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h.c. arora

TOWARDS FUNDAMENTAL REFORMS IN JUDICIAL SYSTEM

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DEDICATED

TO

My Gurudev

Swami Vishvas Ji

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INDEX

SECTION - 1

JUDICIAL REFORMS (IN GENERAL)

SECTION-2

CRIMINAL PROCEDURE CODE, 1973

PREFACE

The Hon'ble Chief Justice of India has repeatedly said that our judicial system is on the verge of collapsing. His Lordship's indication is towards pendency of huge number of court cases. My humble submission is that the system has almost decayed. We have, therefore, to evolve a new system that may be suited to the requirements of the Nation. **At this stage, however, I would like to congratulate our Parliamentarians for inserting Section 436-A in the Code of Criminal Procedure, 1973 for providing much needed relief to under trials languishing in jails without any sign of the trial concluding. Our Supreme Court also deserves appreciation for it as the amendment is the result of certain judgments passed by it in this matter. They also deserve appreciation for introducing the concept of plea bargaining in our criminal justice system. In fact, I have been fighting for these things in the Punjab and Haryana High Court through Public Interest Petitions (PILs)**. The Code of Criminal Procedure, 1973 governs the procedure of trial of accused persons in the criminal Courts. No citizen in our Country feels comfortable in police station or a criminal court. The very sight of police sends shivers across the spine of an innocent citizen. He feels uncomfortable. The police have unbridled powers to arrest any citizen. The first action of a person, on coming to know of a case having been filed against him in a criminal court/ police station, is to approach a Court of law for securing an anticipatory bail. The Courts of law have unguided power to grant or reject the prayer for anticipatory bail by an accused person. Errors of judgments also take place. Personal perceptions of a judge do have a role to play in this important aspect of redressal available to citizens. Citizens in our country do not have any statutory right to claim compensation on acquittal in a criminal case, even though their careers or family life might have been destroyed due to the criminal case. The victims of rape, and dependents of killed person also do not have any statutory right to claim

compensation from the State or the convicted person. On the other hand, the Code of Criminal Procedure has proved teeth less against hardened criminals, who shamelessly confess their crimes before media, and nevertheless deny the charges when presented before a Court of law. The witnesses too often turn hostile. The Courts are helpless in the matter. The High Courts find themselves helpless even in cases of perjury. Can we still boast of fair trials? An honest answer will be "**NO**".

The biggest reason behind the failure of our criminal justice system is that it is a legacy of the British. It does not suit our value-based philosophy. It does not give justice to the victims of crime. The agony undergone during trial is worse than conviction, even if the accused person is ultimately acquitted. It does not inspire confidence of general public. The conviction rate in our country is very low. The Code of Criminal Procedure, 1973 requires a major surgical operation. It requires fundamental reforms.

Likewise, certain fundamental reforms are required to be made in the working of the High Courts. The Contempt of Courts Act, 1971 is also required to be appropriately amended so as to minimize the filing of contempt petitions, while ensuring that the judgments of the Courts are implemented in an expeditious manner.

The book in your hands is an attempt to draw the kind attention of Hon'ble Members of the Parliament and the Hon'ble Judges to certain areas of Judicial system which require such major surgical operations. In fact, it is a representation to them. The Nation has entrusted its stewardship to them. Let them **meditate** over my suggestions. If the suggestions given in this book are found to be of some assistance to them in their assigned task, the author shall feel amply rewarded.

Dated: July 1, 2006 **(h.c. arora)**

SECTION-1

JUDICIAL REFORMS (IN GENERAL)

1

Viability of Division Benches In High Courts

In many High Courts, particularly in Northern India, which are successors of Lahore High Court, a system of Division Benches, comprising two Judges, is prevalent. Undoubtedly, it is the prerogative of the Chief Justice of the concerned High Court, to constitute Benches for hearing of various types of cases. It appears that utility of such Division Benches and their adverse effect on backlog of cases has not been adequately debated upon in legal circles. It is a matter of common knowledge that the junior Member of the Bench rarely dictates orders. The Senior Member dominates the proceedings. As a matter of well-established practice, the Division Benches do not decide time-consuming cases during motion hearing, and such cases, if prime facie well merited, are admitted for regular hearing by Single Judge Benches. Moreover, in view of the backlog of cases, the Single Judge Benches, being inadequate in number, are not in a position to cope with burden of admitted cases. Pendency of lakhs of cases in various High Courts is also attributable to the fact that the cases, which could have been heard and decided by one Judge, are listed for hearing before two Judges sitting in a Division Bench. Thus, invaluable human resources are utilized for hearing of trivial cases also by Division Benches, instead of Single Judge Benches. The unintended adverse consequence of constituting Division Benches for preliminary hearing of cases is, therefore, addition to the existing backlog of cases in various High Courts, which is spiraling day by day. The figures released by the Central Law Ministry reveal that the backlog of cases in the Courts, including in the Supreme Court and various High Courts is increasing. The spiraling trend of backlog in the Supreme Court and various High Courts, as per a report published in the Indian Express of March 23rd, 2006 is as follows:-

Year	Supreme Court	High Courts
2000	22,145	28,86,839
2001	22,722	30,56,614
2002	24,335	31,87,527
2003	26,750	32,39,295
2004	30,151	33,79,033
2005	33,635	34,24,518

Even if the vacant posts of Judges in various High Courts (around one hundred at present) were filled up, that would perhaps be just sufficient to arrest the spiraling rise in the backlog of cases, but would not at all be adequate to eliminate the existing backlog. Thus, some innovative and far-reaching extra ordinary steps are required to rejuvenate the judicial system. The Judicial System can add to its strength scores of more Judges merely by dis-banding unnecessary and avoidable Division Benches, thereby sparing more Judges for deciding the oldest cases in the backlog. Around ten Judges may become spare in the Punjab and Haryana High Court itself if unnecessary Division Benches are dis-banded. It is high time, therefore, that this important aspect of constitution of Division Benches is given due attention by the Judicial System.

It is also my humble view that the LPA (Letter Patent Appeals) system in the High Courts, under which an appeal in certain specified type of matters against the judgments delivered by a Single Judge Bench of the same High Court is heard by a division bench (known as LPA Bench) of the same High Court, also deserves to be abolished, so that such appeals may be heard and decided directly by Supreme Court of India under article 132 of the Constitution. In our judicial system,

where the decisions in cases are already protracted ones, the Nation cannot afford to waste its scarce human resources (i.e., Judges) by providing for repetitive appeals, including appeal within the High Court against the judgment of same High Court. The Constitution, under article 132, does not distinguish between appeals against single Judge's decision and the decision by a division Bench of the High Court. It is also pertinent to note that these LPA Benches, or other Division Benches, are being constituted in various High Courts under the provisions of Government of India Act, 1915/1935, or the Indian Independence Act, 1947, both of which stand abolished under article 395 of the Constitution. However, the Chief Justices of various High Courts are continuing these Benches, under the transitory powers conferred under article 372 of the Constitution, and unless the provisions relating to constitution of Division Benches or LPA Benches are repealed by the Legislature, or the concerned Chief Justices, in exercise of their own prerogative, discontinue such Division Benches, except for hearing matters involving substantially important matters only, these Benches are deemed to be validly constituted, notwithstanding these being a burden upon the scarce human resources of the Nation. One unintended benefit of the abolition of Division Benches would be that it would not be necessary to constitute Special Benches for hearing review applications, which take away much of the valuable time of the Division Benches, as it is the same Judge, who decided the original case, who has to hear the review applications. This aspect of the matter deserves utmost attention of all concerned.

2

Roster System in High Courts

The assignment of cases amongst various Benches of the High Court (Single Judge Benches, Division Benches etc.) is made by an Order issued by the Chief Justice of a High Court, which is referred to as "Roster System". The prescription of roster and altering it from time to time is undoubtedly the prerogative of Chief Justice of any High Court. Surprisingly enough, the Roster System, which can be utilized by the concerned Chief Justices as a tool for introducing transparency in listing of cases, besides ensuring equitable distribution of work amongst various benches, has remained under utilized for that purpose. It has been reduced to a mechanical process. In most of the High Courts, roster is subject-wise. Some Benches are allotted criminal cases, and some other benches are allotted civil cases. There is a further sub-division also. Some Criminal Bench may be allotted bail matters, and some others may be allotted 'Quashing matters', and so on. Similar is the position of civil cases. Distribution of civil cases is also based on further sub-classification. One Bench may be allocated cases filed against the State Government, and the other may be allotted cases filed against Central Government, and the third may be assigned cases filed against Public Sector Corporations, and the fourth may be given Tax matters etc. Many a time, it results into under utilization of the capacity of a Bench, while over burdening some other Bench, thereby adversely affecting the efficiency of the judicial system as a whole. A litigant knows in advance as to before which Bench his case is likely to be fixed, and thereby manipulate the timing of filing of his case. Such inherent weaknesses of the Roster System presently in vogue have to be removed. Atmosphere in one of the High Courts in Northern India was so much vitiated by baseless allegations regarding the close relatives of sitting Judges getting undue benefit of their position, that the concerned Chief Justice issued

an order that the cases represented by advocates, who are close relatives of sitting Judges of that High Court, may be listed only before the Bench of Chief Justice. This resulted into humiliation to some of the Sitting Judges and their kith and kin practicing in that High Court. The said office order was revoked by his successor Chief Justice, and perhaps very rightly. Such unnecessary controversies can be effectively avoided by resorting to a scientific roster system. I may humbly suggest that subject wise roster system should be abolished, and replaced by a computerized system of listing of cases. The cases before actual listing thereof should be arranged alphabetically just like in Oxford Dictionary, through computer, based on the first name of the lawyer representing the petitioner/ appellant, and thereafter listed Court-wise in that order, from Court No.1,2,3 and so on, in equal proportions. The unintended result of it would also be that almost all the cases of a particular counsel shall be listed before one court, or in one or two adjoining Courts. The output/ disposal of cases would be increased thereby reducing addition to back log of cases.

