GOVERNMENT OF INDIA

LAW COMMISSION OF INDIA

# ONE HUNDRED AND SEVENTY EIGHTH REPORT

ON

# RECOMMENDATIONS FOR AMENDING VARIOUS ENACTMENTS, BOTH CIVIL AND CRIMINAL

DECEMBER 2001

December 14, 2001

D.O. No. 6(3)(73)/2001-LC(LS)

Dear Shri Jaitley,

I am herewith forwarding the 178th Report containing recommendations for amending various enactments, both civil and criminal. Such a course was adopted in the Law Commission for the reason that there are quite a few provisions in civil and criminal enactments which require urgent attention and amendment. For example, amendment of several provisions are called for in Hindu Adoptions and Maintenance Act, Civil Procedure Code and Criminal Procedure Code. If we take each of these enactments for a comprehensive study and report, it would have taken a long time whereas here are amendments which are urgent in nature. Moreover, the Law Commission had prepared and sent a full report on Code of Criminal Procedure as recently as 1996. The amendments recommended herewith pertain to:

1) Section 35, Stamp Act
2) Section 58(c), Transfer of Property Act
3) 0.20 R.12 and 0.20 R.18 of CPC
4) 0.34, CPC
5) Section 69(2), Partnership Act
6) Section 306, Indian Succession Act & Section 166, Motor Vehicles Act

7) 0.38 R.5, CPC

8) Section 58(f), Transfer of Property Act & other amendments

9) Insertion of sections 89B, 89C and 89D in Transfer of Property Act

10) Section 34, CPC

11) Section 19, Hindu Marriage Act

12) Section 125, CrPC

13) Problem of hostile witnesses

14) Sections 161, 162 and 173(5), CrPC

15) Section 174, CrPC

16) Chapter XIX, CrPC

17) Section 424A, Indian Penal Code

18) Section 424B, Indian Penal Code

19) Revenue Recovery Act, purchase by government

I am sure the Government would bestow immediate attention to these amendments which, if implemented, would go a long way in meeting the interests of justice.

With warm regards,

Yours sincerely,

(B.P. Jeevan Reddy)

Shri Arun Jaitley,
Union Minister for Law, Justice
And Company Affairs,
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# CONTENTS

## Annexure

## INTRODUCTORY

The attention of the Commission has been drawn by several Jurists and Organizations to certain specific provisions in various statutes, both civil and criminal, which require immediate amendment. The Commission gave serious consideration to their requests and felt that having regard to the urgency for their amendments, it will be advantageous if these are taken up immediately rather than wait for an occasion when a review of the entire statute in each of these cases is taken up. That is the reason why the Commission has taken up amendments of these specific provisions in various enactments and is submitting this Report. The list of the Sections in various statutes in regard to which amendments are proposed is given below:

**(1). Section 35 of Stamp Act, 1899:** Bills of Exchange and Promissory notes to be admissible even if stamp duty is deficient. Payment of Penalty or stamp duty to be made applicable to these instruments also for validating them.

**(2). Section 58 ( c ) of the Transfer Of Property Act, 1882:** Mortgage by conditional sale- conveyance and agreement of reconveyance in separate deeds- Right to seek reconveyance within three years recommended.

**(3). Order XX Rule 12 and Order XX Rule 18:** Making it mandatory that evidence as to mesne profits, rents up to the date of commencement of trial should be adduced at the trial.

**(4). Sec 424 A Indian Penal Code, 1860:** Failure to inform transferee of immovable property regarding prior transactions to be punishable.

**(5). Sec 424 B Indian Penal Code, 1860:** Failure to inform transferee of immovable property about pendency of litigation to be punishable.

**(6). Sections 6 and 6 A of the Revenue Recovery Act, 1890:** Enabling Government or the public authority to whom moneys are due from the defaulter, to purchase when bidders are not forthcoming in regard to public auction of immovable property.

**(7). Sec 79 of Negotiable Instruments Act, 1881:** Interest at contract rate to be payable up to date of suit and not after suit.

**(8). Sec 34 of Code of Civil Procedure 1908:** Maximum rate of interest pending suit and thereafter raised from 6 % to 12 % p.a.

**(9). O XXXIV Code of Civil Procedure, 1908:** Procedure for passing Preliminary decree deleted (as done by the Kerala Amendment).

**(10). Order XXXVIII Rules 5 and 6 Code of Civil Procedure, 1908:** Interim attachment before judgment to be made without prior notice and attachment before Judgment to be made only after prior notice.

**(11). Sec 89 A of Registration Act, 1908:** Notice to be sent to Registration Offices regarding attachments and decrees related to immovable property- Notice to be registered.

**(12). Sec 89 B of Registration Act, 1908:** Notice to be sent to Registration Offices regarding mortgage by deposit of title deeds- Notice to be registered.

