** (2013) 4 SCC 186; **Tara Chand** v. **State of Rajasthan** 2007 Cri.L.J. 3424 (Raj); however as regards TADA, 1987, it was held that the JJ Act does not have an overriding effect over TADA which was not in existence on the date of commencement of provisions of Section 1(4) of JJ Act in **Yakub Abdul Razak Memon** v. **State of Maharashtra** (2013) 13 SCC 1). Question of applicability of the Act to children above 16 years of age committing offences punishable with death penalty in view of Section 27 Cr.P.C. has been settled by Supreme Court in **Rohtas Singh** v. **State** AIR 1979 SC 1839 and **Raghubir Singh** v. **State** AIR 1981 SC 2037]. However, under the Act of 2015 certain specific provisions have been incorporated in that regard.

C.3 The functions and responsibilities of the Board include ensuring informed participation of the child and the parent or guardian in every step of the process and that the rights of the child are protected throughout the process of apprehending the child, inquiry, aftercare and rehabilitation, ensuring availability of legal aid for the child through the legal services institutions, directing preparation of social investigation report, adjudicating and disposing of cases of children in conflict with law, transferring to the Committee, matters concerning the child alleged to be in conflict with law, stated to be in need of care and protection, disposing of the matter and passing a final order that includes an individual care plan for the child's rehabilitation, conducting inquiry for declaring fit persons or fit facilities regarding care of children in conflict with law, conducting inspection of the residential facilities for children in conflict with law, directing the police to register FIR for offences committed against any child in conflict with law and a child in need of care and protection on a complaint made in that regard/ written complaint by a Committee and conducting regular inspection of jails meant for adults to check if any child is lodged in such jails and taking immediate measures for transfer of such a child to the observation

home. Under the Rules of 2016, the Board shall also wherever required, pass appropriate orders for the re-admission or continuation of the child in the school where the child has been disallowed from continuing his education in a school on account of the pendency of the inquiry or the child having stayed in a Child Care Institution for any length of time and maintain a suggestion box or grievance redressal box in the premises of the Board at a prominent place to encourage inputs from children and adults alike. The Board is also to ensure that the Legal cum Probation Officer in the District Child Protection Unit and the State or District Legal Services Authority extends free legal services to a child, and deploy, if necessary, the services of student volunteers or non-governmental organization volunteers for para legal and other tasks such as contacting the parents of the child in conflict with law and collecting relevant social and rehabilitative information about the child.

C.4 The children in conflict with law are not to be kept in jail or lock-up (proviso to Section 10 (1) of the Act of 2015) and the Act provides for setting up of **observation homes**, **special homes** a**nd place of safety** for children in conflict with law. 'Observation home' means a home established by a State Government or by a voluntary organization and certified by that State Government under Section 47 of the Act of 2015 as an observation home for the child in conflict with law (Section 2(40) of the Act of 2015). They are meant for temporary reception of any child in conflict with law during the pendency of any inquiry regarding them under the Act. Provision is also made for the classification of the children according to the age group.

C.5 'Special home' means an institution established by a State Government or by a voluntary organization and certified by that Government under Section 48 of the Act of 2015 as defined in Section 2 (56) of the Act of 2015. The special homes are meant for reception and rehabilitation of children in conflict with law. Classification and separation of children in conflict with law has to be done on the basis of age of the children and the nature of offences committed by them and their mental and physical status. The Act also makes provision for a '**place of safety**' which means any place or institution (not being a police lock-up or jail), the person in charge of which is willing temporarily to receive and take care of the child alleged or found to be in conflict with law, by an order of the Board or the Children's Court, both during inquiry and ongoing rehabilitation after having been found guilty (Section 2(46) of the Act of 2015[4]).

C.6 The Act of 2015 classifies the offences into three types:

- 'petty offences' which include the offences for which the maximum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment up to three years (Section 2(45) of the Act of 2015).
- 'serious offences' which include the offences for which the punishment under the Indian Penal Code or any other law for the time being in force, is imprisonment between three to seven years (Section 2(54) of the Act of 2015).
- 'heinous offences' which include the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more (Section 2(33) of the Act of 2015). This would be open to interpretation by the JJBs and Courts as the words used are '**minimum punishment** under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years'.

The nature of the proceedings before the Board and the orders passed in respect of children, to some extent depend on the category in which the offences fall.

[4] Under Section 49 of the Act of 2015, the State Government shall set up at least one place of safety in a State registered under section 41, so as to place a person *above the age of eighteen years or child in conflict with law, who is between the age of sixteen to eighteen years and is accused of or convicted for committing a heinous offence.*

D. Who are children in conflict with law?

D.1 A 'juvenile' or 'child' means a person who has not completed the eighteenth year of age [Section 2(k) of the Act of 2000 and as per Section 2 (35) of the Act of 2015, 'juvenile' means a child below the age of eighteen years]. A 'juvenile in conflict with law' is a juvenile who is *alleged to have committed an offence* and *has not completed the eighteenth year of age as on the date of commission of such offence* [Section 2(l) of the Act of 2000 though the said definition has been done away by the Act of 2015]. Section 2 (13) of the Act of 2015 defines a 'child in conflict with law' as a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence.

D.2 The material date for determination of juvenility even under the Act of 2015 remains the date of commission of offence. A person may be apprehended when he is more than 18 years old but if on the date of the offence he was less than 18 years old he would be treated as a juvenile/ child[5] (**Hari Ram** v. **State of Rajasthan** (2009) 13 SCC 211; **Dharambir** v. **State** (2010) 5 SCC 344; **Daya Nand** v. **State of Haryana** (2011) 2 SCC 224; **Subodh Nath** v. **State of Tripura** (2013) 4 SCC 122**).** This is made clear by Section 6 of the Act of 2015 which lays down that 'any person, who has completed eighteen years of age, and is apprehended for committing an offence, when he was below the age of eighteen years, then, such person shall be treated as a child during the process of inquiry.

D.3 In case of a continuing offence, the relevant date would be the last date of the offence (**Vikas Chaudhary** v. **State of NCT of Delhi** (2010) 8 SCC 508 where a child was kidnapped and murdered and ransom was demanded, it was held that the last date of demand would be relevant for determining the juvenility of the accused). Further it has been held that date of birth is to be excluded for determining juvenility **(Eerati Laxman** v. **State of UP** (2009) 3 SCC 337).

D.4 A reference to **Sections 82 and 83 of the IPC** is necessary. Under Section 82 IPC nothing is an offence which is done by a child under 7 years of age and it confers absolute immunity in case of such a child. Under Section 83 IPC, in case of children in the age group of 7 to 12 years nothing done by them would be an offence if they had not attained sufficient maturity of understanding to judge the nature and consequences of their conduct on that occasion. Thus the immunity is a qualified one and it is for the Board to decide how the case of a child in the said age group is to be dealt with. A child under 12 years is presumed not to have reached the age of discretion but the presumption can be rebutted by strong and cogent evidence of the child's understanding and judgment (**Hiralal** v. **State of Bihar** AIR 1977 SC 2236). However, above the age of 12 years there is no immunity from criminal liability and the lack of maturity of understanding the nature and consequences of his conduct would not take away the criminal liability though upto the age of 18 years, the child allegedly committing an offence would be governed by the provisions of the Act. It is often argued that in view of Section 83 of the IPC, a person above the age of 12 years, would be liable for any offence committed. However, the Act is a special provision and enacted after the IPC and as such the provisions of the Act would prevail, in case of any inconsistency between the IPC and the Act.

D.5 When during the course of inquiry under the Act, the child completes the age of eighteen years, then, the inquiry may be continued by the Board and orders may be passed in respect of such person as if such person had continued to be a child (Section 5 of the Act of 2015. Reference may also be made to Rule 90 of the Model Rules of 2016).

[5] Such a person, if not released on bail by the Board, shall be placed in a place of safety during the process of inquiry and he shall be treated as per the procedure specified under the provisions of the Act.

E. Age Enquiry

E.1 This is the most important issue as the question whether the person alleged to be involved in the offence would be brought before the Board or a regular criminal court rests on age determination. Immediately on apprehension the police officers are required to make enquiries about the age of the person apprehended and the steps taken in this regard have to be mentioned in the final report (The Supreme Court in **Gopi Nath Ghosh** v. **State of West Bengal**, AIR 1984 SC 237 observed: *"We are of the opinion that whenever a case is brought before the magistrate and the accused appears to be aged 21 years or below before proceeding with the trial or undertaking an inquiry, an inquiry must be made about the age of the accused on the date of the occurrence… this procedure if properly followed, would avoid a journey up to the apex court and return journey to the grass court."*) Thus in every case where a person appears to be upto 21 years of age or states his age to be so, an inquiry has to be made about the age of the person apprehended on the date of the offence (reiterated by High Court of Delhi in **Court on its Own Motion** v. **Dept. Of Women and Child Development & Ors**.WP (C) No.8889 of 2011 decided on 11.5.2012 and in **Jitender Singh** v. **State of UP** (2013) 11 SCC 193).

E.2 **Section 9 of the Act of 2015 (Sections 7 and 7A of the** Act of 2000): Section 9 (1) of the Act of 2015 applies only to the Magistrate's court and under the same, immediately on forming an opinion that the person brought before the Magistrate is a child, the Magistrate is to record the opinion and forward the child immediately to the Board. However under Section 9(2) every court before which the question of juvenility is raised or arises, whatever be the stage and even after final disposal of the case, is to make an inquiry and take such evidence as may be necessary (but not on affidavit) so as to determine the age of the person raising the claim of juvenility and if the person is found to be a juvenile/ child on the date of commission of the offence he shall be forwarded to the Board. Under Section 9(4) it has been clarified that in case a person under the said section is required to be kept in protective custody while the person's claim of being a child is being inquired into, such person may be placed, in the intervening period in a place of safety.

E.3 **Prima facie opinion:** Under Section 94 of the Act of 2015 (formerly the provision regarding manner of age inquiry was contained in Rule 12 of the Model Rules of 2007which has been modified now) when a person is brought before the Board other than for the purpose of giving evidence and it is obvious to the Board, *based on the appearance of the person* that the said person is a child, the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under Section 14 of the Act of 2015, without waiting for further confirmation of the age. However, if the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Board shall undertake the process of age determination.

E.4 **Age Determination:** Section 94 of the Act of 2015 lays down a definite ordering of documents to be considered for determining the age namely:

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned Examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in absence of (i) and (ii) the age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Board (however, wherever possible, examination by a Medical Board should be got done).