Vacation in High Courts

The Supreme Court of India took a small step forward some times back in the direction of much delayed judicial reforms by announcing a cut of one week in the summer vacations observed by the highest Court of the land. Now onwards, the Supreme Court Judges shall enjoy summer vacation for 7 weeks instead of eight weeks. It was also announced that during long summer vacations, there shall be a special Bench of the Supreme Court for deciding old cases. The step is quite appreciable. The various High Courts were also expected to follow suit. However, nothing of the sort followed.

The figures released by the Central Law Ministry reveal that the backlog of cases in the Courts, including in the Supreme Court and various High Courts is increasing. The spiraling trend of backlog in the Supreme Court and various High Courts, as per a report published in the Indian Express of March 23rd, 2006 is as follows:-

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Even if the vacant posts of Judges in various High Courts (around one hundred at present) were filled up, that would perhaps be just sufficient to arrest the spiraling rise in the backlog of cases, but would not at all be adequate to eliminate the existing backlog. Thus, some innovative and far-reaching extra ordinary steps are required to rejuvenate the judicial system.

Some thing substantial needs be done for re-vamping the judicial system, which as per fears repeatedly voiced by the present Chief Justice of India, is on the verge of collapsing. The million-dollar question that arises in one's mind in this fact situation is as to whether in the above scenario, it is fair and justified to close the judicial system to litigant public continuously for a month during summer season every year. We must get rid of this colonial legacy also, and be ready to sacrifice the summer vacations. Instead, all the Courts in the Country, including the Supreme Court and the High Courts should decide the old cases during the period, now a days being referred to as "*Summer Vacations*".

4

Impeachment of Judges

The existing procedure for impeachment of a Judge of the Supreme Court or that of the High Courts, as laid down under article 124 of the Constitution of India, is quite embarrassing not only for the concerned Judge, but for the judicial system as a whole. Besides, the existing procedure is amenable to politicization. It is, therefore, suggested that the complaints against a Judge of the High Court or Supreme Court should be heard by a Committee of retired Supreme Court Judges. It is, therefore, suggested that the provisions of article 124 (4) of the Constitution be amended in the following manner for impeachment of Judges:-

EXISTING PROVISIONS UNDER ARTICLE 124 (4) OF CONSTITUTION:

"124 (4).- A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of the House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

(5) Parliament by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4)."

PROPOSED AMENDED PROVISIONS UNDER ARTICLE 124(4) OF THE CONSTITUTION:

"124 (4).- A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed ***on the recommendation of a Committee comprising retired Judges of the Supreme Court, and on endorsement of the proposal for his removal by the Committee of Eminent Persons, appointed by the Prime Minister in consultation with the Leader of the Opposition in the Lok Sabha.***

(5) ...to be deleted.

However, no amendment is required to be made in article 218 of the Constitution which lays down that the provisions contained in article 124 (4) and 124 (5) shall be applicable in relation to High Court Judges also.

The provisions of "The Judges (Inquiry) Act, 1968" may be thoroughly amended for regulating the procedure for the investigation and proof of the misbehaviour or incapacity of a Judge sought to be impeached.

5

Contempt Power

(in General)

It has become a practice of the government officers to implement an order passed by a Court, only after a notice of contempt is received for non-compliance of the order. A contempt notice activates the respondents, who generally comply with the order before the next date of hearing in the contempt petition fixed by the Court, upon which the Court discharges the contemnors. This results into wastage of valuable time of the Courts, which are already over-burdened with cases. Situation requires to be corrected by slightly amending the provisions contained in section 12 of the Contempt of Courts Act, 1972.

EXISTING PROVISIONS

Section 12. Punishment for contempt of Court.- (1) Save as otherwise expressly provided in this Act or in any other law, a contempt of Court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both;

Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court.

PROPOSED AMENDED PROVISIONS

Section 12. Punishment for contempt of Court.- (1) Save as otherwise expressly provided in this Act or in any other law, a contempt of Court may be punished with simple imprisonment for a term which may extend to six months, or

with fine which may extend to two thousand rupees, or with both;

Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court.

Provided further that the accused shall be discharged with an advice to be careful in future, in a case where he had complied with the order of the Court after receiving the notice of contempt, but before the first date of hearing, in the contempt petition, fixed by the Court.

It is also suggested that a proviso be inserted below clause (a) of section 13 of the C.A.T. (Contempt of Courts) Rules, 1992 to similar effect.

EXISTING PROVISIONS

Section 13 (a). if the respondent has tendered an unconditional apology after admitting that he has committed the contempt, the Tribunal may proceed to pass such orders as it deems fit;

PROPOSED PROVISIONS

Section 13 (a). if the respondent has tendered an unconditional apology after admitting that he has committed the contempt, the Tribunal may proceed to pass such orders as it deems fit;

Provided that the respondent shall be discharged with an advice to be careful in future, in a case where he had complied with the order of the Tribunal after receiving the notice of contempt, but before the first date of hearing in the contempt petition fixed by the Tribunal.

6

Contempt Power

(in Money Matters)

The number of petitions for contempt of Court is becoming unbearable on the Courts. During his visit to the office of Director of Public Instructions, Punjab in January, 1999, this author was told by a dealing clerk of that office that they are unable to comply with Court orders in routine in view of spurt in the number of Contempt of Court cases. Thus, they had found a way out to save their skin. They were, therefore, complying with only those orders of the Courts, where the Court had issued notice for its contempt. There is other side of this story also. The litigants are unnecessarily paying counsel's fee for filing contempt petitions. On the first date of hearing, the Court on finding a prima facie case for contempt, issues a routine show cause notice to the respondents, (for next date of hearing which is generally after lapse of two to three months). The Government officials, who engage a government counsel, pay his fee at government rates (rupees three thousand six hundred, at present rates), and file affidavit in the Court to the effect that its order has been complied with. The Court then dismisses the contempt petition. As per the settled position of law, the Contempt Court cannot issue direction for payment of interest on the amount payable under its orders. Both sides are, therefore, losers. Thus, following amendments are required to be made in the Central Administrative Tribunal (Contempt of Courts) Rules, 1992, as well as in the "Contempt of Courts Act, 1971", for balancing the interest of both the warring parties, while eliminating unnecessary litigation.

1. CAT (CONTEMPT OF COURT) RULES, 1992.

EXISTING PROVISIONS

Rule 7. Initiation of proceedings.- (i) Every petition for "Civil Contempt" made in accordance with these rules shall be scrutinized by the Registrar, registered and numbered in the Registry and then placed before the Bench for preliminary hearing.

PROPOSED PROVISIONS

Rule 7. Initiation of proceedings.- (i) Every petition for "Civil Contempt" made in accordance with these rules shall be scrutinized by the Registrar, registered and numbered in the Registry and then placed before the Bench for preliminary hearing.

Provided that no petition for "Civil Contempt" involving payment of money shall be entertained by the Registry for a period of three months after the expiry of the period mentioned in the order of the Court under reference, read with proviso to Section 21 of the Administrative Tribunals Act, 1985, after which period also, no such petition shall be entertained by the Registry, in case the respondents have meanwhile paid to the petitioner, the amount as per the order of the Court, along with interest at the current post office savings bank rate for the period of delay.

CORRESSPONDING AMENDMENT PROPOSED IN THE ADMINISTRATIVE TRIBUNALS ACT, 1985.

EXISTING PROVISIONS

Section 27. Execution of orders of a Tribunal.- Subject to the other provisions of this Act and the rules, the order of a Tribunal finally disposing of an application or an

appeal shall be final and shall not be called in question in any Court (including a High Court) and such order shall be executed in the same manner in which any final order of the nature referred to in clause (a) of sub-section (2) of Section 20 (whether or not such final order had actually been made) in respect of the grievance to which the application relates would have been executed.