**(13). Sec 84 A of Registration Act, 1908:** Failure to send notice under Section 89 B to be punishable.

**(14). Sec 89 C of Registration Act, 1908:** Rules to be made for purpose of section 89A, 89B.

**(15). Sec 306 Indian Succession Act, 1925:** Claims for damages for injury not to abate on death of injured claimant.

**(16). Sec 69 Partnership Act, 1932:** Prohibition from suing in subsection (2) to apply only if right to sue has arisen out of a contract entered in the course of business.

**(17). Sec 19 Hindu Marriage Act, 1955:** Wife enabled to present petition where she is residing.

**(18). Sec 18 Hindu Adoption & Maintenance Act, 1956:** Right of woman to maintenance where husband's previous marriage with another woman was not disclosed.

**(19). Sec 125 of Code of Criminal Procedure, 1973:** Right to maintenance by wife who is divorced and not married or where the marriage is void in certain circumstances.

**(20). Sec 164, 162 , 173 (5) of Criminal Procedure Code, 1973:** Section 161 statements –copies to be given to persons who made statement and statements to be sent forthwith to the Magistrate.

**(21). Sec 164 of Criminal Procedure Code, 1973:** In the case of investigation in to offences punishable with more than 10 years imprisonment or death, Magistrate to record statement and the statement of witnesses straight away to be treated as evidence.

**(22). Sec 174 of Criminal Procedure Code, 1973:** Statements during inquest to be forwarded to Magistrates forthwith.

**(23). Sec 207A, 239 (Ch XIX) of Criminal Procedure Code, 1973:** Procedure in case of complaint by public servants simplified to permit speedier trials in economic offence cases, etc.

**(24). Sec 166 Motor Vehicles Act, 1988:** Claim for damages by injured persons not to abate on death of injured claimant.

**(25). Sec 217 Motor Vehicles Act, 1988:** Pending claims by injured persons under Motor Vehicles Act, 1939 not to abate on death of injured claimant.

The afore said 25 subjects are being dealt under the under mentioned 19 heads.

**1.Section 35 of the Stamp Act, 1899 & 'Bills of exchange on promissory notes':**

The opening part of sec. 35 of the Stamp Act, 1899 provides as follows: 'No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authorized to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless the instrument is duly stamped'.

Clauses (a) to (e) of the proviso to the above sec. 35 contain provisions which permit the instrument to be used as evidence upon payment of the stamp duty in full (where it is unstamped) or upon payment of the deficient stamp duty (where there is deficiency in the stamp duty) and the proviso permits the collection of penalty up to a maximum of ten times the stamp duty or the deficiency, as the case may be. Levy of penalty is of course discretionary.

However, clause (a) of sec. 35 does not permit the validation of the instrument as stated above, in the case of 'a bill of exchange or promissory note'. The result is that while in regard to all other instruments there is a procedure prescribed for subsequent validation of the instrument by collection of the stamp duty or penalty, such a procedure is not available in the case of "bills of exchange and promissory notes". Even if the party who wants to use it as evidence is prepared to pay the stamp duty and penalty, he is not allowed to do so, so far as these instruments are concerned. The document become 'waste paper'. On account of this rigid procedure applied only to "bills of exchange and promissory notes", several debtors are allowed to escape liability unjustly.

The Indian courts have also not been able to render justice in such cases where one party relies upon a "bill of exchange or promissory note" which is not stamped or is deficiently stamped. In addition, the provisions of sec. 91 of the Evidence Act also come in the way and preclude oral evidence being adduced in such cases. This is clear from illustration (b) below section 91 of the Evidence Act.

These disabilities have led to a large volume litigation in courts. The Privy Council, the Supreme Court and the High Court have declared their helplessness in getting over these provisions of sec. 35 in so far as they disable validation of "bills of exchange and promissory notes". The result is that these instruments are not allowed to be used as evidence 'for any purpose'.

In one novel case in the Andhra Pradesh High Court during the time when our currency shifted from the old system of "rupees, annas and paise" to the present system of 'naya-paise', a promissory note which had to bear a stamp duty of 4 annas under the Stamp Act was executed on a document bearing stamp duty of 'twenty four' naya-paise on the undertaking that each anna was equal to six naya paise. But, under the new system, the correct equivalent of 4 annas was 25 paise, and the suit was dismissed on the ground of deficiency of stamp duty of one naya paisa. The law never changed. In fact, a special bench of seven Judges of the Andhra Pradesh High Court in L. Sambasivarao vs. Balakotaiah AIR 1973 AP 343 (FB) affirmed an earlier judgment of five Judges of the Madras High Court in Perumal Chettiar vs. Kamakshi Ammal (AIR 1938 Mad 785 (FB)). The judgment of the Andhra Pradesh High Court is exhaustive and refers to the entire cased law on the subject. In fact it refers to 133 decisions of various courts. The question is whether this injustice which is the result of the Act of 1899 is to be remedied by enabling the deficiency to be paid, with or without penalty, as may be decided by the competent authority.