It is significant that the first document is to be considered to the exclusion of the other documents and if document at (i) is not available, then the document at (ii) would be considered and if both (i) and (ii) are not available, then medical opinion is to be sought. Even the judgments of the Supreme Court give

primacy to documentary evidence over medical test and it is only where the documents are proved to be forged or unreliable or are doubtful that medical examination is to be ordered (**see Om Prakash** v. **State of Rajasthan** (2012) 5 SCC 201). Generally, the age on the lower side of the range is to be considered. Rule 12 of the Model Rules of 2007 provided that where exact assessment of the age could not be done, the Court, **for reasons to be recorded**, could, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year [**Babloo Passi** v. **State of Jharkhand** (2008) 13 SCC 133; **Ram Suresh Singh** v. **Prabhat Singh** (2009) 6 SCC 681; **Shah Nawaz** v. **State of UP** (2011) 13 SCC 751; **Ashwani Kumar Saxena** v. **State of MP** (2012) 9 SCC 750; **Jodhbir Singh** v. **State of Punjab** AIR 2013 SC 1; **Ranjeet Goswami** v. **State of Jharkhand** (2014) 1 SCC 588; **Darga Ram** v. **State of Rajasthan** (2015) 2 SCC 775; **State of Bihar** v. **Chhotu Pandey** 2015 (1) SCALE 59]. However, the same has been done away in the new Act though following the judgments which are there on the subject some benefit may be given. A hyper-technical approach is not to be taken while determining the age (**Arnit Das v State of Bihar)**. The matter should be considered *prima facie* on the touchstone of preponderance of probability (**Abuzar Hossain @ Gulam Hossain** v. **State of West Bengal** (2012)10 SCC489).

Same procedure has to be followed for *determining the age of the victims* (**Jarnail Singh** v. **State of Haryana** (2013) 7 SCC 263; **Mahadeo** v. **State of Maharashtra** (2013) 14 SCC 637). It has also been laid down that the age recorded by the Board to be the age of a person so brought before it shall, for the purpose of the Act, be deemed to be the true age of that person.

E.5 **Scope of Age Inquiry**: This has been a question of difficulty with some courts ordering detailed inquiry including examining witnesses (**Khem Chand** v. **State of Rajasthan** MANU/RH/0056/2008; **Subhash** v. **State of UP** MANU/UP/0085/2008; judgment of High Court of Delhi in **Court on its Own Motion** v. **Department of Women and Child Development & Ors.** WP (C) No.8889 of 2011 dated 11.5.2012) while others have relied upon documentary proof and passed orders. It has been held by the Supreme Court in **Ashwani Kumar Saxena** v. **State of M.P.** (2012) 9 SCC 750 that S.7A (of the Act of 2000) obliges the court only to make an inquiry, not an investigation or a trial, an inquiry not under the Code of Criminal Procedure, but under the JJ Act. Further it was observed that the Court or the Board can accept as evidence something more than an affidavit i.e. the Court or the Board can accept documents, certificates etc. as evidence need not be oral evidence; and that age determination inquiry contemplated under the JJ Act and Rules has nothing to do with an inquiry under other legislations, like entry in service. Even otherwise the provisions have been made more liberal under the Act of 2015 which provides that the Board can proceed with the inquiry under Section 14 of the Act of 2015, if based on the physical appearance of the child, it is obvious to the Board that the person brought before it is a child.

E.6 The court is bound to hold an age determination inquiry in all cases in which an accused claims to be a child and the claim cannot be rejected on the ground of being an afterthought. Even if application for withdrawing the application under Section 9 of the Act of 2015 (Section 7A of Act of 2000) is filed, still the court should decide the question (**Bhola Bhagat** v. **State of Bihar** (1997)8 SCC 720) and even if the documents are found to be fabricated still the plea of juvenility has to be considered and decided.

E.7 **Claim of juvenility raised after conviction: C**laim of juvenility may be raised at any stage even after final disposal of the case and delay in raising the claim of juvenility cannot be a ground for rejection of such claim. If the claim is raised after conviction, the claimant must produce some material which may *prima facie* satisfy the court that an inquiry into the claim of juvenility is necessary, initial burden has to be discharged by the person who claims juvenility. If *prima facie* satisfied, the court can

remand the matter to the trial court to decide the claim of juvenility (**Union of India** v. **Ex-GNR Ajeet Singh** (2013) 4 SCC 186; **Abuzar Hossain @ Gulam Hossain** v. **State of West Bengal** (2012)10 SCC489; **Abdul Razzak** v. **State of UP** decided on 16th March, 2015; **Anil Agarwala** v. **State of W.B.** (2012) 9 SCC 768; **Babla @ Dinesh** v. **State of Uttarakhand** (2012) 8 SCC 800; **Dharambir** v. **State** (2010) 5 SCC 344).

E.8 When a person is brought before a Board under any of the provisions of the Act who appears to be a child, the Board shall make due inquiry as to the age of that person.

F. Pre-production processes

Section 10 of the Act of 2015 provides that as soon as a child alleged to be in conflict with law is apprehended, he shall be placed in the custody of a Special Juvenile Police Unit or the designated child welfare police officer (meaning thereby that there should be designated police officers such as Child Welfare Police Officers in each Police Station in whose custody the child can be placed on apprehension and who should be imparted special training to deal with cases of children in conflict with law). As per Rule 8(5) of the Model Rules of 2016 (Rule 11 of the Model Rules of 2007), the Child Welfare Police Officers are required to record the social background of the child and circumstances of apprehending in every case of alleged involvement of the child in an offence i.e. to prepare a Social Background Report (defined under Rule 2(xvi) of the Model Rules of 2016 as a report of a child in conflict with law containing the background of the child prepared by the Child Welfare Police Officer) which is to be forwarded to the Juvenile Justice Board forthwith and is to be considered by the Juvenile Justice Board when the child is produced before the Board. It is pertinent that:

i. The parents or the guardian of the child are to be informed immediately about the apprehension of the child (Section 13 (1) (i) of the Act of 2015) and about the address of the Board and where the child would be produced and the date and time when the parents or guardian need to be present before the Board. The probation officer is to be informed immediately as well under Rule 8(2)(ii) of the Model Rules of 2016 [Rule 11(5) of the Rules of 2007].

ii. The child is in no case to be kept in lock up or jail under proviso to Section 10 (1) of the Act of 2015or with adult accused [proviso to rule 10 (1) and rule 11 (3) of the Rules of 2007. Under Rule 8(3)(i) of the Model Rules of 2016, the police officer apprehending a child alleged to be in conflict with law is not to send a child to a police lock-up and not to delay the child being transferred to the Child Welfare Police Officer from the nearest police station] and as far as possible he should not be brought to the police station (courts have even awarded monetary compensation where the juvenile/ child has been kept in jail or police lock-up **Master Salim Ikramuddin Ansari** v. **Officer-in-charge**, 2005 Cri.L.J. 799 and **Master Rajeev Shankarlal** v. **Officer-in-charge**, 2003 Cri.L.J. 4522).

iii. Rule 8(3)(i) of the Model Rules of 2016 provides that the police officer may send the person apprehended to an observation home only for such period till he is produced before the Board i.e. within twenty-four hours of his being apprehended and appropriate orders are obtained from the Juvenile Justice Board.(Also see Section 10 of the Act of 2015). This eventuality may arise where the child alleged to be in conflict with law cannot be produced before the Board or even a single member of the Board due to the child being apprehended during odd hours or distance. [Rule 9(6) of the Model Rules of 2016 and the procedure in this regard is laid down in Rule 69D of the Model Rules of 2016] Period of 24 hours is the outer limit and in fact the child should be produced before the Board "without any loss of time" and it was so held in **Court on its own motion** v. **Govt. of NCT of Delhi** WP (C) 8801/2008 order dated 3.3.2009.

iv. The child is not be hand-cuffed, chained or otherwise fettered and no coercion or force is to be used on the child [Rule 8(3)(ii) of the Model Rules of 2016].

v. The child is to be informed promptly of the charges levelled against him through his parent or guardian and be provided all appropriate assistance. If an FIR is registered against the child, copy of the same is to be made available to the child or the copy of the police report is to be given to the parent or the guardian [Rule 8(3)(iii) of the Model Rules of 2016].

vi. The child is to be provided appropriate medical assistance, assistance of interpreter or a special educator, or any other assistance which the child may require [Rule 8(3)(iv) of the Model Rules of 2016].

vii. The child should not be compelled to confess his guilt [Rule 8(3)(v) of the Model Rules of 2016. **In Court on its own motion** v. **Govt. of NCT of Delhi** WP (C) 8801/2008 order dated 3.3.2009 the issue of juveniles being made to sign statements made to police officers came up and the Delhi Police thereafter issued a circular dated 17.12.2008 that the said practice should be stopped forthwith].The child cannot be asked to sign any statement[Rule 8(3)(vi) of the Model Rules of 2016]. The child is to be interviewed only at the Special Juvenile Police Unit or at a child-friendly premises or at a child-friendly corner in the police station, which does not give the feel of a police station or of being under custodial interrogation and the parent or guardian, may be present during the interview of the child by the police[Rule 8(3)(v) of the Model Rules of 2016].

viii. The police officer has to also inform the District Legal Services Authority for providing free legal aid to the child[Rule 8(3)(vii) of the Model Rules of 2016].

ix. Notwithstanding anything in the Code of Criminal Procedure, 1973 or any preventive detention law for the time being in force, no preventive proceeding shall be instituted against a child such as proceedings u/s 107/150, 107/151, 109, 110 Cr.P.C. (Section 22 of the Act of 2015 and Section 17 of the Act of 2000).

x. The guidelines laid down in **D.K. Basu** v. **State of West Bengal** (1997)1SCC416 to be adhered to by the police in all cases of arrest or detention and the amended provisions of Cr.P.C. are equally applicable, *mutatis mutandis,* to a juvenile or a child (**Jitender Singh** v. **State of UP** (2013) 11 SCC 193) particularly in view of S.41-B, 50A, 54 of Cr.P.C.

xi. No FIR is to be registered except where a heinous offence is alleged to have been committed by the child or when such offence is alleged to have been committed jointly with adults or if it was not in the knowledge of the IO that the person involved is a child and the said information regarding commission of an offence is to be recorded in the general diary only [Rule 8(1) of the Model Rules of 2016 and Rule 11 (1) of the Model Rules of 2007]. This information along with the Social Background Report is to be forwarded to the Juvenile Justice Board before the first hearing.