PROPOSED PROVISIONS.

Section 27. Execution of orders of a Tribunal.- Subject to the other provisions of this Act and the rules, the order of a Tribunal finally disposing of an application or an appeal shall be final and shall not be called in question in any Court (including a High Court) and such order shall be executed in the same manner in which any final order of the nature referred to in clause (a) of sub-section (2) of Section 20 (whether or not such final order had actually been made) in respect of the grievance to which the application relates would have been executed.

Provided that an order passed by a Tribunal directing for payment of money only to the applicant shall be deemed to be extended by a period of three months from the date of expiry of the period specified in the order, in case the respondents, within that deemingly extended period of three months, pay the entire amount as ordered by the Tribunal, along with interest at the Post Office Savings Bank rate for the period of delay.

2. THE CONTEMPT OF COURTS ACT, 1971

EXISTING PROVISIONS

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

(a) "Contempt of Court" means civil contempt or criminal contempt;

(b) "civil contempt" means willful disobedience to any judgment, decree, direction, order, writ or other process of a Court or willful breach of an undertaking given to a Court;

PROPOSED PROVISIONS

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

(a) "Contempt of Court" means civil contempt or criminal contempt;

(b) "civil contempt" means willful disobedience to any judgment, decree, direction, order, writ or other process of a Court or willful breach of an undertaking given to a Court;

Provided that in case of final order or judgment of a Court directing for payment of money only within a specified period, if the money so directed to be paid, is actually paid within a further period of three months along with interest at the current Post Office savings bank rate for the period of delay, the delay in complying with the direction or order of the Court shall not be deemed to be willful.

7

Court Fee

On Writ Petitions

There are certain practices and procedures followed by certain High Courts which are quite irritating and irksome, and defy all logic. Some such practices relate to payment of court fee on writ petitions and the mode and manner of payment thereof. For instance, in the Punjab and Haryana High Court, the Court fee stamps on the civil writ petition are being affixed @ Rs.50/- per petitioner, and additional Court Fee is levied @ Rs.0.65 paise per page on annexures to the Writ Petition. The system of payment of Court Fees is highly cumbersome and outmoded. One would not mind paying more Court Fee, if it is not required to be affixed on each document. It results into unnecessary labour and wastage of time of clerks of advocates. The court fee stamps have to be affixed on the documents/ annexures, name of the petitioner has to be affixed on each court fee stamp. Thereafter, the officials in the Writ Branch have to scrutinize each court fee stamp, where after these are cancelled by class-IV staff of the Writ Branch. A little mistake in the calculation of court fee results into objections being raised by the Writ Branch. This system requires to be replaced by some simple procedure. For instance, court fee can be calculated on the total number of pages of the paper book of the civil writ petition, but entire court fee may be affixed on the first page only, and that too may be required to be rounded off to the next higher figure divided by five rupees. Besides, court fee can be accepted in the shape of bank drafts etc., for the convenience of litigant public. That will simplify the whole system, and would result into quicker scrutiny of the civil writ petitions.

Section 4 of the Court Fee Act, 1870 lays down that

"No documents of any kind specified in the First or Second Schedule to this Act, annexed, as chargeable with fees, shall be filed, exhibited or recorded in, or shall be received or furnished by, any of the said High Courts in any case coming before such Court in the exercise of its extra ordinary original civil jurisdiction." However, a search through the First and Second Schedule does not give any clue regarding the Court fee to be charged on Civil Writ Petitions and their accompanying documents.

Volume 5 of the Punjab and Haryana High Court Rules and Orders, at page 42 thereof, in "Part 1- General" lays down the "Rules made by the High Court of Punjab and Haryana regulating proceedings under article 226 of the Constitution". This section also does not have any reference to the subject of court fee to be levied on such Civil Writ Petitions. Section 20 of the Court Fees Act, 1870, which deals with 'Rules as to the cost of Processes"also does not deal with the issue of court fee to be levied on civil writ petitions on original side.

Entry no. 3 in List-II "State List" contained in the Seventh Schedule to the Constitution of India clearly lays down that "fees taken in all courts except the Supreme Court" is a State Subject.

It will be appreciated if the concerned State Governments step in and review the issue of payment of court fee on various types of proceedings, including the civil writ petitions, as the system being followed till now appears to be of "*bullock cart age*", if not of "*stone age*".

8

MOST OBSOLETE STATUTE

(Stamp Act)

There has been many scandals in this country in relation to stamp papers, including the latest "*Telgi scam*" involving printing and sale of stamp papers. There was a news report in "Times of India" dated May 4, 2005 that the Punjab Government has decided to sell stamp papers through post offices. Stamp papers are purchased by the people for paying revenue to the State, or for paying court fee etc. If court fee for a small amount is required, adhesive court fee stamps are purchased by the concerned person, and those are pasted on the court paper (*pakka paper*). If amount of revenue or court fee payable is substantial, then one has to purchase stamp papers of requisite value, which are printed by the Security Printing Press of Government, for various denominations. These stamp papers are sometimes annexed with the related document, and the documents are written or typed on the stamp papers itself. Now, in view of various scandals, the Punjab Government has decided to sell tamp papers through post offices, to prevent the occurrence of such scams.

Our country is carrying the unbearable load of "The Indian Stamp Act, 1899" which is again a British legacy. The main reason for stamp paper scams is that these stamp papers are printed in bulk. Another reason is the Government not being alive to the fact that this Act is a ridiculous piece of legislation. Ridiculously small amount of court fee , like 50 Naiya Paisa, is still required to be paid on some type of documents. Then there are complicated provisions for canceling those court fee stamps. In the High Courts also, where the paper books are very heavy, the petitioner is required to affix a court fee stamp of 65 Naiya Paisa on each page of

annexures. Considerable amount of man-hours are wasted in this useless process. The litigants or the clerks of Advocates are always found busy in pasting court fee stamps on pages of the paper books, then writing the name of the case on the court fee stamps, for cancellation thereof (so that those court fee stamps may not be re-used). Then the employees of the court check each and every page of paper books to ensure that stamps of correct amount are affixed and properly cancelled before clearing the paper book for further processing. These ridiculous provisions continue to remain on statute book even fifty six years after the Constitution of India came into force. Added to all these problems is the artificial shortage of stamp papers occasionally created by Agents, leading to sale of those stamp papers in black market.

It is, therefore, suggested that in view of more innovative methods of charging court fee being available in our country, the mode of payment of court fee should be drastically overhauled. Court fee should be made payable for an amount in round figures, and should be payable through demand drafts or cash orders. In the Debts Recovery Tribunals, and Central Administrative Tribunals, the system of paying court fee in lump sum on the entire petition, or application, through demand drafts or cash orders is working wonderfully well, with no allegations of fraud so far, and the Government is also saving huge costs otherwise required for printing court fee stamps and stamp papers, as well as on payment of commission to stamp vendors etc.

9

Environmental Costs of Court Proceedings

We are fastly approaching an era of "Paperless Courts", and the Hon'ble Courts, including the Hon'ble Supreme Court, have contributed maximum towards conservation of forest wealth. Special Benches, called 'Green Benches' have been constituted in each High Court and the Supreme Court for hearing matters relating to environment. However, the proverb "*the nearer the church, the farther from God*" applies to the proceedings in various Courts also. Under the rules of various High Courts, the Letters Patent Appeal (LPAs) are not entertained/registered unless three originally typed sets of the paper book are deposited, although such LPAs are heard by a Bench of two Judges only, and rarely the matter is referred to a larger Bench comprising three Judges. Likewise, two sets of the paper book of the contempt petition are required to be filed, although such contempt petitions are heard by a single Judge. In the Central Administrative Tribunals, under the rules framed by the Central Government, the extra paper books meant for service on the respondents are also required to be filed along with the Original Applications, and those paper books turn into waste paper in all those cases where the Original Applications are dismissed at the stage of preliminary hearing.

There are other practices in various High Courts, which are also avoidable. For instance, in support of Contempt Petitions, exhaustive/ detailed affidavit by the petitioner has to be filed. Thus, along with a contempt petition comprising ten pages, a supporting affidavit of ten pages has to be filed, although a short affidavit comprising one page only can also serve the same purpose. Similar avoidable practice of filing detailed affidavit exists in relation to stay applications also.

These things appear to be petty ones, but if the total environment costs, i.e., the number of trees destroyed for manufacturing the paper to be used in Courts are calculated, that would definitely run into millions of trees every year. The relevant rules/ procedure, if any, should, therefore, be amended, in the interest of conservation of forest wealth, which goes into manufacturing of paper, as well as the expenditure involved.