In some cases, courts invented various theories to grant relief, by holding that the 'bill of exchange or promissory note' was a collateral security or that it did not contain all the terms of the contract and therefore sec. 91 of the Evidence Act could not exclude oral evidence. In some other cases, Courts have stated that there could be an action on the debt. However, whenever such pleas of inadmissibility are raised, there is

unending litigation and uncertainty. A party would not know if any such plea would ultimately be accepted for getting over the rigid posture of sec. 35 of the Stamp Act and the equally strict rule in sec. 91 of the Evidence Act.

In our view, justice to those who have parted with money under a bill of exchange or a promissory note, requires that this provision in sec. 35 be deleted and that the procedure for paying up the stamp duty or penalty, is made applicable to these instruments also. That will further augment the revenues of the State. Such a procedure will also eliminate unnecessary disputes as to whether the plaint can be amended by permitting the plaintiff to sue on the debt and also eliminate disputes as to admissibility of oral evidence.

The Commission, after due consideration of various aspects, namely, rendering justice to those who have parted with money, the benefit that will accrue to the State by way of collection of stamp duty or penalty, and elimination of unnecessary disputes, is of the considered view that in the proviso (a) of sec. 35 of the Stamp Act, 1899, the words

"any such instrument not being an instrument chargeable with a duty not exceeding ten naya paise only, or a bill of exchange or promissory note, shall subject to all just exceptions be admitted in evidence", the words "any such instrument shall be admitted in evidence", shall be substituted

It is also proposed to give limited retrospective operation to this amendment in all cases where proceedings before the courts or authorities referred to under sec. 35 have not reached finality.

## 2. Section 58(c): mortgage by conditional sale :

It has been brought to the notice of the Commission that in several cases, persons entering into a "mortgage by conditional sale" are put to serious problems. Under such a mortgage, the person who borrows money from another, under a mortgage , executes an ostensible sale deed and an agreement of reconveyance, but the intention of the parties is that it is to be treated as a mortgage.

Under the proviso to sec. 58(c) inserted by the legislature in 1929, only when the agreement of reconveyance is contained in the deed of ostensible sale, is the transaction treated as a mortgage. Several owners who are under financial pressure fall into a trap when the two documents are obtained separately by the purchaser. In that event, because of the proviso to Sec.58(c) there is no mortgage in the eye of the Law and hence no right of redemption. There is only a right to obtain a reconveyance.

In a mortgage it is obvious that the full consideration is never paid. But when, in law, the transaction when it is covered by two deeds is treated not as a mortgage but as a sale, the purchaser gets the property for half the price or even less and the original owner is unable to get back the property by way of redemption. The Commission proposes to examine and remedy the situation.

Under sec. 58(c) of the Transfer of Property Act, it is stated as follows:

> "Section 58(c): Mortgage by conditional sale: where the mortgager ostensibly sells the mortgage property –
>
> > on a condition that on default of payment of the mortgage on a certain date, the sale shall become absolute, or
> >
> > on condition that on such payment being made, the sale shall become void, or
> >
> > on condition that on such payment being made, the buyer shall transfer the property to the seller,
>
> the transaction is called a mortgage by conditional sale and the mortgage, a mortgage by conditional sale:
>
> Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale."

As already stated, the proviso was introduced in 1929 into the statute and has been the source of considerable injustice to unwary mortgagors.

One would think that the best solution could be to straightaway drop the proviso. In fact, the West Bengal legislature incorporated sec. 37A into the Bengal Money Lenders Act to say that "in the case of any loan secured by a mortgage and the mortgager ostensibly sells the mortgaged property on any of the conditions specified in sub clause (c) of sec. 58 of the Transfer of Property Act, then, notwithstanding anything contained in the proviso to sec. 58(c), the transaction shall always be deemed to be a mortgage by conditional sale, even if the transaction is effected by two separate deeds" viz., the ostensible sale deed and the agreement of reconveyance.

But the question is whether there can be any other remedy to enable the original owner to get back his property.

Before going into the question, it is necessary to notice that in law, it does not follow that if the stipulation for reconveyance is embodied in the same document, the transfer is necessarily a mortgage (see Pandit Chunchun Jha vs. Sheik Ebadat Ali AIR 1954 S.C. 345). The Supreme Court held that the party who claims the deed to be a mortgage, must discharge the burden by establishing that a mortgage was intended and not a sale. Thereafter, it would be open to the other side to show that it was intended to be a sale and not a mortgage.

But where the sale and reconveyance are embodied in separate documents, proviso to sec. 58(c) states that the transaction cannot be a mortgage by conditional sale. Further, oral evidence would also remain

prohibited under sec. 92 of the Evidence Act to show that the transaction was intended to be a mortgage by conditional sale.

We shall now consider what remedies can be provided by amendment of the Law.