xii. The child is to be apprehended only in case of heinous offences under the proviso to Rule 8(1) of the Model Rules of 2016 (under the Model Rules of 2007 i.e. Rules 11 (2), (3) and (4), the power of apprehension could be exercised in cases only of alleged involvement in serious offences entailing a punishment of more than 7 years imprisonment for adults) unless the apprehension is in the best interest of the child himself, such as where the child takes drugs or his family cannot be traced or he is being used by gangs. In all other cases, the information regarding the nature of offence alleged to be committed by the child along with his Social Background Report is to be forwarded to the Juvenile Justice Board and the parents or guardian of the child have to be intimated as to when the child is to be produced for hearing before the Juvenile Justice Board.

xiii. In **Sheela Barse** v. **Union of India** AIR 1986 SC 1773 a direction was issued by the Supreme Court that investigation in all cases related to juveniles, where the punishment prescribed for adults is less than seven years, should be completed within three months and the final report forwarded to the Board. The said direction was to be followed strictly and where the final report in such cases was not filed within the period of 3 months the case was to be treated as closed. Under Rule 10(6) of the Rules of 2016, in cases of petty or serious offences, the final report has to be filed before the Juvenile Justice Board at the earliest and in any case not beyond the period of two months from the date of information to the police, except in those cases, where it was not reasonably known that the person involved in the offence was a child, in which case extension of time may be granted by the Juvenile Justice Board for filing the final report.

xiv. Even in cases of heinous offences the final report is to be filed at the earliest as the mandate contained in the Act for speedy disposal of cases applies to all and often even after the child is granted bail the matter is kept pending so that the IO is constantly reminded to file the final report at the earliest.

G. Bail

G.1 Institutionalization of a child in conflict with law has to be the last resort and the aim has to be rehabilitation of the child and his reintegration in the society. Section 12 of the Act of 2015 provides for release on bail of a person accused of a bailable or non-bailable offence, and apparently a child when he is arrested (apprehended) or detained or appears or is brought before a Board. The child has a right to bail which is one of the most important rights of the child and if bail is declined, a reasoned order has to be given by the Board. Bail of a child cannot be rejected in a routine manner.

Bail can be with or without surety or the child can be placed under the supervision of a Probation Officer or under the care of any fit institution or fit person.Grounds on which bail can be refused are expressly stated i.e. if there appear reasonable grounds for believing that the release is:

- likely to bring him into association with any known criminal (**Devesh** v. **The State** MANU/DE/8693/2006; **Dattatray G. Sankhe** v. **State of Maharashtra** MANU/MH/0490/2003; bail rejected as the juvenile, if released on bail, may again mix up with other adult co-accused who were absconding **Fawaad Nasir @ Ziya** v. **State** MANU/DE/8845/2007; **Jaif Ahmed Sheikh** v. **State of Rajasthan** 2004 Cri.L.J. 3272); or
- expose him to moral, physical or psychological danger (**Sandeep Kumar** v. **State** 2005 Cri.L.J. 3182: 119 (2005) DLT 398); or
- that his release would defeat the ends of justice.

The child is to be kept in the institution only if it is in his interest and not as a mark of punishment or because it is felt that he may repeat the act (**Abdul Rab** v. **State of Bihar** (2008) 17 SCC 475; **Jitendra Singh** v. **State of UP** (2013) 11 SCC 193). The phrase 'defeat the ends of justice' in Section 12 of the Act has to be construed harmoniously with other grounds for rejecting bail and has to mean 'interest of the child'.Thus even here primarily the interest of the child is to be seen. The High Court of Delhi interpreted the words 'would defeat the ends of justice' as one of the grounds for denying bail to a juvenile in 2006 [3] JCC 1430 where referring to **Master Abhishek (Minor)** v. **State** 2005 VIAD Delhi 18 it held: "*The facts for determining as to what amounts to defeat of the ends of justice must be construed in the context of the purpose of the Act. It was indicated in the decision that what needs to be adopted is a child friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institutions established under the enactment. What is important is that the court should*

keep in mind the developmental needs of juvenile and the necessity for his rehabilitation. It is only if the developmental needs of the child require that he be kept in custody or that keeping him in custody is necessary for his rehabilitation, or care or protection that his release would defeat the ends of justice and not otherwise." (**Manoj @ Kali** v. **The State** 2006 Cri.L.J. 4759; **Dev Vrat (Minor)** v. **Govt. of NCT of Delhi** MANU/DE/8999/2006; **Mohd. Adnan Aftab** v. **The State, NCT of Delhi** MANU/DE/8096/2007)

G.2 The offence alleged against the child or the gravity thereof or the role of the child in the same or even the interest of the victim is not the consideration. The Court/Board has to be see whether it would be in the interest of the child to keep him in protective custody (in **Master Niku Chaubey** v. **State** 129 (2006) DLT 577 the High Court of Delhi did not entertain the plea of the State "*...that the alleged act said to have been committed by the juvenile along with co-accused was one of great moral degradation and the act in itself would demonstrate the perversity of the mind of the juvenile"* and held that the nature of the offence is not one of the grounds on which bail can be granted or refused to the juvenile; **Prakash** v. **State of Rajasthan** 2006 Cri.L.J. 1373; **Vijendra Kumar Mali** v. **State of UP** 2003 Cri.L.J. 4619; **Bharat @ Bharat Ram** v. **State** MANU/RH/0078/2008).

G.3 The Boards call for a Social Investigation Report ('social investigation report' has been defined in Rule 2(xvii) of the Model Rules of 2016 as the report of a child containing detailed information pertaining to the circumstances of the child, the situation of the child on economic, social, psycho-social and other relevant factors, and the recommendation thereon) from the probation officer as also report of physical and mental assessment and regarding drug use while the police file a social background report (SBR) which the Board peruses and after interaction with the child and his family members, the Board decides if he is to be released on bail or other measures are necessary (**Nand Kishore** v. **State (Del)** MANU/DE/8814/2006; **Master Niku Chaubey** v. **State** 129 (2006) DLT 577; **Sandeep Kumar** v. **State** 2005 Cri.L.J. 3182: 119 (2005) DLT 398). Where a child is released on bail, the probation officer or the Child Welfare Officer has to be informed by the Board (Section 13(2) of the Act of 2015).

G.4 Under the Act of 2015, if the child in conflict with law is unable to fulfil the conditions of the bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail.

H. Post-production processes:

H.1 **Order on First Production before the Board**: When the child is produced before the Board, it has to consider the Social Background Report (SBR) prepared by the Child Welfare Police Officer or officers, individuals, agencies producing the child and the Board may:

- dispose of the case, if the Board is satisfied on inquiry that the child brought before it has not committed any offence (Sections 14(1) and 17(1) of the Act of 2015); or
- transfer the child to the Child Welfare Committee if it appears to the Board that the child has not committed any offence and is in need of care and protection (Section 17(2) of the Act of 2015 and Rule 10(1)(ii) of the Model Rules of 2016). Under Rule 9(3) of the Model Rules of 2016, when the child produced before the Board is covered under Section 83 of the Act of 2015, including a child who has surrendered, the Board may, after due inquiry and being satisfied of the circumstances of the child, transfer the child to the Child Welfare Committee and/ or pass appropriate directions for rehabilitation, including orders for safe custody and protection of the child and transfer to a fit facility recognized for the purpose which shall have the capacity to provide appropriate protection and consider transferring the child out of the district or out of the State to another State for the protection and safety of the child; or

- consider the release of the child on bail; or
- release the child in the supervision or custody of fit persons or fit facility or probation officers; or
- keep the child in an observation home or place of safety pending inquiry [Rule 9(2)of the Model Rules of 2016].

The Board has also to satisfy itself that the child in conflict with law has not been subjected to any ill-treatment by the police or by any other person, including a lawyer or probation officer and take corrective steps in case of such ill-treatment [Section 14(5)(a) of the Act of 2015].

Where the child alleged to be in conflict with law has not been apprehended and the information in this regard is forwarded by the police or Special Juvenile Police Unit or Child Welfare Police Officer to the Juvenile Justice Board, it shall require the child to appear before it at the earliest so that measures for rehabilitation, where necessary, can be initiated. [Rule 9(4) of the Model Rules of 2016]

H.2 **Nature and Scope of Inquiry before the Board:**

a) The proceedings before the Board are to be conducted in as simple a manner as possible and the child is to be given child-friendly atmosphere during the proceedings (Section 14(5)(b) of the Act of 2015).

b) The child has to be given the opportunity to be heard and participate in the inquiry.

c) The Board may require any parent or guardian having the actual charge of or control of the juvenile/ child to be present at any proceeding in respect of the child. The Board may dispense with the attendance of the child and proceed with the inquiry in the absence of the child, if it is satisfied that the attendance of the child is not essential for the purpose of the inquiry.

d) The Board conducts an inquiry and not a trial (Section 14 of the Act of 2015) and is to ensure that the inquiry is not conducted in the spirit of strict adversarial proceedings.

e) The cases of 'petty offences' are to be disposed of by the Board through summary proceedings as per the procedure laid down in Cr.P.C.

f) The procedure of summons trial is to be followed during inquiry of serious offences and inquiry of heinous offences where the child was below the age of sixteen years on the date of commission of the offence (Section 14 (5) (e) and (f) of the Act of 2015), or where in case of children in the age group of 16 to 18 years, the Board decides to dispose of the matter itself (Section 15 (2) of the Act of 2015). Accordingly, instead of framing charges, only a notice is served upon the child.

g) No child can be charged with or tried for any offence together with a person who is not a child (Section 23 (1) of the Act of 2015 and Section 18 of the Act of 2000).

h) Only the material witnesses are examined. It is not necessary to record the evidence in detail as is recorded in a full-fledged trial.

i) Inquiry has to be completed within 4 months from the date of first production of the child before the Board, and in exceptional cases within 6 months, having regard to the circumstances of the case and after recording reasons in writing for such extension.

j) If an inquiry by the Board for petty offences remains inconclusive even after the extended period, the proceedings shall stand terminated (Section 14 (4) of the Act of 2015). However, in case of serious or heinous offences, further extension for completion of inquiry may be

granted by the Chief Judicial Magistrate or the Chief Metropolitan Magistrate, for reasons to be recorded in writing.

k) The Board may use the powers of questioning conferred by Section 165 of the Indian Evidence Act [Rule 10(7) of the Model Rules of 2016 and Rule 13 (3) of the Model Rules of 2007] and shall proceed with the presumptions in favour of the child.

l) The right to privacy and confidentiality of a juvenile/ child is to be protected at all times and at all stages of proceedings (**Jitender Singh** v. **State of UP** (2013) 11 SCC 193).

m) The Board shall take into account the report of the police containing circumstances of apprehension and offence alleged to have been committed and the social investigation report prepared by the Probation Officer or the voluntary or non-governmental organization on the orders of the Board, along with the evidence produced by the parties for arriving at a conclusion about the child [Rule 10(9) of the Model Rules of 2016].