SECTION - 2

CRIMINAL PROCEDURE CODE, 1973

10

Under trials

Criminal trials in our country are long drawn. Many times, the delay in conclusion of trial is attributable to the accused. However, there is hardly any chance of an under trial delaying the trial, if he is not released on bail. There are numerous instances where the under trials remained in prison for a period more than the maximum term of imprisonment that could have been imposed on them if they had been convicted of the offence. Supreme Court came to their rescue some time back when it directed the State Governments to release such under trials on bail. The million dollar question is as to whether there is any logic in continuing the trial of such under trials, who have already undergone imprisonment for maximum term, though not as convicts, but as under trials?

Our criminal justice delivery system is quite slow. Society should not suffer for the delays which are attributable to the judicial system. An under trial, who has completed in jail the maximum period for which he could have been put in imprisonment even if convicted, should be entitled to be discharged. Under trials are also human beings. They also have their human rights. Releasing them on bail on completing the maximum period of imprisonment as under trial in jail is no mercy. Rather it is a mercy on our legal system. Such under trials should be entitled to reasonable compensation from the State Government, on ultimate acquittal. Releasing them once for all, by ordering that their trial has been rendered in fructuous, would not be a mercy on them, but a mercy on our legal system. They are entitled to be discharged, without any stigma, on completion of maximum period of sentence as an under trial. Special provisions to the above effect are required to be incorporated in the Criminal Procedure Code. The insertion of Section 436-A in the Cr.P.C. for granting bail to

under trial who have completed half of the sentence which can be imposed on them, if convicted (this provision coming into effect on 23.6.2006) is a good first step. Approximately fifty thousand under trials are likely to be released on bail under this newly added provision, many of whom must have completed even the full term for which they can be sentenced, if convicted. The latter type of under trial prisoners must be discharged by amending the provisions of Section 239 and 245 of the Criminal Procedure Code, 1973.

11

Concurrent Sentences

Let us examine a real fact-situation reported in the newspapers of June 5, 2005, where an accused charged with offences of murder and terrorist activities was convicted and sentenced to life imprisonment for offence under section 302 of the Indian Penal Code, and with seven years' imprisonment and a fine of Rs.2000/-for offence under section 3 of the TADA, and to sentence of another ten years for an offence under section 4 of the TADA. It is further directed by the Court that on failure to pay fine, the accused shall be liable to further imprisonment for six months. All these sentences have been directed to run concurrently.

The awarding of concurrent as well as the consecutive sentences is regulated by section 71 of the Indian Penal Code as read with section 31 of the Criminal Procedure Code, 1973. These provisions are reproduced hereunder for better appreciation of the problem as to whether in such cases, the direction that the punishments would run concurrently is justified, or the punishments should have been directed to run consecutively.

"Section 71 of the Indian Penal Code, 1860.- Limit of punishment of offence made up of several offences.- Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, ***unless it be so expressly provided.***

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

Where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

The offender shall not be punished with a more severe punishment than the Court which tries him could have awarded for any one of such offences."

"Section 31 of the Criminal Procedure Code.- Sentence in cases of conviction of several offences at one trial.- (1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments, prescribed therefor, which such Court is competent to inflict, the Court shall direct that such punishments shall run concurrently.

Applying these provisions to the case in hand, the Court, in view of section 71 of the IPC, could not have inflicted a punishment of more than 10 years, which has been inflicted on the accused for offences under TADA. The Court could punish the accused for offence under section 302 of IPC only by directing that all the punishments shall run concurrently. The Court could not have, therefore, directed for consecutive sentences, as that would have exceeded the sentence that the Court could have awarded for offences under TADA. Thus, in most of the cases, the provisions contained in section 71 of the IPC and those in section 31 of the Cr. PC, for awarding consecutive sentences, are superfluous and impracticable. It is, therefore, suggested that the following amendments be carried out in these provisions of law:-

PROPOSED AMENDE PROVISIONS OF LAW:

"Section 71 of the Indian Penal Code, 1860.- Limit of punishment of offence made up of several offences.- Where anything which is an offence is made up of parts, any of

which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

Where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

The offender shall not be punished with a more severe punishment than the Court which tries him could have awarded for any one of such offences."

Now the newly inserted provisions of Section 436-A in the Criminal Procedure Code, 1973, would become unworkable if the expression "***unless it be so expressly provided***" occurring at the end of section 71 of Indian Penal Code, 1860, is not deleted, and it would not be possible for the Court to ascertain as to whether an under trial has completed half the period of sentence of imprisonment that could have been awarded on him, if convicted, so that he may be released on bail.

12

Arrest without warrant

In our Country, the power of arrest without warrant, which is available with the police officers, in cases of cognizable offences, is often misused, and it is a major source of corruption also. Under clause (c) of Section 2 of the Cr. P.C., a "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule, or under any other law for the time being in force, arrest without warrant. Section 41 of the Cr. PC lays down the class of offences and the circumstances entitling the police to arrest a person without warrant.

EXISTING PROVISIONS OF SECTION 41 OF CRIMINAL PROCEDURE CODE:

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

(a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or

(b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking; or

(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 356; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears there from that the persons might lawfully be arrested without a warrant by the officer who issued the requisition.

(3) Any officer in charge of a police station may, in the manner, arrest or cause to be arrested any person, belonging to one or more of the categories of persons specified in section 109 or section 110."

As it is said "***power corrupts, and absolute power corrupts absolutely***", it is necessary to regulate the powers of police officers to arrest persons, without warrant. A police officer should have no hurry to arrest a person, where he has the time to approach the concerned Magistrate for issuance of warrants of arrest. If a provision is made to this effect, the public shall heave a sigh of relief, and the Courts of Session and the High Courts shall also be considerably saved from

entertaining the applications for anticipatory bail on the basis of apprehension of arrest by a police officer. Besides, it is to be noticed that in our society, the humiliation on being arrested is many more times severe than the humiliation of facing a false case. It is, therefore, suggested that the following amendments be made in the opening sentence of this provision so as to place some reasonable restrictions on this unbridled power of the police officials.

PROPOSED AMENDED PROVISIONS:

"Section 41. When police may arrest without warrant.- (1) Any police officer may without an order from a Magistrate and without a warrant, ***if it is not reasonably practicable to get such order or such warrant in the facts and circumstances of a case,*** arrest any person-

(no change to be made in the rest of the provision.)

Breach of peace

The provisions of section 107 and 151 of the Criminal Procedure Code are most misused provisions in the country side. Section 107 empowers the Executive Magistrate to direct a person to execute a bond for keeping peace for such period, not exceeding one year, when a complaint is received against him about threat to peace by him. Section 151 empowers the police authorities to arrest a person if they come to know that he is likely to commit a cognizable offence, and detaining him for a period not exceeding twenty four hours. In country side, the people usually file complaints against their rivals alleging the apprehension of threat to their life from such rivals, and the police authorities raid the village for arresting the accused persons, take them to police station, and if they are not available, leave a message for calling at the police station, and on reaching their, they are released on bail bonds. Then it comes the turn of the other party, and on his complaint, the same process is followed, and the first party is released on bail. The police authorities waste their valuable time on non-existing disputes, because such complaints are filed only to get the rivals arrested so that they may be humiliated in public.

In view of the gross misuse of the provisions under reference, it is suggested that a sub-section (3) be added to section 151 to the following effect:-

"151 (3). ***Proceedings under this section may be taken only if the person against whom complaint of the type referred to in sub-section (1) is received has been earlier convicted in any criminal case. In all other cases, the complainant may, in the discretion of the police officer, or the Magistrate, be provided with security at his cost."***

14

Statements before Police

There is a joke that our police officials can make any person confess any crime whatsoever. On the other hand, the hardened criminals don't mind confessing even those crimes which they had never committed. The reason is that statements recorded by the police under section 161 and 162 are not required to be signed by the person making such statement before a police officer. With the advent of modern technology, a stage has now been reached when the provisions of section 161 and 162 should be completely overhauled. Another problem is regarding the statement to be given to the police officer by the rape victim. This section does not prescribe that the statements of rape victim should be recorded by-the police officer only in camera. The rape victims feel extremely harassed, while answering the questions of the police officer, in the presence of friends and relatives who accompany them to the police station for recording of their statements. The following amendments in the provisions are, therefore, proposed for replacing the earlier provisions contained in section 161 and 162:-

EXISTING PROVISIONS

"161. Examination of witnesses by police.- (1) Any police officer making an investigation under this Chapter, or any police officer not below the rank as the Appropriate Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put up to him by such officer, other than questions the answers to which would have a tendency to

expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section, and if he does so, he shall make a separate and true record of the statement of each person whose statement he records.

PROPOSED PROVISIONS

"161. Examination of witnesses by police.- (1) Any police officer making an investigation under this Chapter, or any police officer not below the rank as the Appropriate Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case. ***Complete proceedings of such examination of the witness shall be video recorded at the Government's cost.***

Provided that such examination of a rape victim shall only be conducted in camera."