Where the sale and reconveyance are contained in different documents, though the plea of mortgage is thus ruled out altogether, the original seller can get back the property by seeking specific performance of the reconveyance agreement if he complies with the conditions referred to in sec. 58(c) within the time stipulated. Such a case does not present any difficulty.

The difficulty arises only in a case where the original seller has not been able, may be for good reasons, to comply with the said conditions within the time stipulated. Does the principle that time is not the essence of the contract in the case of contracts relating to immoveable property have any bearing on this question?

Section 55 of the Contract Act states that "when a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time shall be of the essence of the contract."

True, so far as contracts of sale of immovable property are concerned it is settled by the decision of the Privy Council in Jamshedji vs. Burjorji: AIR 1915 PC 83 that there is a presumption that time is not the essence of the contract. But, this is a rebuttable presumption and it is always open to a party to say that there were circumstances in existence at the time the contract which was entered into which make it clear that the intention of the parties was that time should be the essence of the contract. Take a case of a contract of sale of immovable property where an owner has fixed up the marriage of his daughter and proposes to sell the property and use the consideration for the marriage expenditure and where the purchaser agrees to pay the consideration well before the date of marriage. In such a case, the said fact may be prima facie evidence that the date fixed for payment of consideration was the essence of the contract.

But the law, so far as contracts of reconveyance are concerned is different. It has been held by the Federal Court, following the English law, that in such contracts, the conditions stipulated for getting back the property are in the nature of a concession granted to the seller by the purchaser and that if the conditions are not performed within the time stipulated, the concession lapses. In other words, time is always the essence in contracts of reconveyance relating to immovable property (see Shanmugham Pillai vs. Annalakshmi Ammal: AIR 1950 F.C. 38) and Caltex (India) Ltd. vs. Bhagwan Devi (AIR 1969 S.C. 405) and Bismilla Begun vs. Rehnitullah Khan (1998(2) SCC 226).

Therefore, the legal position is that where the sale and reconveyance are in separate documents and the original seller is not able to comply with the conditions specified in sec. 58(c) for seeking reconveyance, the 'concession' lapses and the right to obtain reconveyance comes to an end. The principle that time stipulations are not normally the essence in contracts relating to immovable property, does not apply.

In the case of an ordinary agreement of sale (i.e. other than revonveyance agreements), the dates fixed for payment of consideration etc. are, in law, not the essence of the contract, the agreement continues to be in force, and therefore parties could issue notices making time essence of contract. It is only in cases where there is default even by the date so fixed under the notice that, the agreement will come to an end. But that is not the position in the case of agreements of reconveyance where the contract to reconvey simply lapses because of the default.

If, therefore, by default in conforming to the conditions, the contract for reconveyance itself ceases to exist, there is no question of seeking specific performance of such a contract of reconveyance nor any question of issuing a notice making time essence of the contract nor of filing a suit for specific performance within 3 years from the date of refusal to perform the contract or within three years of any stipulated date. Once the contract of reconveyance ceases to be in existence, the question of filing a suit within the time prescribed in Art. 54 of the Limitation Act, 1963 for seeking

specific performance, does not, therefore, arise. (see Pattay Gounder vs. P.L. Bapuswami)(AIR 1961 Mad 276).

It is these legal principles that have to be kept in mind before proposing any remedy other than dropping the proviso in sec. 58(c).

First, we have to make a provision that the concession regarding reconveyance does not lapse due to non-performance of the conditions before the stipulated date or dates by the seller, where the sale and reconveyance are covered by separate documents. Next, we have to make a provision giving time to the seller to pay up or deposit in a court, the consideration, if need be, with interest from the date of default, to get back the property.

It is, therefore, proposed to add a further proviso in section 58(c) that where the sale and reconveyance are in separate documents, the default in complying with the conditions stipulated for reconveyance will not ipso facto put an end to the contract of reconveyance and that the right to seek reconveyance can still be exercised. It is also proposed to provide that if the consideration is paid back within three years from the date stipulated in the condition, together with interest on the amount of consideration at 12% per annum, computed from the date fixed for payment, till the date of payment, the seller could seek reconveyance.

The Commission is of the view that a second proviso be added below sec. 58(c) as follows:

> "Provided further that where the condition is embodied in a document other than the one which effects or purports to effect the sale, the concession granted in favour of the seller by the purchaser for obtaining a re-conveyance of the property, shall be deemed to have not lapsed on account of non performance of the condition by the date stipulated, and if the seller pays to the buyer or deposits in a court, the consideration referred to in the sale-deed within three years of the date stipulated in the condition, together with interest at twelve percent. computed from the said date up to the date of payment or deposit, as the case may be, he shall be entitled to re-conveyance of the property."