Where a child is not represented by a counsel it is the duty of the Board to inform the child of the availability of legal aid counsel and such legal aid counsel ought to be available in the Board to assist the children (Rule 14 of the Model Rules of 2007 and in the Rules of 2016, it is included in the functions of the Board in Rule 7). Also every child who has to file or defend a case is entitled to free legal services under Legal Services Authority Act, 1987 [Section 12 (1) (c) of the Legal Services Authority Act, 1987].

H.3 Under the Act of 2015, the Board, **in case of heinous offences** alleged to have been committed by a child, who has completed or is above the age of sixteen years, has to conduct a preliminary assessment. The said preliminary assessment is to be done with regard to:

i) the mental and physical capacity of the child to commit such offence;

ii) ability of the child to understand the consequences of the offence; and

iii) the circumstances in which the child allegedly committed the offence.

The Board for conducting such an assessment, may take the assistance of experienced psychologists or psycho-social workers or other experts. It is clarified by the Explanation to Section 15(1) of the Act of 2015 that the preliminary assessment is not a trial, but is to assess the capacity of the child to commit and understand the consequences of the alleged offence. Thus no cross-examination is to be done on the reports considered by the Board. Nor can any evidence be led in this regard. However, in the first instance, the Board has to determine whether the child is of sixteen years of age or above. [Rule 10A(1) of the Model Rules of 2016]

While no specific indicators have been laid down in the Act of 2015, the Board while conducting such preliminary assessment may take into consideration the social investigation report prepared by the probation officer or a Child Welfare Officer and the report of investigation, statements of witnesses recorded by the Child Welfare Police Officer, medico-legal report, forensic report and other documents prepared during the course of investigation filed by the police before it; medical reports of the child as are available; and the mental health reports of the child. In fact Rule 10(5) of the Model Rules of 2016 enjoins the police officer, in cases of heinous offences alleged to have been committed by a child who has completed the age of sixteen years to produce the statement of witnesses recorded by him and other documents prepared during the course of investigation within a period of one month from the date of first production of the child before the Board, a copy of which shall also be given to the child or the parent or the guardian of the child.

While making the preliminary assessment, the child shall be presumed to be innocent unless proved otherwise [Rule 10A(3) of the Model Rules of 2016].The Board, while conducting a preliminary assessment, may consider:

a. whether the child also qualifies as a child in need of care and protection;

b. whether the child has himself been a victim of any offence in the past;

c. whether the child has had a history of abuse and exploitation;

d. whether the unlawful conduct has been done for survival;

e. whether the alleged offence has been committed due to situational factors such as the child being put to extreme mental trauma and cruelty to compel him to commit an offence;

f. whether the child had committed the offence under coercion or fear of mental or physical harm to himself or to some other person;

g. whether the alleged offence has been committed under the control of adults, or with an adult or the child has been used by a group of adults;

h. whether the child suffers from a mental illness;

i. whether the child is prone to taking drugs or alcohol;

j. whether the child is under the influence of peer groups or associates with those who present risk of harm e.g. sexual offenders, drug peddlers etc or criminals;

k. whether the child has been involved in violent incidents prior to the alleged offence;

l. whether the child has been previously involved in any offence;

m. whether the child has suicidal tendencies or of harming himself;

n. whether the child has been exposed to media and internet including to pornography;

o. personality traits and habits of the child;

p. whether the child was aware of what he has done and his perception of the act; and

q. whether the child has been recruited or used by any non-State, self-styled militant group or outfit declared as such by the Central Government.

The said preliminary assessment has to be disposed of by the Board within a period of three months from the date of first production of the child before the Board (Section 14(3) of the Act of 2015).

The Board may, after the preliminary assessment decide to dispose of the matter itself. However, where the Board passes an order that there is a need for trial of the child as an adult, then the Board may transfer the trial of the case to the Children's Court having jurisdiction to try such offences (Section 18(3) of the Act of 2015). The Board is required to assign reasons for the same and the copy of the order is to be provided to the child forthwith [Rule 10A(4) of the Model Rules of 2016]. The order of the Board on the preliminary assessment is appealable under Section 101(2) of the Act of 2015.

H.4 After the Children's Court receives the preliminary assessment, it has to make a decision on whether to try the child as an adult or as a child. The Children's Court may also receive an appeal against the order on preliminary assessment passed by the Board. The Children's Court can also take assistance of experienced psychologists and medical specialists other than those whose assistance had been obtained by the Board. The Children's Court while taking a decision would have to consider similar factors as the Board is required to consider while taking a decision on the basis of the preliminary

assessment. The Children's Court shall record its reasons for arriving at a conclusion whether the child is to be treated as an adult or as a child.

If the Children's Court decides that there is no need for trial of the child as an adult it may conduct an inquiry as a Board and pass dispositional orders as per Section 18 of the Act of 2015. In such a situation, only an inquiry would be conducted and not a trial and the procedure for trial in summons case under the Cr.P.C. would be followed [Rule 13(7)(ii) of the Model Rules of 2016]. The Children's Court is to conduct the proceedings in camera and in a child friendly atmosphere.

H.5 Where the Children's Court decides that there is need for trial of the child as an adult as per the provisions of the Cr.P.C., 1973, it may pass appropriate orders considering the special needs of the child, the tenets of fair trial while maintaining a child friendly atmosphere.

In no case, there can be joint proceedings of a child alleged to be in conflict with law, with a person who is not a child.

I. Dispositional Orders and Rehabilitation

I.1 After the conclusion of inquiry, if the Board or the Children's Court where it is exercising the powers of the Board, is satisfied that the child is involved in the alleged offence, it may pass one of the dispositional orders enumerated in Section 18 of the Act of 2015 i.e.:

a) allow the child to go home after advice or admonition following appropriate inquiry against and counselling to the parent or the guardian and the child;

b) direct the child to participate in group counselling and similar activities;

c) order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board such as serving the elderly, helping out at a local hospital or nursing home or a school.

d) order the parent or the child or the guardian to pay a fine. However, where the child is working, it has to be ensured that the provisions of any labour law are not violated.

e) direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person on their executing a bond, with or without surety for the good behaviour and well-being of the child for a period not exceeding three years. The juvenile/ child may also be placed under the supervision of a probation officer for maximum of three years.

f) direct the child to be released on probation of good conduct and placed under the care of any fit facility for ensuring the good behavior and well-being of the child for any period not exceeding three years. Fit facility meansa facility being run by a governmental or a registered voluntary or non-governmental organization prepared to temporarily own the responsibility of a child for a specific purpose and such organization is found fit by the Board. Such fit facility should be located nearest to the place of residence of the child's parent or guardian.

Where it appears to the Board that the child has not complied with probation conditions, it may order the child to be sent to a special home or place of safety for the remaining period of supervision.

g) direct the child to be sent to a special home for a period not exceeding three years and the special home should be located nearest to the place of residence of the child's

parent or guardian (though sending the child to a special home should be the last resort as held in **Jitender Singh** v. **State of UP** (2013) 11 SCC 193). The Board may also reduce the period of stay to such period as it thinks fit (Section 97 of the Act of 2015). Even if the child attains the age of 18 years, he would still have to undergo sentence of three years, if so awarded; and the said three years could spill beyond the period when he attains majority (**Salil Bali** v. **Union of India** (2013) 7 SCC 705).

If the conduct and behaviour of the child has been such that it would not be in the child's interest, or in the interest of other children housed in a special home, the Board may send the child to a place of safety.

In addition to the said orders, the Board or the Children's Court may also pass orders to attend school, attend a vocational training centre, attend a therapeutic centre or prohibit a child from visiting, frequenting or appearing at a specified place or to undergo a de-addiction programme.

I.2 Before passing an order, the Board shall obtain a social investigation report prepared by the probation officer and take the findings of the report into account. All dispositional orders passed by the Board and those passed by a Children's Court whether the children are treated as adults or as children, must include an individual care plan for the rehabilitation of the child[Rule 11(3) andRule 13(7)(vi) of the Model Rules of 2016] prepared by a probation officer or child welfare officer or recognized voluntary organization on the basis of interaction with the child and his family where possible.An 'individual care plan' has been defined in Rule 2(ix) of the Model Rules of 2016] as a comprehensive development plan for a child based on age and gender specific needs and case history of the child, prepared in consultation with the child, in order to restore the child's self-esteem, dignity and self-worth and nurture him into a responsible citizen. It is meant to address the health and nutrition needs, including any special needs, emotional and psychological needs as also educational and training needs, need for leisure, creativity and play, protection from all kinds of abuse, neglect and maltreatment, restoration and follow-up, social mainstreaming and life skill training. Thus it should include a plan for the child's restoration, rehabilitation, reintegration and follow-up.

I.3 The orders passed by a Children's Court in cases of children who are treated as adults must also include follow up by the probation officer or the District Child Protection Unit or a social worker.

The child who is treated as an adult and is found to be in conflict with law is to be sent to a place of safety till he attains the age of twenty-one years and thereafter, the person may be transferred to a jail. During the period of stay in place of safety, the child is to be provided reformative services such as education, skill development. There has to be a yearly review year by the probation officer or the District Child Protection Unit or a social worker to evaluate the progress of the child [Rule 13(8)(iv) of the Model Rules of 2016] in the place of safety and to ensure that there is no ill-treatment to the child in any form. The Children's Court may also direct the child to be produced before it periodically and at least once every three months for the purpose of assessing the progress made by the child and the facilities provided by the institution for the implementation of the individual care plan [Rule 13(8)(v) of the Model Rules of 2016].

I.4 No child in conflict with law can be sentenced to death or life imprisonment without the possibility of release (Section 21 of the Act of 2015).