(2) Such person ***shall be bound*** to answer truly all questions relating to such case put up to him by such officer, ***including*** the questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing, ***or prepare a transcript of*** any statement made to him in the course of an examination under this section, and if he does so, he shall make a separate and true record of the statement of each person whose statement he records.

EXISTING PROVISIONS

162. Statements to police not to be signed: Use of statements in evidence.- (1) No statement made by any person to a police

officer in the course of investigation under this Chapter, shall, if reduced to writing, be signed by the person making it, nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record , be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made.

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872), and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act.

Explanation.- An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.

PROPOSED PROVISIONS

162. Statements to police got to be signed: Use of statements in evidence.- ***(1) Every statement made by any person to a police officer in the course of investigation under this***

Chapter, shall, if reduced to writing, be signed by the person making it, and any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record , may be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made.

Provided that such person, during proceedings in the Court, may be permitted to resile from the whole or a part of such statement before such Court, if he satisfies the Court that such whole or part of the statement was not given by him to police of his free volition.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act.

15

Maintenance

As is said, every law in our Country has lacunas, which help the law breakers. It also appears to be the position about the provisions contained in section 125 of the Criminal Procedure Code, 1973, in relation to the obligation of a person to maintain his wife, children and parents. This section lays down such obligation to maintain the wife, children and parents only on a person, who has sufficient means. Thus, a person can circumvent the provisions of this section by pleading that he does not have sufficient means, as many persons in our Country deliberately do not keep any property in their names, though they possess a huge wealth in the name of other persons. It is also the position of persons, who are not income-tax payees. It is, therefore, suggested that the expression "*having sufficient means*" be deleted from the provisions contained in section 125 of the Criminal Procedure Code. Otherwise too, in Hindu or Muslim or Sikh Society, a male can not be permitted to say that he does not have sufficient means to maintain his wife, parents and children, unless our intention is to convert our country into an "America" where every body lives for himself or herself. Besides, minimum level of monthly maintenance allowance is also required to be prescribed by law as one third of the income of such person.

EXISTING PROVISIONS OF SECTION 125 OF THE CRIMINAL PROCEDURE CODE:

"Section 125. Order for maintenance of wives, children and parents.-(1) If any person ***having sufficient means*** neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor children, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child(not being a married daughter) who has attained majority, where such child

is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct....."

PROPOSED AMENDED PROVISIONS OF SECTION 125 OF THE CRIMINAL PROCEDURE CODE:

"Section 125. Order for maintenance of wives, children and parents.-(1) If any person neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor children, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child(not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, but ***not less than one-third of the monthly income of such person*** and to pay the same to such person as the Magistrate may from time to time direct....."

Explanation.- The onus of proving that a person claiming maintenance under this section is able to maintain himself or herself, shall be on the person from whom such maintenance is claimed under this section."

16

Unlawful Assemblies

Whether the administration used force which was more than what was the minimum required in the circumstances, is often a subject matter of Judicial Inquiries, when some members of such "unlawful assemblies" are killed on account of such use of force. In some cases, it so happens that no officer takes the responsibility for ordering firing on the members of such unlawful assembly. That obviously speaks of the falling level of integrity and honesty of police officers. In many such cases, oral orders come from the "top". It is, therefore, suggested that the provisions of section 129 of the Criminal Procedure Code, 1973 be amended to say that for the purpose of dispersing the members of an unlawful assembly, the Executive Magistrate or the police officer shall not resort to "firing" on the members of any unlawful assembly, without the express permission from the Chief Secretary of the State. Besides, the power under this section, which has been conferred on sub-inspector, is not justified. The word "sub inspector" needs be substituted by "inspector".

EXISTING PROVISIONS OF SECTION 129 OF THE CRIMINAL PROCEDURE CODE, 1973:

"129. Dispersal of assembly by use of civil force.- (1) Any Executive Magistrate or officer in charge of a police station or, in the absence of any such officer in charge, any police officer, not below the rank of a ***sub-inspector,*** may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

(2) If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts

itself in such a manner as to show a determination not to disperse, any Executive Magistrate or police officer referred to in sub-section (1), may proceed to disperse such assembly ***by force,*** and may require the assistance of any male person, not being an officer or member of the armed forces and acting as such. For the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law."

PROPOSED AMENDED PROVISIONS OF SECTION 129 OF THE CRIMINAL PROCEDURE CODE, 1973:

"129. Dispersal of assembly by use of civil force.- (1) Any Executive Magistrate or officer in charge of a police station or, in the absence of any such officer in charge, any police officer, not below the rank of an ***inspector,*** may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

(2) If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Executive Magistrate or police officer referred to in sub-section (1), may proceed to disperse such assembly ***by use of such minimum force (except by firing on the members of such assembly, which may be ordered only by the Chief Secretary of the State) as may be required in the circumstances***, and may require the assistance of any male person, not being an officer or member of the armed forces and acting as such. For the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law."

17

Untraceable reports

Section 169 of the Criminal Procedure Code empowers the police to release an accused on furnishing a bail bond, if on investigation; it appears to the officer In charge of the police station that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate. The irony of this procedure is that even after many years after the police takes such decision, the concerned accused person is not treated as discharged or acquitted, even for the time being, since he can still be proceeded against at any future stage, if sufficient evidence is found against him. The provision is often misused against the officials in public sector as well as those in Government service. If such official approaches the Incharge of the Police Station for a report, he is given a report to the effect that the case has been closed as *'untraceable'*. Subsequently, if the employer approaches the In charge of the Police Station for a report, he is given a letter that although the case has been closed "as untraceable", it is likely to be re-opened, or that it has been decided to re-open the investigations. Thus, despite discharge from the case (though it is not said in so many words by the Police authorities), such a person is not treated as having been discharged in actual practice, and he cannot reap the fruits of 'untraceable report'. Thus, the provisions of section 169 of the Cr. PC are required to be modified as under, for doing some equity to the accused person in such a case:-

EXISTING PROVISIONS:

"Section 169. Release of accused when evidence deficient.- If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is not sufficient evidence, or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if

such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial."

PROPOSED AMENDED PROVISIONS:

"Section 169. Release of accused when evidence deficient.- If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is not sufficient evidence, or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release **him** ***without executing a bond, and on such release, he shall be treated as if discharged in the case by order of a Court of competent jurisdiction."***

18

Police Jurisdiction

Section 178 of the Criminal Procedure Code, 1973 has given rise to occasional difficulties, and the concerned complainants have to suffer a lot when a police station declines to take cognizance of such complaint or FIR on the ground that it is to be inquired into by the adjoining or other police station. More difficulty is faced if the other police station falls within another State or Union Territory. A perusal of the provisions of section 178 would, therefore, be essential.

EXISTING PROVISIONS

Section 178. Place of inquiry or trial.- (a) When it is uncertain in which of several local areas an offence was committed, or

(b) where an offence is committed partly in one local area and partly in another, or

(c) where an offence is a continuing one, and continues to be committed in more local areas than one, or

(d) where it consists of several acts done in different local areas,

it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

PROPOSED AMENDED PROVISIONS

Section 178. Place of inquiry or trial.- (a) When it is uncertain in which of several local areas an offence was committed, or

(b) where an offence is committed partly in one local area and partly in another, or

(c) where an offence is a continuing one, and continues to be committed in more local areas than one, or

(d) where it consists of several acts done in different local areas,

it may be inquired into or tried *only by a Court having jurisdiction over such local area, amongst all such local areas, whose name comes first in alphabetical order.*

Illustration- *If it is uncertain as to whether Court at Ropar or at Patiala will have jurisdiction to inquire into or try the offence, the Court at Patiala (being earlier in alphabetical order) only shall have jurisdiction in such a case.*

19

Discharge of accused

The procedure for trial of criminal cases in our Courts is that the case is opened by the prosecutor by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused. If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is no sufficient ground for proceeding against the accused, he has to discharge the accused by passing a reasoned order. However, the problem faced by the employees facing such criminal cases is that the employer is not ready to take such employee back in service despite such an order of discharge in his favour, because, according to the employer, such discharge cannot be treated as acquittal of the accused person by the Court of law. The position requires to be clarified in this regard by amending the relevant provisions of the Criminal Procedure Code, 1973, as contained in Section 227 (relating to discharge by a Court of Session), Section 239 (relating to trial of warrant cases, instituted on a police report, by Magistrates) and Section 245 (relating to trial of warrant cases, instituted otherwise than on police report), as under:-

EXISTING PROVISIONS OF SECTION 227 (RELATING TO TRIAL BY A COURT OF SESSION):

"227. Discharge.- If, upon considering the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

PROPOSED AMENDED PROVISIONS OF SECTION 227 (RELATING TO TRIAL BY A COURT OF SESSION):

"227. Discharge.- If, upon considering the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing, ***and such discharge of the accused person shall be treated as acquittal ordered by the Judge under section 232 of this Code."***

EXISTING PROVISIONS OF SECTION 239 (RELATING TO TRIAL OF A WARRANT CASE INSTITUTED ON A POLICE REPORT, BY MAGISTRATES):

"239. When accused shall be discharged.- If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing."