**3. Order 20 Rule 12 and Order 20 Rule 18 of the Code of Civil Procedure :**

(a) Order 20 Rule 12:

Order 20 Rule 12 of the Code refers to the manner in which a decree may be passed in a suit for possession of immovable property and for rent/ profits. Sub clauses (a) to (c) of sub section (1) and sub section (2) of 020 R12 refer to the procedure as follows:

"R.12 Decree for possession and mesne profits.- (1) Where a suit is for the recovery of possession of immoveable property and for rent or mesne profits, the Court may pass a decree –

(a) for the possession of the property;

(b) for the rents which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent;

(ba) for mesne profits or directing an inquiry as to such mesne profits;

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until -

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under Clause (b) or Clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

In practice, in most courts, a decree is passed for possession and so far as past or future rents or mesne profits are concerned, an inquiry is directed. Usually, this inquiry hangs on for years in as much the court appoints advocate commissioners, they give reports after recording evidence, the objections are heard by the courts and a final decree is later passed after several years. Experience shows that once a decree for possession is passed and preliminary decree for the rents/ mesne profits is passed, the matter is not given importance and final decrees usually take 5 years or more to be passed after the preliminary decree. The suit might have been pending for years earlier and if profits or rents are ascertained long after the preliminary decree, the delay leads to serious injustice.

Now when a suit for possession comes up for trial, if the parties are compelled to adduce evidence not only in regard to their right to possession but also in regard to the rents or mesne profits for the period prior to suit (if any) up to the date of commencement of the trial, (which normally takes place several years after the institution of the suit) and if the Court of first instance is required to record findings on the rents and profits that may be payable to the plaintiff for the period prior to suit up to the date of

commencement of trial, irrespective of whether the Court of first instance is passing a decree for possession or not, such evidence and such findings which are on record will be for the benefit of the parties, in the event of any of the appellate courts subsequently setting aside a dismissal of the suit and granting a decree for possession. In other words, there will be evidence and findings on record in regard to the income or mesne profits payable to the plaintiff for the period prior to the suit up to the date of commencement of the suit and again up to the date of commencement of trial and these findings will be given by the Court of first instance even if it is not granting a decree for possession. In case any appellate court grants a decree for possession the evidence and the findings in regard to the income or mesne profits will enable the appellate court to pass appropriate orders in regard to such income or mesne profits.

In fact, it is a practice for courts in several States to record evidence of rents or mesne profits, at the trial, and give findings thereon, irrespective of whether a decree for possession is passed or not.

It is well settled that a decree can be partly preliminary and partly final. Even in the case of suits for possession there may be more than one decree for possession where for example parties agree or there is no contest with regard to some items of the property. In such cases there can be more than one decree for possession and more than one preliminary decree in regard to inquiry into rents or mesne profits of different items of property. Sometimes the inquiry into rents or mesne profits may be done separately

for different periods of time. That is why it is stated that there can be more than one preliminary decree or more than one final decree.

We therefore propose to substitute the following provision for Order 20 Rule 12:

**Decree for possession and mesne profits**

> "**12.** (1) Where a suit is for recovery of possession of immovable property and for rents or mesne profits, the parties shall, in addition to adducing evidence in the Court of first instance, as to their right to possession, adduce evidence also in regard to the rents or mesne profits for the period prior to the institution of the suit (if any claimed), up to the date of commencement of trial and the said Court shall, irrespective of whether a decree for possession is passed or not, record findings as to the rent or mesne profits that may be payable to the plaintiff for the aforesaid period, in the event of a decree for possession being passed..
>
> (2) The Court may pass a decree –

(a) for possession of the property;

(b) for the rents or mesne profits which have accrued on the property during the period prior to the institution of the suit up to the date of commencement of trial;

(c) directing an inquiry into the rents or mesne profits from the date of commencement of trial until,

(i) the delivery of possession to the decree holder; or
(ii) the relinquishment of possession by the judgment debtor with notice to the decree holder through the Court or

(iii) the expiration of three years from the date of the decree whichever event first occurs.

(3) Where an inquiry is directed under clause (c) of sub-rule (2), a final decree in respect of the rents or mesne profits, shall be passed in accordance with the result of such inquiry.

(4) Where an appellate Court orders an inquiry as stated in clause (c) of sub rule (2), it may direct the Court of first instance to make the inquiry and in every case, the Court of first instance may, of its own accord and shall, whenever moved to do so by the decree holder, inquire and pass a final decree.

(5) A decree may be partly preliminary and partly final and there may be more than one preliminary decree and more than one final decree."

(b) Order 20 Rule 18:

Similarly in a partition suit, at the stage of preliminary decree the quantum of share and the items of property which are partable, are ascertained initially and under Order 20 Rule 18(2) a preliminary decree is passed together with a direction for accounts to be taken.

Order 20 Rule 18 reads as follows:

"Rule18. Decree in suit for partition of property or separate possession of a share therein.- Where the Court passes a decree for

the partition of property or for the separate possession of a share therein, then,-

(1) …….

(2) If and so far as such decree relates to any other immoveable property or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required."

The words in Order 20 Rule 18(2): "giving such further directions as may be required" are the source of the power of the Court to direct accounts to be taken.