I.5 Where the Children's Court comes to a finding that the child was involved in the offence, and the child is sent to a place of safety, once the child attains the age of twenty-one years and is yet to complete the term of stay (which he was directed to undergo as per the dispositional order), the Children's Court is to review the case of the child to evaluate if the child has undergone reformative changes and can be a contributing member of the society. The Children's Court has to take into

account the periodic reports of the progress of the child prepared by the probation officer or the District Child Protection Unit or a social worker and it shall also interact with the child. For the said purpose assistance may be taken of experienced psychologists or psycho-social workers or other experts.

After making the evaluation, the Children's Court may decide to release the child forthwith or on execution of a personal bond with or without sureties for good behaviour or with directions regarding education, vocational training, apprenticeship, employment, counselling and other therapeutic interventions or on such conditions as it deems fit which include appointment of a monitoring authority for the remainder of the prescribed term of stay or decide that the child shall complete the remainder of his term in jail. Under the Model Rules of 2016, a probation officer or case worker or Child Welfare Officer or a fit person may be appointed as a monitoring authority.

I.6 The Board may discharge or transfer a child from one Special Home to another keeping in view the best interest of the child and his natural place of stay (Section 96 of the Act of 2015). On the report of a Probation Officer or social worker or Government or voluntary or non-governmental organization, the Board may consider the release of the child kept in a special home either absolutely or on such conditions as it may think fit to impose, permitting him to live with his parents or guardian or under the supervision of any authorized person named in the order and willing to receive and take charge of the child, to educate and train him for some useful trade or calling or to look after him for rehabilitation (Section 97(1) of the Act of 2015). If the child who has been released conditionally or the person under whose supervision the child has been placed, fails to fulfil the conditions, the Board, if necessary may cause the child to be taken charge of and to be placed back in the concerned home and the period of stay in the institution may also be extended.

I.7 A child may also be permitted leave of absence or be allowed on special occasions like examination, marriage of relatives, death of kith and kin or accident or serious illness of parent or any emergency of like nature, to go on leave under supervision, for a period generally not exceeding seven days, excluding the time taken in journey and the period of such absence will be deemed to be part of the time for which he was liable to be kept in the special home (Section 98 of the Act of 2015 and Section 59(2) of the Act of 2000). However, if the child refuses or fails to return to the institution, on the leave being exhausted or permission being revoked or forfeited, the Board may cause him to be taken charge of and to be taken back to the concerned home and the period of stay in the institution may also be extended.

J. Appeal and Revision

An appeal against the order of the Board can be filed, within thirty days from the date of such order to the Children's Court though an appeal may be entertained even thereafter on sufficient cause for delay being shown. An appeal can also be filed against the order of the Board making the preliminary assessment. No appeal shall lie from any order of acquittal made by the Board in respect of a child alleged to have committed an offence (Section 101 (3) of the Act of 2015 and Section 52(2)(a) of the Act of 2000) other than the heinous offence by a child who has completed or is above the age of sixteen years. No second appeal lies from any order of the Court of Session passed in appeal. However, a person aggrieved by an order of the Children's Court may file an appeal before the High Court.

The High Court, may, at any time, either of its own motion or on an application received, call for the record of any proceeding in which the Board or the Children's Court or the Court has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order (Section 102 of the Act of 2015 and Section 53 of the Act of 2000).

K. Pending cases

Under Section 25 of the Act of 2015, all proceedings in respect of a child alleged or found to be in conflict with law pending before any Board or court on the date of commencement of the Act shall be continued in that Board or court. As per the earlier law, if the juvenile/ child was found to have committed an offence, the court was to record such finding but not pass order on sentence and forward the juvenile/ child to the Board which would pass further orders and which may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of the juvenile/ child. Thus old matters are to be dealt with by the courts or the Boards themselves. Earlier the Section was interpreted to mean that the person should have continued to be less than 18 years as on 1.4.2001 to avail the benefit of the Section **(Pratap Singh** v. **State of Jharkhand** (2005)3SCC 551; **Brijendra Singh** v. **State of Haryana** MANU/SC/0230/2005: (2005)3SCC685)**.** However the position has been clarified by the addition of Explanation to Section 20 in 2006 and the judgments in **Jayasingh** v. **State by Inspector of Police** decided on 15.2.2008 and **Hari Ram** v. **State of Rajasthan** (2009)13SCC211where it was held that all persons who were below the age of 18 years on the date of commission of the offence even prior to 1st April, 2001, would be treated as juveniles, even if the claim of juvenility was raised after they had attained the age of 18 years on or before the date of commencement of the Act and were undergoing sentence upon being convicted. Thus it stands categorically established that the relevant date for the applicability of the Act is the date of occurrence and not the date of trial or when the person alleged to be involved first appears or is produced before the court [reference may be made to Rule 90 of the Model Rules of 2016]**.**

Where the claim of juvenility was raised after conviction for an offence and a person was found to be a child, several views were taken on 'sentencing' namely:

1. the child was found guilty of crime but the sentence awarded was quashed or
2. the child was held to be adequately punished for the offence committed by him by serving out some period in detention or
3. the entire case was remitted for consideration by the jurisdictional Board, both on the innocence or guilt of the child as well as the sentence to be awarded
4. if the child was found guilty or the case was examined on merits, after having found the child guilty of the offence, the matter was remitted to the jurisdictional Board on the award of sentence.

It has been held in **Jitender Singh** v. **State of UP** (2013) 11 SCC 193 that the appropriate course of action would be to remand the matter to the jurisdictional Board for determining the sentence.

L. Removal of disqualification attached to conviction

A child who has committed an offence and has been dealt with under the provisions of the Act shall not suffer disqualification, if any, attaching to a conviction of an offence under such law (Section 24(1) of the Act of 2015 and Section 19(1) of the Act of 2000). However if the child has completed the age of sixteen years and is found to be in conflict with law by the Children's Court under Section 19(1)(i), the said provisions would not apply. The Board is also to make an order directing that the relevant records of such conviction shall be removed after the expiry of the period of appeal or a reasonable period as prescribed under the rules [under Rule 14 of the Model Rules of 2016, the records of conviction in respect of a child in conflict with law shall be kept in safe custody till the expiry of the period of appeal or for a period of seven years, and no longer, and thereafter be destroyed]. However, in case of a heinous offence, where the child is found to be in conflict with law under Section 19(1)(i) of the Act of 2015, the relevant records of conviction of

such child shall be retained by the Children's Court. Thus, if a child, except as provided in Section 24 of the Act of 2015 is found to be involved in an offence that would not be a bar to his seeking a government job. Likewise, a child in conflict with law cannot be thrown out of school merely because he is alleged to have committed an offence or because he remained in an observation home for some period. Section 74 of the Act of 2015 further provides that the police shall not disclose any record of the child for the purpose of character certificate or otherwise in cases where the case has been closed or disposed of and violation of the same would amount to an offence.

M. Protection of identity of the child

The media (print, visual) is barred from disclosing the name, address or school or any other particulars calculated to lead to the identification of the child except with the permission of the authority holding the inquiry, which may grant permission only, if in its opinion such disclosure is in the interest of the child (Section 74 of the Act of 2015 and Section 21 of the Act of 2000). The picture of the child cannot be published. The Board shall take cognizance of such violation by print or electronic media and shall initiate necessary inquiry and pass appropriate orders.

N. Cruelty, Abuse & Exploitation of child during investigation and in the institution

The Board, at the time of initiating the inquiry, is to satisfy itself that the child has not been subjected to any ill-treatment by the police or by any other person and is to take corrective steps in case of such ill-treatment. Where the police keep implicating the child in offence after offence simply because he was involved in an earlier offence, it would be violative of the principle of fresh start.

As regards cruelty with a child while in an institution, a child who is in an Observation Home or Special Home is in *de jure* custody of the Board and is kept there only for his own protection or because it is in his interest. Section 75 of the Act of 2015 provides punishment for cruelty to a child and that whosoever, having the actual charge of, or control over, a child, assaults, abandons, abuses, exposes or wilfully neglects the child or causes or procures him to be assaulted, abandoned, abused, exposed or neglected in a manner likely to cause such child unnecessary mental or physical suffering shall be punishable with imprisonment upto three years or with fine of Rs.1,00,000/- or with both.

The Act of 2015 also lays down various other offences against the children in Sections 76 to 83 of the Act of 2015.

O. Role of Legal Services Lawyers in the Juvenile Justice System

The legal services lawyers have a vital role to play in the juvenile justice system. Most of the children who are in conflict with law belong to poor families who cannot afford private lawyers, or there may be children who have no one to take care of them. In these circumstances they have to be represented by legal services counsels. Even the mandate of the law is that the children have to be informed about the availability of legal services counsels and they are to be represented by legal services lawyers, if not otherwise represented. While the legal services lawyers have to discharge the duties which any other counsel defending a case for his client has to discharge, the role of legal services lawyers in the Board is not limited to merely representing the child in the Board during the inquiry. The legal services lawyers in the Boards have to additionally play a proactive role as they primarily deal with cases of children which require sensitive handling. They are not to treat the cases before them as just cases but have to bear in mind the best interest of the children they represent.

They have to build trust so that the children and their families are forthcoming with the truth, besides explaining to the children and their families that the objective of the Act is not to penalize or punish the children but to rehabilitate them and to ensure their reintegration in the society.

- There may be instances where the child has been apprehended but is kept in police station for several days and the parents come to the Board seeking some remedy or the child may have been subjected to coercion. In such cases the legal services lawyers can file appropriate applications including for registration of FIR under Section 75 of the Act of 2015.
- Through their interaction with the child prior to the production of the child before the Board, especially if the child is taking drugs or is being used by someone to commit offences, the legal services lawyers can better assist the Board by highlighting these facts.
- At times, the child may disclose his whereabouts to the lawyer which he had not told the police.
- The lawyer is to inform the child and his family members about their rights. In fact, legal representation is needed at every stage so that the rights of the child are not violated.
- If it comes to the knowledge of the lawyer that adults are using children, he has to bring the same to the notice of the Board and insist on registration of FIR under Sections 77 or 78 or 83 of the Act of 2015 against the adult offenders. Similar would be the position where any of the rights of the children have been violated.
- The lawyers must argue for closure of the case where the final report is filed belatedly or insist on speedy disposal of matters as per the mandate of law. They can help in the process by not insisting on examination of all the witnesses as only an inquiry is held before the board and at times there may be a number of witnesses in the list of witnesses who are not material and whose examination would only delay the completion of the inquiry.
- If the child is a school going child and the presence of the child is not necessary, the legal services lawyers must seek exemption of the child from the proceedings before the Board but that must not be done only to delay the matter.
- The lawyers must also prepare the child for recording of his statement before the Board. Further it is the duty of the legal services lawyers to keep the child and his family informed about the court process, the proceedings before the Board and the next date given in the matter and the next stage of the matter. The legal services lawyers must assist the children in the legal proceedings throughout the case.
- At times the child may not be allowed to attend school because of the case against him when the lawyer can move an appropriate application before the Board.
- The lawyers have to move applications for bail where bail is not granted on the very first date of production of the child.
- The lawyers can put forth their views on the rehabilitation measures to be adopted for the child and assist in development of a care plan for the child which is best suited to his needs.
- The lawyers can also be involved in the follow-up process after the case of the child is over to ensure that the child does not come into conflict with law in the future.
- If there is any possibility that the identity of the child may be revealed by any person to the detriment of the child or any disqualification may be attached to him except as provided under Section 24 of the Act of 2015, the lawyers can move appropriate applications.
- If a child faces any problems in the institution where he is kept, the lawyers can bring the same to the notice of the Board. This also requires that the legal services lawyers should regularly interact with the children in the Homes.