PROPOSED AMENDED PROVISIONS OF SECTION 239 :

" 239. When accused shall be discharged.- If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing, ***and such discharge of the accused person shall be treated as acquittal ordered by the Magistrate***

under section 248 of this Code."

EXISTING PROVISIONS OF SECTION 245

"245. When accused shall be discharged.- (1) If, upon taking all the evidence referred to in section 244 the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if un-rebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

PROPOSED AMENDED PROVISIONS OF SECTION 245

"245. When accused shall be discharged. - (1) If, upon taking all the evidence referred to in section 244 the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if un-rebutted, would warrant his conviction, the Magistrate shall discharge him, ***and such discharge of the accused person shall be treated as acquittal ordered by the Magistrate under section 248 of this Code."***

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

Lie Detector Test (in criminal cases)

Some of the judges are very honest in saying that *"We do not deliver justice, We can only decide cases on the basis of evidence before us."* The inherent flaw in the criminal justice delivery system, where innocent persons can be sent to jail, is thus obvious. Cases where after the conviction of the alleged murder accused, the "murdered person" appeared in the Court, and prayed for protecting his life, since the police authorities were allegedly trying to murder him, are no longer confined to motion pictures alone; such cases have actually happened in real life. In a recent case of U.P., the wife, who was allegedly the victim of dowry death, was, during the pendency of that case and after about seven-eight years of his alleged death, arrested and produced before the Court before whom a trial of his husband (who had fled away for fear of police, and was missing after having been declared as a proclaimed offender) for her alleged murder was going on. She was found to be living with another person all these years whom she had married, begetting two sons from the wedlock. Thus, instead of permitting more and more innocent persons to be hanged or imprisoned, it would be worthwhile for the Central Government to empower the Courts to direct any person, including the complainant, accused and any of the witnesses appearing in the case, to be put to a lie detector test. It is suggested that the following amendments be made in the Code of Criminal Procedure, 1973:

PROPOSED PROVISIONS

Section 297-A. When lie detector test of a witness or any other person may be necessary.- (1) Whenever, in the course of any inquiry, trial or other proceedings under this Code, it appears to a Court of a Magistrate that the lie detector test of any witness, or that of the complaint or accused is necessary

for the ends of justice, the Court or Magistrate may order for putting that person to a lie detector test before the specified authority in accordance with the provisions of this Chapter. The evidence collected through lie detector test shall be treated as a part of the cross-examination of the concerned witness.

(2) The Court may, when issuing an order for conducting lie detector test of any person, direct that such amount as the Court considers reasonable to meet the expenses of such test be paid by the prosecution.

Section 297-B. Failure of a person to appear for lie detector test.-On the failure of a person to appear before the specified authority for facing lie detector test, at the appointed place, date and time, the Court shall draw adverse inference against the case of that person, after giving such person an opportunity of being heard.

Bail to Approver

The provisions of law at times are very harsh to certain persons. Section 306 (4) of the Criminal Procedure Code, 1973 lays down that an approver shall, unless he is already on bail, be detained in custody until the termination of the trial. In some cases it so happened that even the main accused got bail, but the approver was not granted bail and was continued to be detained in custody as the trial was yet not over. If such a person were otherwise on bail, there is very little likelihood of his turning approver. Thus, the justification generally given in such cases, that detention of an approver in jail is for his own security from other accused persons, is of no relevance. The second justification, that he may not be influenced or pressurized or threatened by the other accused persons, is also not sustainable for the same reasons. Thus, at best an approver may be retained in jail till the completion of his own evidence. It is, therefore, suggested that the provisions of section 306 (4) be appropriately amended as under:

EXISTING PROVISIONS

Section 306 (4). Every person accepting a tender of pardon made under sub-section (1) –

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any:

(c) shall, unless he is already on bail, be detained in custody until the termination of the trial.

PROPOSED AMENDED PROVISIONS

Section 306 (4). Every person accepting a tender of pardon made under sub-section (1) –

(a) ***shall be examined as a first prosecution witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any:***

(b) ***shall, unless he is already on bail, be detained in custody until his evidence is recorded in the trial, if any.***

22
Exemption from Appearance

The criminal trials, particularly involving the VIPs, are long drawn. The trial gets protracted as the VIP accused persons repeatedly file applications seeking exemption from personal appearance, on one ground or the other. If such application is declined, revision petitions are filed against the orders of the Court. Although all citizens, including VIP accused persons proclaim to respect the Courts, and affirm their faith to the principle of equality before law, the actual position is otherwise. The Criminal Courts are awesome for ordinary citizens. The sitting space in such Courts is limited. The accused persons, and many times, even the complainants have to keep standing. Sometimes, all the persons, witnesses, complainants or accused persons, are directed to stand outside the Court. Any citizen would like to avoid such humiliation of appearing in a Criminal Court. However, when it comes to dealing with an application for seeking exemption from personal appearance, the Courts adopt a very strict attitude, and invariably such applications are rejected, except when those are made on medical grounds. With this back ground, let us examine the relevant provisions of Section 317 of the Criminal Procedure Code, 1973, and the proposed amendments.

EXISTING PROVISIONS OF SECTION 317 OF THE CRIMINAL PROCEDURE CODE:

"Section 317. Provision for inquiries and trial being held in the absence of accused in certain cases.-(1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in the Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his

absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused."

It is submitted that where an accused is represented by a pleader, the personal attendance of the accused in the Court is unnecessary. It must be remembered that the accused is also as good a citizen as the private complainant (who is represented by the State), or the prosecution witnesses, and should not be put to unnecessary harassment and humiliation of remaining present in the Court on each and every hearing of the case. It is, therefore, suggested that the existing provisions of section 317 of the Criminal Procedure Code, 1973 be substituted as under, so that the presence of all the accused persons may not be necessarily required on each and every date:-

PROPOSED AMENDED PROVISIONS

"Section 317. Provision for inquiries and trial being held in the absence of accused in certain cases.- .-(1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in the Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

EXPLANATION.- ***If an accused person in a case gives an undertaking to the Court that he may be exempted from personal attendance in the case, and that he shall not raise any objection with regard to the validity of the proceedings in the case that may take place in his absence, the Judge or Magistrate may dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct his personal attendance, if it is necessary in the interest of justice.***

Withdrawl of Cases

In our Country, up teen number of instances can be quoted, where criminal cases were filed for political reasons, and were subsequently withdrawn on account of political compulsions. On certain occasions, with the change of the Government in a State, criminal cases pending against politicians belonging to the ruling party, including the cases under Prevention of Corruption Act and even murder cases are also sought to be withdrawn. The emerging trend is quite dangerous. Section 321 of the Criminal Procedure Code, 1973 lays down that the State Government can withdraw criminal case at any stage before the judgment is pronounced, with the consent of the Court before whom such criminal case is pending. Besides, the distinction between "discharge" and "acquittal" in such cases is hyper-technical, and is required to be removed. In order that withdrawal of criminal cases may not be actuated by extraneous reasons, it is suggested that section 321 of Cr. PC be amended, as under, for making the approval by the High Court a pre-condition for withdrawal of criminal cases by the State Government:-

EXISTING PROVISIONS:

" 321. Withdrawal from prosecution.- The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried, and upon such withdrawal,-

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code, no charge is required he shall be acquitted in respect of such offence or offences:

Provided that where such offence-

(i) was against any law relating to a matter to which the executive power of the Union extends, or

(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946); or

(iii) involved in the misappropriation or destruction of, or damage to, any property belonging to the Central Government; or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty,

and the prosecutor in charge of the case has not been appointed by the Central Government he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from prosecution."

PROPOSED AMENDED PROVISIONS:

" 321. Withdrawal from prosecution.- The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, ***to be given with the prior approval of the High Court,*** at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried, ***and upon such withdrawal, the accused shall be deemed to have been discharged in respect of such offence or offences:***

Provided that where such offence-

(i) was against any law relating to a matter to which the executive power of the Union extends, or

(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946); or

(iii) involved in the misappropriation or destruction of , or damage to, any property belonging to the Central Government; or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty,

and the prosecutor in charge of the case has not been appointed by the Central Government he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from prosecution."