In some cases, the plaintiff might have been out of possession of the entire joint property or might have been in possession of a small portion thereof or of an item which produced no income. Another party might have been possession of the whole property or an item which yielded income in excess of his share.

Experience shows that when under Order 20 Rule 18(2) a preliminary decree directs accounts to be taken subsequently, the final decree regarding the rents/profits collected by other parties is normally passed several years after the preliminary decree. This again leads to lot of injustice.

When a suit for partition is filed, the parties may seek partition of movable as well as immovable property and also in regard to the income arising from various items of property prior to the suit, pending the suit until the property is divided by metes and bounds and delivered.

The current practice in several courts is to relegate the inquiry into the income to a stage after the passing of the preliminary decree for partition. Where the preliminary decree is passed after several years either by the Court of first instance or by the appellate Court, the inquiry into the income gets indifferently delayed. But if the parties are compelled to adduce evidence in regard to income, in the Court of first instance, for the period prior to the date of filing of the suit and up to the date of commencement of the trial, and if the trial Court is compelled to give findings as the share of the various parties in the said income, irrespective of whether a decree for partition is passed or not, the said evidence and the findings can help an appellate Court to give appropriate findings on the question of income, in the event of the appellate Court granting a preliminary decree for possession.

As stated in the discussion under Order 20 Rule 12, similarly in the case of partition suits also there can be more than one preliminary decree and more than one final decree such as where a preliminary decree for partition is first passed in regard to admitted or non contested items and a separate preliminary decree for partition is passed in regard to contested items. Similarly in the case of inquiry into the income from the joint property, there can be more than one inquiry such as where one inquiry relates to certain properties while other inquiries relate to other properties, or where inquiries deal with income during different periods of time. Further a decree can be partly preliminary and partly final.

So far as the inquiry into the income from the date of commencement of trial up to the date of delivery of the property, that can be relegated to a separate inquiry.

In fact, in some courts in some States, it is the practice to ascertain rents/profits upto the date of the preliminary decree straightaway when the preliminary decree is passed.

It is therefore proposed to substitute the following provision for sub section (2) of Order 20 Rule 18:

"Order 20 Rule 18: (1) ……...

(2)(a) If and so far as such decree relates to any movable or immovable property, the parties shall, in addition to adducing evidence in the Court of first instance as to their right to partition, adduce evidence also in regard to the income for the period prior to the institution of the suit (if any claimed), upto the date of commencement of trial and the said Court shall, irrespective of whether a preliminary decree for partition is passed or not, record findings as to the share of income that may be payable to the plaintiff or other parties for the aforesaid period, in the event of a preliminary decree for partition being passed.

(b) The Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required for partition of the property by metes and bounds and direct that an inquiry into the income from the property from the date of commencement of the trial shall be made.

(c) Where inquiry is directed under sub-clause (b), parties may adduce evidence in regard to the division of the property by metes and bounds

and also in regard to the income from the property for the period from the date of commencement of the trial and the Court shall pass a final decree in regard to the partition of the property by metes and bounds and the allotment thereof and also in regard to the share of the income to which each of the parties is entitled for the period prior to institution of the suit, and for the period during the pendency of the proceedings, upto and until the date of delivery of the property.

(d) Where a preliminary decree for partition is passed by an appellate Court and an inquiry is directed to be made under sub-clause (b), the said Court may direct the Court of first instance to make the inquiry and in every case, the Court of first instance may of its own accord and shall, whenever moved to do so by any of the parties, inquire and pass a final decree.

(e) A decree may be partly preliminary and partly final and there may be more than one preliminary decree and more than one final decree."

4. **Certain transfers by to be punishable- Insertion of section 424 A in the Indian Penal Code( 45 of 1860):**

In the last three decades, there is a surge in real estate transactions all over the country. Sale of land, construction of multi-storied buildings and sale of flats has become a common feature in every city or town. Along with this business, malpractices have also increased. Builders purchase land or enter into development agreements with owners of land. They then enter into agreements of sale with prospective buyers in respect of the land or in respect of buildings or flats already constructed or proposed to be constructed. In the process, some unscrupulous builders enter into agreements with more than one purchaser in respect of the same premises constructed, or proposed to be constructed. While entering into such transactions, they do not disclose to the prospective purchasers that they have already entered into like agreements with others earlier in regard to the same property. This conduct of builders is leading to endless litigation in courts and the litigation drags on for years. The Skipper Company case (Delhi Development Authority V. Skipper Construction Co (p) Ltd and Others (2000) 10 SC 130) handled by the Supreme Court is a case in point. In that case hundreds of purchasers had to suffer and the litigation regarding refund of amounts paid by them or in regard to specific performance is still pending.