- Apart from this, the legal services lawyers must maintain proper documentation in respect of each child, at the same time, ensuring that there is no breach of privacy of the child on their part.
- The lawyers also have an important role to play during the preliminary assessment and they must bring before the Board all such factors which favour the person being treated as a child.
- The lawyers can further file appeals or recommend filing of appeals against the order of the Board passed on age or on preliminary assessment.

The legal services lawyers can thus act as friends, philosophers and guides of the children in conflict with law. Besides the legal services lawyers in the Juvenile Justice Boards, the other legal services lawyers in regular courts may also be required to raise the plea of juvenility when it comes to their notice that a person who appears to be a child has been produced before a regular court or otherwise the person raises a claim to juvenility. Then there may be instances where an appeal or a revisionis to be filed against the order of the Board and the same comes to the legal services lawyers and in such cases, they would be required to act as per the mandate of the Act of 2015.

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Session X
2.00 PM – 3.30 PM
Total Time: 1 Hour 30 Minutes

MODULE FOR TRAINING OF LEGAL SERVICES LAWYERS ON LABOUR LAW & INDUSTRIAL DISPUTES ACT

— Justice Manju Goel (Retd.)[1]

SESSION PLAN

Objective:

1. To inform the participants different aspects of Law relating to Labour Welfare of Labour.
2. To inform the participants about various laws that affect the service conditions of an individual workman and other employees.

Expected Learning Outcome:

1. Participants will be sensitized on the rights of Labour.
2. Participants will be fully equipped to get the relief available from various authorities under various Acts that may be available to a labour.

Programme:

1. Introduction 10 Minutes

The Resource Person will briefly speak on how smooth industrial relation is essential for the economic progress of the country and mention the various legislations governing the service conditions of a labourer industrial work.

2. Group Discussion 30 Minutes

The Participants will be divided in groups of 5 or 6 and findanswers to Activity I, II and III.

3. Presentation and whole group discussion 30 Minutes

The groups will make their presentations and the Resource Person shall lead awhole group discussion touching on all the aspects of the issues raised in the activity.

4. Lecture by the Resource Person 10 Minutes

The Resource Person will give the information that is not covered by the whole group discussion.

5. Concluding Remark by the Resource Person or by the visiting dignitaries

10 Minutes

Training method

1. Lecture
2. Group Discussion
3. Experience sharing

Note: The resource person will pool the points on the flip chart/white board. He/she may prepare a power point for the lecture.

[1] Former Judge, High Court of Delhi

Tools required

1. Facility for power point presentation
2. Flip chart
3. Pens
4. Blue tack
5. Whiteboard

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Activity for Session X- Labour Law and Industrial Dispute

Reading

1. Mohd. Idris a workman of Usman Bakery raised a dispute over wrongful termination of his employment. The Secretary (Labour) referred the dispute to the Labour Court with the following terms of reference.

"Whether the services of Mohd. Idris has been terminated illegallyand/or unjustifiably by the Management and if so, to what relief is he entitled and what directions are necessary inthis behalf?"

2. Mohd. Idris filed a statement of claim stating that he had been employed with the Management from 01.04.1995 at a salary of Rs.6000/- per month as a packer, that the Management had not provided the legal facilities viz. appointment letters, attendance cards, annual leave, leave wages, minimum wages etc., that the workmen had been demanding these facilities from the Management and that the Management in retaliation terminated the employment of all the workmen including that of Mohd. Idris in violation of the provisions of Section 25(F) of the Industrial Dispute Act, 1987 on 30.11.2011.Mohd. Idris alleges that he remained unemployed ever since the date of termination of his employment with the Management of Usman Bakery. Mohd. Idris wants reinstatement with full back wages.

3. The Management contests the claim contending *inter-alia*that the workmen struck work abruptly on 02.12.2011 without any valid reason and consequently the Management was compelled to close down his business, that Mohd. Idris left his job without notice on 30.11.2011 as he found a better job and that Mohd. Idris as also the other workmen did not come back to work despite notices being issued to them by the Management. The Management denies that it did not provide the legal facilities as claimed by the workmen. The Management further avers that the Management has now re-opened the Bakery with entirely a new set up of machines which the workmen including Mohd. Idris never handled.

4. In trial, the Management fails to prove the case of strike by workers and that the workers did not return to work despite letters being issued to them. In fact the Management failed to provide any evidence of dispatch of letters to the workmen or to the Labour Authorities as alleged by it. The Management also fails to prove when the Bakery was closed and when it was reopened.

5. Mohd. Idris claims that he remained unemployed for nearly three years after his termination of employment but leads no evidence about the means ofhis livelihood in these three years.Nor does the Management produce any evidence about the whereabouts of Mohd. Idris during these years.

Activity-I

Divide the participants into groups of five, each group having the task of finding points in favour of the workmen or of the Management. During these group discussions, each group will consider the following points:

1. Whether termination of the services of Mohd. Idris as proved in this case will amount of retrenchment as defined in Section 2(oo) of the Industrial Dispute Act, 1948?
2. What are the requirements for valid retrenchment as provided in Section 25(F) of the Industrial Dispute Act, 1948?
3. What are the consequences of violation of the provisions of Section 25(F)?

4. Is Mohd. Idris entitled to reinstatement?

5. On whom would the onus of proof regarding back wages lie?

6. What are the different forms of reliefs, Labour Court may award to Mohd. Idris?

Activity-II

Out of the participants, one will argue the case in favour of the workmen and another in favour of the Management on the basis of the group discussions.

Activity-III

Whole group discussion led by the presenter/resource person on the following points:

1. Assuming that the Industrial Employment Standing Orders Act applies to Usman Bakery what should have been the steps to be taken by the Management to remove Mohd. Idris from his employment.

2. Could a lawyer be of help in the steps contemplated in the above paragraph?

3. What steps could Mohd. Idris take in case he was not being paid the minimum wages and was not provided with the legal facilities mentioned in the reading?

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SHORT NOTE
ON LAW RELATING TO LABOUR AND DISCUSSION ON THE PROBLEM GIVEN IN THE TRAINING MODULE

– Ila Rawat[1]

1. Introduction

Labour laws are a specialised field in the study of law not only because they deal with the exclusive domain of labour and its inter-relationship with the management but also because the jurisdictions to deal with the issues arising in this area are conferred on various adjudicatory bodies outside the traditional Civil Courts. Labour law also known as employment law is the body of laws, administrative rulings, and precedents which address the legal rights of, and restrictions on, working people and their organizations. As such, it mediates many aspects of the relationship between trade unions, employers and employees. In other words, Labour law defines the rights and obligations as workers, union members and employers in the workplace. Generally, labour law covers:

1. Industrial relations – certification of unions, labour-management relations, collective bargaining and unfair labour practices;
2. Workplace health and safety;
3. Employment standards, including general holidays, annual leave, working hours, unfair dismissals, minimum wage, layoff procedures and severance pay.

There are two broad categories of labour law. First, collective labour law relates to the tripartite relationship between employee, employer and union. Second, individual labour law concerns employees' rights at work and through the contract for work.

The labour movement has been instrumental in the enacting of laws protecting labour rights in the 19th and 20th centuries. Labour rights have been integral to the social and economic development since the industrial revolution.

History of Labour laws

Labour law arose due to the demands of workers for better conditions, the right to organize, and the simultaneous demands of employers to restrict the powers of workers in many organizations and to keep labour costs low. Employers' costs can increase due to workers organizing to win higher wages, or by laws imposing costly requirements, such as health and safety or equal opportunities conditions. Workers' organizations, such as trade unions, can also transcend purely industrial disputes, and gain political power - which some employers may oppose. The state of labour law at any one time is therefore both the product of, and a component of, struggles between different interests in society.

International Labour Organisation (ILO) was one of the first organisations to deal with labour issues. The ILO was established as an agency of the League of Nations following the Treaty of Versailles, which ended World War I. The first annual conference (referred to as the International Labour Conference, or ILC) began on 29th October 1919 in Washington DC and adopted the first six International Labour Conventions, which dealt with hours of work in industry, unemployment, maternity protection, night work for women, minimum age and night work for young persons in industry.

Purpose of labour legislation

Labour legislation that is adapted to the economic and social challenges of the modern world of work fulfils three crucial roles:

[1] Presiding Officer, Labour Court, Delhi and officer of Delhi Higher Judicial Services.

1. it establishes a legal system that facilitates productive individual and collective employment relationships, and therefore a productive economy;
2. by providing a framework within which employers, workers and theirrepresentatives can interact with regard to work-related issues, it serves as an important vehicle for achieving harmonious industrial relations based on workplace democracy;
3. it provides a clear and constant reminder and guarantee of fundamental principles and rights at work which have received broad social acceptance and establishes the processes through which these principles and rights can be implemented and enforced.

But experience shows that labour legislation can only fulfills these functions effectively if it is responsive to the conditions on the labour market and the needs of the parties involved. The most efficient way of ensuring that these conditions and needs are taken fully into account is if those concerned are closely involved in the formulation of the legislation through processes of social dialogue. The involvement of stakeholders in this way is of great importance in developing a broad basis of support for labour legislation and in facilitating its application within and beyond the formal structured sectors of the economy.