24

Trial for perjury

It is the general experience that the Courts are not inclined to take cognizance of the conduct of the party to the proceedings, under section 340 of the Criminal Procedure Code, 1973, even when serious allegations of perjury are leveled against such party, and instead, they attempt to decide the case on merit, without deciding the issue of perjury, in case its decision is likely to go against the party against whom such allegations of perjury are leveled. In any case, the High Courts are generally not inclined to entertain such applications by the parties against each other, and instead, are inclined to issue notice for criminal contempt of the Court. It is also the position of the Central Administrative Tribunals. The reason is that in such cases, the High Court or Administrative Tribunal, or any other Court, who finds that a prima facie case of perjury has been committed by a person, can not decide the issue of perjury, under section 340, itself. It has to forward such case to a Magistrate of first Class for trial, which lowers the dignity of the Superior Court. It is, therefore, suggested that in the interest of curbing such incidents of perjury, that are taking place in relation to the Court proceedings, section 340 of the Criminal Procedure Code may be amended in the following manner so that the Court, in relation to proceedings before whom an act of perjury has been committed by a person, may have the power to try such an offence itself in a summary manner:-

EXISTING PROVISIONS:

"340. Procedure in cases mentioned in section 195.- (1) When upon an application made to it in this behalf or otherwise any Court is of the opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that

Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,-

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance for the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate."

PROPOSED AMENDED PROVISIONS:

"340. Procedure in cases mentioned in section 195.- (1) When upon an application made to it in this behalf or otherwise any Court is of the opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, ***such Court may, record a finding to that effect, and thereupon proceed to decide the issue in a summary manner as per the procedure laid down under Chapter XXI of this Code."***

NOTE:- In view of the proposed amendment in section 340, the provisions contained in section 343 and 344 of the Code, shall have to be deleted.

25

Compensation to Victims

Let us examine a real fact-situation, reported in the news papers of June 5, 2005, where an accused charged with offences of murder and terrorist activities is convicted and sentenced to life imprisonment for offence under Sction 302 of the Indian Penal Code, and with seven years' imprisonment and a fine of Rs.2000/-for offence under section 3 of the TADA, and to sentence of another ten years for an offence under section 4 of the TADA. It is further directed by the Court that on failure to pay fine, the accused shall be liable to further imprisonment for six months. Whether by awarding these sentences against the accused, the family of the victim has been compensated to a reasonable extent for the loss and injury caused to it by the offence? Obviously, the answer is in the negative. With this back ground, let us examine the relevant provisions of section 357 of the Criminal Procedure Code, 1973.

EXISTING PROVISIONS:

"Section 357. Order to pay Compensation.- (1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment order the whole or any part of the fine recovered to be applied-

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

(c) when any person is convicted of an offence for having

caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reasons to believe the same to be stolen in compensating any bonafide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment order the accused person, to pay, by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) Any order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its power of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section."

It may be submitted that the aforesaid provisions are grossly inadequate in a welfare State like India. The State,

being the custodian of the life and property of all citizens, must compensate the family of the person who incurs loss caused by the offence, within a period of one month from the date of judgment of the Court, convicting the accused, and such compensation may be ordered to be recovered from the accused, by way of fine, if he is convicted of the offence. It is also suggested that instead of recovering compensation as per principles enshrined under the Fatal Accidents Act, 1855, it should be determined and recovered as per principles contained in the Motor Vehicles Act, 1988. The following amendments are, therefore, suggested:-

PROPOSED AMENDED PROVISIONS:

"Section 357. Order to pay Compensation.- (1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment order the whole or any part of the fine recovered to be applied-

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

(c) when any person is convicted of an offence for having caused injuries resulting into loss of limb or resulting into the death of another person or of having abetted the commission of such an offence, the Court shall direct that the victim or his family shall be entitled to compensation , as if it were a case of awarding compensation under the provisions of the Motor Vehicles Act, 1988;

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained,

or of having voluntarily assisted in disposing of, stolen property knowing or having reasons to believe the same to be stolen in compensating any bonafide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court shall , when passing judgment, direct the accused person, to pay, by way of compensation, such amount, ***which may be determined in the manner indicated in clause (c) of sub-section (1),*** to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

Note 1 :- The compensation as envisaged under clause (c) of sub-section (1), and under sub-section (3) shall at the first instance be payable by the State to the victim, or his family members, as the case may be, within a period of one month from the date of conviction of the accused, and shall be recoverable from the accused as arrears of land revenue.

Note 2.- For the purpose of awarding compensation under this section, the offence of rape shall be treated as if it were an offence causing death of the victim of rape.

(4) Any order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its power of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section."

26

Compensation for Groundless Arrest

The provisions contained in section 358 of the Criminal Procedure Code for awarding compensation to a person, whose arrest is found to be groundless, are ridiculous, to say the least, and these provisions may be termed as a slap on the face of a society clamoring for protection of human rights of its members. The provision for compensation "not exceeding one hundred rupees" is a pittance. The sooner this provision is amended, the better will it be for the protection of dignity and honour of our Indian society before the world community, who may have the occasion to read these provisions. It is, therefore, suggested that the provisions contained in this section be amended in the following manner:-

EXISTING PROVISIONS:-

"358. Compensation to persons groundlessly arrested.- (1) Whenever any person causes a police officer to arrest another person, if it appears to the Magistrate by whom the case is heard that there was no sufficient ground of causing such arrest, the Magistrate may award such compensation, not exceeding ***one hundred rupees***, to be paid by the person so arrested, for his loss of time and expenses in the matter, as the Magistrate thinks fit.

(2) In such cases, if more persons than one are arrested, the Magistrate may, in like manner, award to each of them such compensation, not exceeding one hundred rupees, as such Magistrate thinks fit.

(3) All compensation awarded under this section may be recovered as if it were a fine, and, if it can not be recovered, the person by whom it is payable shall be sentenced to ***simple imprisonment*** for such term not exceeding ***thirty days*** as the

Magistrate directs, unless such sum is sooner paid."

PROPOSED AMENDED PROVISIONS:

"358. Compensation to persons groundlessly arrested.- (1) Whenever any person causes a police officer to arrest another person, if it appears to the Magistrate by whom the case is heard that there was no sufficient ground of causing such arrest, the Magistrate may award such compensation, ***not less than ten thousand rupees,*** to be paid by the person so arrested, for his loss of time and expenses in the matter, as the Magistrate thinks fit.

(2) In such cases, if more persons than one are arrested, the Magistrate may, in like manner, award to each of them such compensation, not exceeding one hundred rupees, as such Magistrate thinks fit.

(3) All compensation awarded under this section may be recovered as if it were a fine, and, if it can not be recovered, the person by whom it is payable shall be sentenced to ***rigorous imprisonment*** for such term not exceeding ***six months*** as the Magistrate directs, unless such sum is sooner paid."

27

Costs of Proceedings

The provisions for payment of costs to the complainant, in the event of conviction of the accused, are not being complied with by the Criminal Courts in their true letter and spirit. Otherwise too, on account of the reluctance of the counsels to disclose the fee charged, these provisions have been rendered totally illusory. In view of the fact that the cost of litigation is quite sizeable, it is suggested that the provisions of section 359 of the Criminal Procedure Code, 1973, governing the issue of awarding of costs of litigation to a complainant, be revised in such a manner that the complainant is awarded costs, which should not be less than rupees ten thousand in any case.

EXISTING PROVISIONS:

"359. Order to pay costs in non-cognizable cases.- (1) Whenever any complaint of a non-cognizable offence is made to a Court, the Court, if it convicts the accused, may, in addition to the penalty imposed upon him, order him to pay to the complainant, in whole or in part, the cost incurred by him in the prosecution, and may further order that in default of payment, the accused shall suffer ***simple imprisonment*** for a period not exceeding ***thirty days*** and such costs may include any expenses incurred in respect of process-fees witnesses and pleader's fee which the Court may consider reasonable.

(2) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision."

PROPOSED AMENDED PROVISIONS:

"359. Order to pay costs in non-cognizable cases.- (1) Whenever any complaint of a non-cognizable offence is made

to a Court, the Court, if it convicts the accused, may, in addition to the penalty imposed upon him, order him to pay to the complainant, in whole or in part, the cost incurred by him in the prosecution, and may further order that in default of payment, the accused shall suffer ***rigorous imprisonment*** for a period not exceeding ***six months***, and such costs, ***which in any case shall not be less than rupees ten thousand***, may include any expenses incurred in respect of process-fees witnesses and pleader's fee which the Court may consider reasonable.

(2) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision."