The Commission is of the view that in such cases civil remedies alone are not sufficient and that a specific provision in the Indian Penal Code in regard to such transactions is necessary. Further the existing provisions in sec. 415 of Indian Penal Code, which may cover such cases,are not sufficient

in as much as the corresponding provision for punishment in sec. 418 does not provide any term of minimum imprisonment. It is proposed that in the case of offences like the one discussed above, the punishment of imprisonment can be up to three years but subject to a minimum sentence of one year with fine.

It is also proposed that such transfers should be punishable per se if made knowingly and it is not necessary to prove fraud or dishonesty.

We propose to include a new provision in the Indian Penal Code dealing with the offence in the manner stated below. The Commission felt that even though by and large, the Penal Code consists of offences for which mensrea is an important criterion and the offence of the nature referred to here does not depend upon proof of a mensrea, yet it was felt that the amendment should be inserted in the Indian Penal Code. We propose to add a new provision 424 A, I.P.C.

It is, therefore, proposed to add the following section 424 A in the Indian Penal Code, 1860.

> "**424A.** Whoever, having entered into any prior transaction or having created any prior encumbrance in relation to immovable property or having knowledge of the existence of such prior transaction or encumbrance, enters into a subsequent transaction or creates a subsequent encumbrance in favour of another person in relation to or affecting the whole or any part of such property and -
>
> (a) knowingly fails to bring the existence of such prior transaction or prior encumbrance to the notice of such other person; or

(b) knowingly fails to include a recital in regard to the existence of such prior transaction or prior encumbrance in any subsequent instrument executed in relation to the whole or part of such property with such other person,

shall be punished with imprisonment for a term which shall not be less than one year but which may extend to three years and shall also be liable to fine.

Explanation:- sale, agreement of sale, exchange, mortgage, lease, charge, or right to possession in relation to land or land with buildings or flats already in existence or buildings or flats proposed to be constructed shall be a "transaction" or "encumbrance" within the meaning of this section."

## 5. Revenue Recovery Act, 1890: Purchase by Government where bidders are not forth coming when immovable property is put to public auction:

Where there are arrears of land revenue or a sum recoverable as arrear of land revenue is due, the same can be recovered under the Revenue Recovery Act, 1890. The Act is a Central enactment. The Act extends to the whole of India.

The Commission proposes to deal with a peculiar problem which is sometimes faced where, when properties belonging to certain individuals are brought to sale by the Collectors for collection of money recoverable as arrears as land revenue, there are no bidders forthcoming. That happens sometimes when the person whose properties are proceeded against is powerful and he is able to prevent anybody bidding at the public auction.

In such a situation, can the Government or the public officer or local authority or other body to which the amounts are due, itself purchase the property? If so, can they purchase at a nominal price and, if not, what is the reasonable procedure that is to be followed by the Collector?

In Rama Rao vs. State of Bombay (AIR 1963 SC 827) arrears of revenue payable by an excise contractor to the State Government were sought to be recovered under the Bombay Land Revenue Code (Act 5 of 1879). Certain items of property of the defaulter were brought to sale under

that Act and the State of Bombay purchased two items for rupee one each. These sales were challenged in a declaratory suit filed by the defaulter. The trial Judge held that the sales were not in accordance with the procedure under the Act. The High Court set aside the judgment and dismissed the suit but the Supreme Court set aside the judgment of the High Court and restored the judgment of the trial Court.

Various sections of the Bombay Land Revenue Code such as sections 155, 165, 171, 172, 173, 175, 178, 179, 182 governed the procedure for sale. The procedure for sale prescribed under the Act is one by way of "public auction" by the Collector or by an Officer designated by him. Rule 128 required the Officer to fix an 'upset' price. The proviso to the said Rule stated that 'where in the opinion of the Collector, difficulty is likely to be experienced in effecting speedy recovery of the arrears or bidders are likely to be deterred from offering bids, no such upset price shall be placed'.

But, the problem arose because of sub Rule (4) of Rule 129. That Rule while permitting the Collector or his nominee to bid in such circumstances provided that he may

"purchase the land or other property for a bid of rupee one."

In the above case, the Supreme Court did not go into the question whether Rule 129(4) was arbitrary (see para 25), but proceeded to examine whether the Rule was consistent with the provisions of sec. 167 of the Code which

required that the 'sale shall be by public auction by such person as the Collector may direct'.

The Supreme Court pointed out that in Bengal under sec. 58 of the Revenue Sale Law of the Bengal (Act 11 of 1859), the statute itself provided for a purchase by the Collector or other officer, on account of the Government, for one rupee, where no bids were forthcoming. But in Bombay there was no such provision in the Code but provision was contained only in the Rules. The Court, therefore, confined itself to the limited question whether under sec. 167 of the Bombay Land Revenue Code which required sale by public auction, a Rule could be prescribed stating that the sale in favour of the officer could be for one rupee, whenever there were no bids forthcoming. The Court held that the sale for a pre-determined sum of one rupee could not be treated as a sale by public auction and declared the sale as void.