Evolution of Labour law in India

The law relating to labour and employment is also known as Industrial law in India. The history of labour legislation in India is interwoven with the history of British colonialism. The industrial/labour legislations enacted by the British were primarily intended to protect the interests of the British employers. Considerations of British political economy were naturally paramount in shaping some of these early laws. Thus came the Factories Act. It is well known that Indian textile goods offered stiff competition to British textiles in the export market and hence in order to make India labour costlier the Factories Act was first introduced in 1883 because of the pressure brought on the British parliament by the textile magnates of Manchester and Lancashire. Thus India received the first stipulation of eight hours of work, the abolition of child labour, and the restriction of women in night employment, and the introduction of overtime wages for work beyond eight hours. While the impact of this measure was clearly welfarist, the real motivation was undoubtedly protectionist.

The earliest Indian statute to regulate the relationship between employer and his workmen was the Trade Dispute Act, 1929 (Act 7 of 1929). Provisions were made in this Act for restraining the rights of strike and lock out but no machinery was provided to take care of disputes.

The original colonial legislation underwent substantial modifications in the post-colonial era because independent India called for a clear partnership between labour and capital. The content of this partnership was unanimously approved in a tripartite conference in December 1947 in which it was agreed that labour would be given a fair wage and fair working conditions and in return capital would receive the fullest co-operation of labour for uninterrupted production and higher productivity as part of the strategy for national economic development and that all concerned would observe a truce period of three years free from strikes and lockouts. Ultimately the Industrial Disputes Act (the Act) brought into force on 01.04.1947 repealing the Trade Disputes Act 1929 has since remained on statute book.

Given below is a list of various laws[1] touching the work and career of labour now in force is under:

[1] a. National Crime Investigation Bureau (http://www.ncib.in/index.html)
[1] b. Ministry of Labour and Employment (http://www.labour.nic.in/)

Industrial Relations

The Trade Unions Act, 1926

The Trade Unions (Amendments) Act, 2001

The Industrial Employment (Standing Orders) Act, 1946

The Industrial Employment (Standing Orders) Rules, 1946

The Industrial Disputes Act, 1947

The Plantation Labour Act, 1951

The Dock Workers (Safety, Health & Welfare) Act, 1986

The Mines Act, 1952

The Factories Act, 1948

Child & Women Labour

Child Labour (Prohibition and Regulation) Act 1986

Child Labour (Prohibition and Regulation) Act 1988

Remuneration Act, 1976

Equal Remuneration Rules, 1976

The Central Advisory Committee on Equal Remuneration Rules, 1991

Social Security

The Employees Compensation Act, 1923

The Employees State Insurance Act, 1948

The Employees Provident Fund & Miscellaneous Provisions Act, 1952

The Employees' Provident Fund & Miscellaneous Provisions (Amendment) Act, 1996

The Payment of Gratuity Act, 1972

The Payment of Gratuity Rules, 1972

Employees liability act 1938

Wages

The Payment of Wages Act, 1936

The Payment of Wages Rules, 1937

The Payment of Wages (AMENDMENT) Act, 2005

The Minimum Wages Act, 1948

The Minimum Wages (Central) Rules, 1950

The Working Journalist (Fixation of Rates of Wages) Act, 1958

Working Journalist (Conditions of service) and Miscellaneous Provisions Rules, 1957

The Payment of Bonus Act, 1965

The Payment of Bonus Rules, 1975

Working Journalist (Conditions of service) and Miscellaneous Provisions Act, 1955

Labour Welfare

The Mica Mines Labour Welfare Fund Act, 1946

The Limestone & Dolomite Mines Labour Welfare Fund Act, 1972

The Beedi Workers Welfare Fund Act, 1976

The Beedi Workers Welfare Cess Act Rules, 1977

The Iron Ore Mines, Manganese Ore Mines & Chrome Ore Mines Labour Welfare Fund Act, 1976

The Cine Workers Welfare Fund Act, 1981

When a matter comes to Court, be it Labour Court, Industrial Tribunal or any other adjudicatory body, the lawyers appearing for the labour have to apply the procedural laws including the law of evidence and law of limitation generally applicable to civil jurisdiction as well as such procedural laws as may have been laid down in the laws relating to labour welfare and industrial relations. Lawyers often encounter issues about the onus of proof and related questions. The Industrial Tribunals have to weigh the reliefs that can be given to the workmen against the consequences of the relief on the industry and management. The role of a lawyer is to resolve the dispute between the worker and the employer/ management. We are particularly concerned with the interest of the workman who often time is the weaker of the two parties. Litigation cost both in terms of time and money is an important consideration while representation the case of a workman. The lawyer will do well to find out the exact need of the workman and try to get his dues by the shortest and easiest methods. The lawyer must know also the weaknesses that the case of a workman may have as also the probabilities of winning his case in various fora.

The module is prepared to give the young lawyer a representative sample of a workman's case before the labour court and to prepare him with the various aspects of law and procedure that he may encounter while handling his case.

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Activity I

Case of the workman

Case of the workman is that he was working as Packer under management from 01.04.1995 at monthly salary of Rs.6,000/- and continued to be so employed till 30.11.2011 when his services were terminated by the management which was antagonized as the workman and his other co-workers raised demand that they be provided legal benefits such as appointment letters, etc. by the management. He further states that he is unemployed since the date of his termination and has prayed for his reinstatement with full back wages.

Case of the management

Case of the management is that the workman had abandoned his service with the management on 30.11.2011 as he had found a better job. It also pleaded that it was forced to close down its business as the workmen working for it had abruptly struck work on 02.12.2011, without any valid reason, and failed to return to work despite letters issued to them by the management. It is further stated by the management that it re-opened its business subsequently but with an entirely new set up of machines which its earlier workmen, including workman Mohd. Idrish were not skilled to handle.

Evidence on record

Both parties led evidence but workman failed to prove that he remained unemployed for nearly three years after termination of his service.

The management failed to prove that there had been strike by its workers or that it had dispatched letters to workmen to return to work or to Labour authorities informing them about the closure. The date of closure and re-opening of the establishment has also not been proved by the management. It also failed to produce evidence about the whereabouts of workman Mohd. Idrish during the intervening period.

As per Section 2 (oo) "retrenchment" refers to termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action but does not include:

(a) Voluntarily retirement of a workman.

(b) Where the employment of workman is on basis of a contract,

(i) Retirement of workman on reaching the age of superannuation.

(ii) Termination of service upon non-renewal of contract of employment or upon such contract being terminated otherwise

(c) Termination of service on account of continued ill-health of workman.

The workman has alleged violation of provision of Section 25 (F) of the Industrial Disputes Act. Conditions precedents to attract Section 25 (F) are:

1. That workman is in continuous service for not less than one year
2. The termination is not consequent to punishment inflicted as a disciplinary action
3. His termination is not covered by sub-clauses (a), (b), (bb) or (c) of Section 2 (oo) of the Industrial Disputes Act.

The management on the other hand is required to prove that,

1. It had given one month's advance notice, in writing, indicating the reasons for retrenchment or paid wages for the period of the notice in lieu thereof

2. Workman has been paid retrenchment compensation equivalent to 15 days average pay for every completed year or continuous service or any part thereof in excess of six months.

3. Notice of such retrenchment has been served on appropriate Government or notified authority as may be prescribed.

In the case at hand, admittedly, the management did not comply with the statutory pre-requisites for retrenchment. The management also failed to prove that workman Mohd. Idrish had abandoned his service with the management, as he found a better job. Further, the management also failed in proving that it had dispatched any notices / letters asking him to resume his duties and that Mohd. Idrish did not return to work despite having received the said notices / letters. Therefore, the only conclusion that can be drawn is that the services of workman Mohd. Idrish were terminated illegally by the management and that the said termination amounts to retrenchment as defined in Section 2 (oo) of the I.D. Act.

In this regard it would be relevant to refer to the mandate of law laid down by the Hon'ble Supreme Court in case of *M/s. Gammon India Ltd. V Sri Niranjan Dass, 1984 (1) SCC 509*, that where the statutory prerequisites for retrenchment are not complied with the termination of service resulting would be void ab initio. Similar ratio was also laid down by the Hon'ble Supreme Court in case of *Deepali Gundu Surwase V Kranti Junior Adhyapak Mahavidyalaya (D.ED.) and Ors.*(2013) 10 SCC 324

Once the termination of workman Mohd. Idrish is held to be illegal, it is also necessary to examine whether he is entitled for reinstatement, backwages and all other consequential benefits. In case of *Punjab National Bank Ltd. V Workman*, (1959) *2 LLJ 669* while holding that reinstatement should be the general rule in case of wrong dismissal the Supreme Court struck a note of caution by observing that in "unusual or exceptional cases" where it was not expedient to grant reinstatement, the Court would direct for compensation to be paid instead.

There is, however, no straight jacket formula as to what circumstances would bring a case within the category of "unusual or exceptional cases". In case of *Hindustan Steel Ltd. V Roy* , (1969) 3 SCC 513, the Supreme Court propounded that the order of recruitment would be inappropriate in cases where there had been strained relations between the employer and the employee or where the post held by the aggrieved employee had been one of trust and confidence, etc.

While noting that industrial adjudicator had discretion to depart from the general rule, the Supreme Court in *Hindustan Steel's* case observed that "no-hard and fast rule as to which circumstances would constitute an exception to the general rule can be laid down as the tribunal in each case must, in a spirit of fairness and justice and in keeping with the objectives of industrial adjudication, decide whether it should, in the interest of justice, depart from the general rule."

The concern of the Supreme Court in striking a fine balance between the interest of an employer on the one hand and disgruntled employee on the other is clearly reflected in the case of *The Management of Panitole Tea Estate V The Workmen*, (1971) 1 SCC 742 wherein it has been observed,

> *"In exercising this discretion, fair-play towards the employee on the one hand and interest of the employer, including considerations of discipline in the establishment,*

on the other, require to be duly safeguarded. This is necessary in the interest both ofsecurity of tenure of the employee and of smooth and harmonious working of the establishment. Legitimate interests of both of them have to be kept in view if the order is expected to promote the desired objective of industrial peace and maximum possible production. The past record of the employee, the nature of the alleged conduct for which action was taken against him, the grounds on which the order of the employer is set aside, the nature of the duties performed by the employee concerned and the nature of the industrial establishment are some of the broad relevant factors which require to be taken into consideration."

On this issue in case of *Surender Kumar Verma V Central Govt. Industrial Tribunal-cum-Labour Court* 5 *(1980)4 SCC 443*, the Supreme Court further observed:

"Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been passed, and so it must ordinarily lead to back-wages too. But theremay be exceptional circumstances which make it impossible or wholly inequitable vis-a-vis the employer and workmen to direct reinstatement with full back-wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the court to make appropriate consequential orders. The court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The court may deny the relief of award of full back-wages where that would place an impossible burden on the employer. In such and other exceptional cases the court may mould the relief, but, ordinarily the relief to be awarded must be reinstatement with full back-wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted."