28

Release on Probation

Section 360 of the Criminal Procedure Code, 1973 confers unguided discretion on the Court to release a convict on probation. The provisions of this section are, therefore, required to be amended. Besides, the purview of the cases covered under this section requires to be extended to all those cases where the offence is punishable with imprisonment for a term up to and inclusive of ten years otherwise a number of offences, which are committed by a person at the spur of moment, without pre-meditation, and for which such person is liable to imprisonment for a term of ten years, would be left out. It is also to be noticed that under the present provisions, the persons falling under the purview of section 360 are either released on probation, or are left to suffer conviction, even though those cases may be border-line cases. It is, therefore, suggested that to give some respite to the persons whose cases are not considered fit for release on probation of good conduct, the provisions of section 360 of the Criminal Procedure Code, 1973 should be amended as under:-

EXISTING PROVISIONS:-

"360. Order to release on probation of good conduct or after admonition.- (1) When any person not under twenty one years of age is convicted of an offence punishable with fine only or with ***imprisonment for a term of seven years or less***, or when any person under twenty one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court

may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour;

Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of the opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class forwarding the accused to or taking bail for his appearance before such Magistrate, who shall dispose of the case in the manner provided by sub-section (2).

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub-section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code (45 of 1860) punishable with not more than two years' imprisonment or of any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(4) An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its power of revision."

PROPOSED AMENDED PROVISIONS:-

"360. Order to release on probation of good conduct or after admonition.- (1) When any person not under twenty one years of age is convicted of an offence punishable with fine only or with ***imprisonment for a term of ten years or less***, or when any person under twenty one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour;

Provided that in all other cases covered under this sub-section for consideration for release on probation, and where the Court did not order the release of a person on probation of good conduct, the Court before whom such person is convicted, shall direct that the sentence of imprisonment shall not be given effect till the decision of appeal, if any, that may be preferred by such person against the sentence of imprisonment, and where no appeal is filed by such person, till the period of filing appeal is over.

Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the

High Court, and the Magistrate is of the opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class forwarding the accused to or taking bail for his appearance before such Magistrate, who shall dispose of the case in the manner provided by sub-section (2).

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub-section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code (45 of 1860) punishable with not more than two years' imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(4) An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its power of revision."

29

Suspension of Conviction

Section 389 of the Criminal Procedure Code, 1973 empowers an Appellate Court to suspend the sentence pending hearing of the appeal and to release the appellant on bail. Due to interpretation of these provisions by the Supreme Court of India in certain cases, the words "*sentence*" and "*conviction*" have to be distinguished by amending these provisions. Besides, in the light of far-reaching suggestions having been made in the preceding Chapter for amending section 360 of the Code, the provisions contained in this section, regarding the powers of the Appellate Court to suspend the sentence, and to release the appellant on bail, have also to be accordingly modified. The existing provisions are very harsh, and lead to burdening the Appellate Courts with bail applications. Under existing law, the Appellate Courts are reluctant to suspend conviction. The employees are the biggest sufferers, as in their cases the suspension of sentence does not have much significance, and even where sentence is suspended; such employees are removed from service during the pendency of appeal against conviction. In our country, there is no provision for awarding compensation to such employees, on their acquittal by the Appellate Court. This does not augur well with a society governed by rule of law. It is, therefore, suggested that the following amendments be carried out in the provisions contained in Section 389 of the Criminal procedure Code, 1973:-

EXISTING PROVISIONS:-

"389. Suspension of sentence pending the appeal, release of appellant on bail.- (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,-

(a) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years; or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail,

order that the convicted person be released on bail unless there are special reasons for refusing bail for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1), and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended."

PROPOSED PROVISIONS

"389. Suspension of sentence pending the appeal, release of appellant on bail.- ***(1) Pending any appeal by a convicted person, the Appellate Court may, and in cases where the Court before whom the appellant was convicted, had ordered that the sentence awarded by it shall not be executed till the decision of the appeal, if any, that may be preferred by him in the Appellate Court, such Appellate Court may, for reasons to be recorded in writing, order that the execution of conviction or the order appealed against be suspended and also, if he is in confinement, that he be released on bail, or on his own bond.***

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by convicted person to a Court subordinate thereto.

(3) ***(recommended to be deleted).***

30

Bail without Bail-Bonds

Section 436 of the Criminal Procedure Code, 1973 empowers a Magistrate to direct the release of an accused person, arrested for a non-bailable offence, on bail subject to his furnishing a bail, or executing a bond without sureties. But these provisions are inappropriate for a new category of accused persons, who secure entry into a jail by deliberately committing some crime, so as to get two square meals a day. The strength of the members of this category is likely to rise once the process of jail reforms, leading to service of good quality food to the prisoners, is completed. Recently, there was a news story on a T.V. Channel, about one crippled person, *Saleem*, who deliberately threw his sleeper on the Judge in a Court, with the object to get re-entry into jail, and he succeeded in his mission. He confessed before T.V. cameras that in the outside world, he was unable to feed himself, as even his family members were not ready to look after him, after his both legs were imputed in an accident, and his case for compensation was also not being decided. Besides, there is another class of persons, namely political prisoners, arrested during some agitation etc., who also sometimes declare their resolve not to furnish bail bonds, and remain adamant on seeking unconditional release, with the result that either they have to be kept in judicial custody, or to be released unconditionally. A way has to be found for releasing such persons, on bail, without insisting on furnishing bail bonds. As a matter of fact, none of the persons in these two categories is likely to abscond, if released on bail, without furnishing bail bonds. Thus, for rectifying the defects in our judicial system, it is suggested that the provisions contained in section 436 of the Cr. PC may be amended as under:-

EXISTING PROVISIONS:

"Section 436. In what cases bail to be taken. – (1) When any

person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail:

Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as herein after provided:

Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 116 or section 446A."

PROPOSED AMENDED PROVISIONS:

"Section 436. In what cases bail to be taken. – (1) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in custody of such officer or at any stage of the proceedings before such Court to give bail, ***and except in cases where the Magistrate is satisfied that grounds exist for releasing such person on bail without insisting on furnishing bail, or executing a bond,*** such person shall be released on bail:

Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as herein after provided:

Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 116 or section 446A."

31

Anticipatory Bail

The Courts do not have any thermometer for knowing as to whether the person seeking anticipatory bail has actually committed the offence or not. Consequently, the persons who have committed serious crime also succeed in getting anticipatory bail, and thereby avoid arrest. The methods of interrogation adopted by the police in our country are so outmoded and obsolete that once an accused succeeds in avoiding police custody, he does not disclose the truth to the police. Thus, the grant of anticipatory bail to an undeserving person causes untold harm to the judicial system. It is, therefore, suggested that the provisions of section 438 of the Criminal Procedure Code, 1973 be amended as under, so as to empower the Court of Session, or for that matter, the High Court, to direct the person seeking anticipatory bail to appear for a lie detector test, for knowing the veracity of the pleadings made by him in his application for such anticipatory bail:-

EXISTING PROVISIONS:

"Section 438. Direction for grant of bail to person apprehending arrest.-(1) When the person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for direction under this section,; and the Court may, if it thinks fit, direct that in event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including-

(a) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(b) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(c) a condition that the person shall not leave India without the previous permission of the Court;

(d) such other conditions as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

(2) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1)."

PROPOSED AMENDED PROVISIONS:

"Section 438. Direction for grant of bail to person apprehending arrest.-(1) When the person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for direction under this section; and the Court may, if it thinks fit, direct that in event of such arrest, he shall be released on bail.

Provided that the High Court or the Court of Session, as the case may be, may direct such person to appear for a lie detector test, for arriving at a prima facie conclusion about

the veracity of the pleadings made by him in his application for bail, before passing any order on such application.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including-

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other conditions as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

(2) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1)."

Jumping the Bail

The 'Times of India" in its issue of May 14, 2005 reported about incident of jumping bail by a hardened criminal, and his re-arrest by police. Cops from Sector 11, Chandigarh Police Station had arrested Gurnaib Singh of Dhanas village who was an electrician employed at the cremation ground and had jumped bail after he was booked for an attempt to commit suicide back in November, 2001. During the period he jumped bail, he was attending to his duties in the cremation ground. Gurnaib, a habitual drunkard, often used to quarrel with his wife. After one such quarrel, in a fit of anger, he gulped some poisonous substance but was saved. He was arrested on charges of a suicide bid, but was released on bail which he jumped repeatedly. Last year, a court declared him proclaimed offender, though local police throughout knew that he was living in Dhanas and attending to his duties.

The provisions of section 439 of the Criminal Procedure Code, 1973 require certain amendments, for considering the opinion of Jail Supdt. before releasing any under-trial on bail, so that only the prisoners with good conduct may be granted bail, so as to reduce the incidents of jumping the bails by the persons in jails. A Proviso is required to be added below section 439 (1) of the Code. The existing provisions of section 439, along with the proposed amendments **(in *italics)*** are given hereunder:-

"439. Special powers of High Court or Court of Session regarding bail.-

(1) A High Court or Court of Session may direct-

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section.;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall call for the opinion of the Jail Superintendent, before releasing any person in judicial custody on bail.

Provided ***further*** that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice."

h.c. arora

ABOUT THE BOOK

This book is a collection of thoughts that occured to the author during meditative thinking about the problems of the Nation.

ABOUT THE AUTHOR

The author of this book is a disciple of Swami Vishvasji, and has no other qualification.

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