In case of *Shri Talukdar Singh V Tata Engineering & Locomotive Co. Ltd.2015 LLR 897* also the Supreme Court deemed it appropriate to award monetary compensation in lieu of retrenchment to meet the ends of justice.

As regards the payment of back-wages in case of *Kendriya Vidyalaya Sangathan V S.C. Sharma AIR 2005 SC 768,*the Supreme Court observed that when the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. Thereafter and if he places materials in that regard, the employer can bring on record materials to rebut the claim.

Once the employee discharges the initial burden of proving that he was unemployed, after termination of his service by the employer, then it is for the employer to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments as was held by Supreme Court in case of *Deepali Gundu Surwase V Kranti Junior Adhyapak Mahavidyalaya (D.ED.) and Ors.* and in case of *Jasmer Singh V State of Haryana 2015 (1) SCALE 360.*

The industrial adjudicator has powers under section 11A of the I.D. Act to give appropriate relief in case of discharge or dismissal of workmen. In the instant case the workman Mohd. Idrish

failed to prove that he remained unemployed for nearly three years after termination of his service and hence no case is made out for granting him back-wages. Though the management has failed to produce evidence about the whereabouts of workman Mohd. Idrish during the intervening period, there is a strong presumption that the workman Mohd. Idrish has moved on with his life. The management also appears to have equipped itself with new set up of machines and team of employees and has not retained services of any of its old employees, who were working with workman Mohd. Idrish. In these facts and circumstances directing reinstatement of workman Mohd. Idrish would not further smooth and harmonious working of establishment of the management either. Thus keeping in mind the guidelines laid down by Supreme Court in case of *"The Management of Panitole Tea Estate V The Workmen"(supra)* as well as in the case of *"Kendriya Vidyalaya Sangathan V S.C. Sharma"(supra)*, it would be appropriate to grant lump sum compensation instead of directing reinstatement to the employee.

The workman Mohd. Idrish had worked for about 6 years and 7 months before his services were illegally terminated by the management. He was lastly drawing salary of Rs.6,000/- per month. Thus compensation for a sum of Rs.80,000/- would meet the interest of justice. A sum of Rs.10000/- is also awarded as costs in favour of the workman. The amount awarded to the workman shall be payable by the management to the workman within 30 days of the publication of the award and in the event of default, the same shall be payable with interest @ 9 % per annum.

Activity-III

Assuming that the Industrial Employment (Standing Orders) Act, 1946 (hereinafter referred to I.E. Act) applies to Usman Bakery, the model of standing orders prescribed in 'Schedule I' would be applicable to the said establishment. The acts and omissions by an employee which would make him liable for 'misconduct' have been enumerated in Rule 14 (3) of the Industrial Employment (Standing Orders) Central, Rules 1946 (hereinafter referred to as I.E. Rules). The Sub Rule (3) (e) of Rule 14 prescribes that a habitual absence without leave or absence without leave for more than ten days by an employee would to be treated as a misconduct. Since the management claims that the workman Mohd. Idrish had absented himself w.e.f. 30.11.2011 i.e. for more than ten days without leave, the management would be required to initiate the disciplinary proceedings against him for the said absence. To achieve this end the management would be required to,

1. Place the workman under suspension, if it is satisfied that it is necessary or desirable to do so, by an order in writing, with effect from such date as may be specified in the order.
2. Supply the workman, within a week of his suspension, a statement setting out in detail the reasons for such suspension.
3 To pay subsistence allowance in accordance with the provisions of Section 10 A of the I.E. Act to the workman.
4. To initiate inquiry against the workman for his alleged misconduct wherein the workman is to be allowed to appear in person or to be represented by any officebearer of a trade union of which he is a member.
5. It is to be ensured that the proceedings of inquiry are recorded in Hindi or in English or in the language of the State where the industrial establishment islocated and preference is to be given in this regard to the language with which the workman is conversant.

6. The proceedings of inquiry shall be required to be completed within a period of three months or such extended period as may be deemed necessary by the inquiry officer.

On conclusion of the inquiry, if the workman is found guilty of charges framed against him, the workman is to be afforded a reasonable opportunity of making representation on the penalty proposed to be enforced against him and only thereafter an order of dismissal or suspension or fine or stoppage of annual increment or reduction of rank may be passed to meet the ends of justice.

In the event the charges do not stand proved against the workman, he shall be deemed to have been on duty during the period of suspension and would be entitled to same wages as he would have received if he had not been placed under suspension after deducting the subsistence allowance paid to him for such period.

The payment of subsistence allowance under this Rule is subject to this fact that the workman concerned does not take up any employment during the period of suspension / punishment.

The authority imposing the punishment is to take into account the gravity of the misconduct, the previous record, if any, of the workman and any other extenuating or aggravating circumstances that may exists.

The workman, if aggrieved, by an order imposing punishment may within 21 days from the receipt of the order, appeal to the Appellant Authority to be specified by the employer. The specified Appellant Authority would then give an opportunity to workman to be heard, and shall pass appropriate orders on the appeal of the workman and communicate the same to the workman in writing.

As per Rule 16 of I.E. Rules, every permanent workman is entitled to a service certificate at the time of his dismissal, discharge or retirement from the service.

The management can take assistance of a lawyer in framing memorandum of charge and conducting an inquiry. There is also no bar to the engagement of a company lawyer as the inquiry officer. In the case of *N. Rarichan V R.K. Venu Nair* (1972) Ker LJ 113 the High Court of Kerala by placing reliance on the Supreme Court's decision in case of *Saran Motor (P) Ltd. V Viswanath (1964) II LLJ 139 SC*, held that there could be no objection to appointment of a lawyer of a company as an inquiry officer and that a lawyer must normally be presumed to be a man without bias or prejudice as he is trained in law.

In the event the workman seeks assistance of a co-worker to present his case, he can have such assistance with the permission of the management. There is no bar to such assistance being given by an employee of another department provided it is allowed by the inquiry officer. An employee has also no fundamental right to be represented by a lawyer. The rules of natural justice are not violated if the request of an employee to be represented by a legal practitioner in domestic inquiry is turned down. The management is, however, required to take caution that in case the presenting officer appointed by it for conducting inquiry is a lawyer or a legal expert or an officer trained in conducting prosecution, then the charged employee can claim as of right the assistance of a lawyer or a legal expert to represent his case before the inquiring authority as has been held by Supreme Court in case of *Board of Trustees, Port of Bombay V Dilipkumar R. Nadkarni AIR 1983 SC 109 (111)*. Again, when the charges are many and complicated and the record is voluminous and in such circumstances when it is not possible for an employee to marshall the facts and to put up an effective defense which includes cross-examination of a number of prosecution witnesses, some of whom may be high ranking officers of the management, a request for legal assistance is justified.

Steps which Mohd. Idrish could have taken in case he was not being paid minimum wages and was not provided with other legal facilities.

The establishment of the management is a bakery. The sale of goods and their storage is an integral part of various activities carried out in a bakery. This being so the establishment of the management would be covered under The Delhi Shops and Establishment Act, 1954.

The workman Mohd. Idrish can thus approach the authority under Delhi Shops and Establishment Act, 1954, for redressal of his grievances regarding the number of hours of work, payment of wages, leaves, holidays, term of service and other condition of service including issuance of appointment letters, maintenance of records and registers by the employer in the establishment of the management.

The Delhi Shops and Establishment Act prescribes that the employees working in any shop or industrial establishment are entitled to following benefits:-

1	Appointment letters	Section 34	On appointment/joining of the job
2	Working hours	Section 8	48 hours a week or 9 hours a day
3	Compulsory rest	Section 10	Half an hour after 5 hours of work
4	Spread o ver of working hours including rest	Section 11	12 hours in shops and 10 and a half hours in an establishment
5	Restriction on working of women / young person	Section 14	In summer 9.00 PM to 7.00 AM and in winter 8.00 PM to 9.00 AM
6	Opening and Closing hours	Section 15	No shop or commercial establishment be opened earlier than such hour or closed later than as may be prescribed i.e. 9.00 AM and 7.00 PM in winter, 9.30 AM to 7.30 PM in summer and 8.00 AM to 6.00 PM for establishment.
7	Closed Day	Section 16	One day in a week
8	Earned/privileged leave	Section 22	15 days
9	Accumulation of earned leave	Section 22	45 days
10	Casual/sick leave	Section 22	12 days
11	Intimation in writing for availing earned leave	Rule 10	15 days in advance
12	Availing of casual/sick leave	Rule 10	As soon as possible
13	Payment of wages	Section 19	7th of the following month
14	Wages for holidays of a piece rated employee		A piece rated employee is also entitled to the average of the wages received by him during the previous month.
15	Payment of wages	Section 19 (4)	The wages are to be paid in cash
16	Cleanliness	Section 25	The premises of every establishment shall be kept clean.
17	Maintenance of records and registers and display of prescribed notices by an employer	Section 33	Every employer is required to maintain such records and registers and display such notices as may be prescribed from time to time.

In the event of violation of any of the abovementioned provisions an employee can file a complaint under the Act. The provisions of the Act are enforced through Chief Inspector of Shops and various Inspectors under the Act, who are posted in nine Districts of the capital, who function under the supervision and control of Deputy / Assistant Labour Commissioner of the concerned Districts.

The monetary dues or benefits can also be recovered by the workman by filing an application under Section 33 C (2) of the Industrial Disputes Act, 1947. However, under the said provision he would not be entitled to put forward a claim in respect of a matter which is not based on an existing right and which can appropriately be the subject matter of an industrial dispute which requires a reference under Section 10 of the I.D. Act as has been held in case of *"Central Inland Water Transport Corporation Ltd. V Workmen"(1974) 4 SCC 696*and in case of *Municipal Corporation of Delhi V Ganesh Razak and Anr. (1995) 1 SCC 235.*

The workman can also file an application for payment of wages under Section 15(2) of Payment of Wages Act, 1936 for recovery of unpaid wages. Such a claim would have to be restricted to those 'wages / remunerations' as are defined in Section 2 (vi) of the Act and by an employee who is drawing wages less than Rs.18,000/- per month.

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(For Socrates public discussion of the great issues of life and virtue is a necessary part of any valuable human life. "The unexamined life is not worth living."- Apology 38a)

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