In the light of the above judgment, we shall examine the Revenue Recovery Act, 1890.

The first question is whether the Revenue Recovery Act, 1890 prescribes a sale by public auction. Section 6 of the Act bears the heading: "Property liable to be sold under this Act". Sub section (1) of sec. 6 permits the Collector to issue a proclamation prohibiting transfer etc. by the defaulter. Sub section (2) permits the proclamation to be withdrawn in case the amount is recovered (i.e. otherwise than by sale) or

"the property has been sold for the recovery of that amount."

Sub section (3) makes all private sales after the proclamation void as against the State or against "any person who may purchase the property at a sale for the recovery of the amount stated in the certificate." Sub section (5) states "the proclamation under the section shall be made by beat of drum or other customary method and by pasting a copy thereof on a conspicuous place in or near the property to which it relates".

Though there is no express provision that the sale is to be by public auction, a reading of the various sub sections of section 6 in our view indicates that the sale is by public auction. At any rate, the Act does not say that the Government or the public officer or the local authority or the body to which the money is due, can purchase the property for one rupee if no bidders are forthcoming.

It is, however, necessary to prescribe, for purposes of the Revenue Recovery Act, 1890, a procedure for sale which will enable the immovable property to fetch a reasonable price. It is further necessary to provide for situations where no bids are forthcoming. Such a situation may arise not only under normal conditions but also where bidders are deterred by the defaulters whose properties are brought to sale. In such a situation the Government, or the public officer or the local authority or the body to which the money is due, is unable to recover the money due to it by conducting the

public auction contemplated under the provisions of the Revenue Recovery Act. In as much as there are no provisions in the Act to cover such a situation it is proposed to make a provision similar to the one contained in Schedule 2 of the Indian Income Tax, 1961. Under the rules contained in Schedule 2 of that Act it is provided that the sale officer shall indicate, in the sale proclamation, a reserve price below which no bid will be accepted. In case there are no bidders who are prepared to offer a bid above the reserve price, the sale officer is permitted, under the rules, to give an option to the Assessing Officer to purchase the property subject to such officer obtaining the prior sanction of the Chief Commissioner or Commissioner of Income Tax. Obviously, the Assessing Officer must take the property by paying the amount specified as a reserve price. It is normally expected that the reserve price will be reasonable minimum price for which the property can be sold.

We propose however that under provisions of the Revenue Recovery Act, the Collector should, after the proclamation for sale, put the immovable property to public auction at least on two occasions and if there are no bidders on each of the two occasions offering a bid equal to or above the reserve price, only in those circumstances can the Collector permit the concerned Government or public officer, or local authority or body, to which the moneys are due to purchase at the reserve price.

Under sec. 6 of the Revenue Recovery Act, 1890 various provisions are made with regard to the sale of the property of the defaulter. Sub section (1) of sec. 6 refers to the issue of the proclamation prohibiting the defaulter

from transferring or charging any property. Sub section (2) thereof permits withdrawal of such a proclamation in certain situations. Sub section (3) states that transactions, if any, entered into by the defaulter after the above proclamation will be void as against the Government and also as against any subsequent purchaser. Sub section (4) provides that the sale shall be in relation to the interest of the defaulter alone, in the property proposed to be sold. Sub section (5) of sec. 6 is relevant for the present purpose and it reads as follows:

> "Section 6(5): A proclamation under this section shall be made by beat of drum or other customary method or by the pasting of a copy thereof on a conspicuous place in or near the property to which it relates".

There is no section in the Act which requires the sale officers to fix reserve price nor is there any procedure prescribed enabling the concerned Government, public officer or local authority or body, to which the monies are due, to purchase the property at the reserve price in the event of there being no bidders forthcoming to purchase the property. We, therefore, propose to prescribe the procedure by introducing sub sections (7), (8) and (9) in sec. 6 of the Act and also by adding sec. 6A as follows:

> (a) in section 6, after sub-section (6), the following sub-sections shall be inserted, namely :-
>
> > "(7): The sale proclamation shall specify, as fairly and accurately as possible –

(a) the property to be sold;
(b) the revenue or tax levied by any local authority upon the property or any part thereof;
(c) the amount for the recovery of which the sale is ordered;
(d) the reserve price below which the property may not be sold; and
(e) any other fact which the Collector considers it material for a purchaser to know, in order to judge the nature and value of the property:

Provided that where the property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the Collector, otherwise be given.

(8) No sale of immovable property shall, without the consent in writing of the defaulter, take place until after the expiration of at least 30 days calculated from the date on which proclamation is made under sub-section (5).

Provided that if the sale is adjourned for want of bidders or for any other reason for a period longer than 30 days, a fresh proclamation of sale shall be issued as specified in this section unless the defaulter consents to waive it.

(9) The sale shall be by public auction to the highest bidder and shall be subject to confirmation by the Collector:

Provided that no bid under this section shall be accepted if the amount bid by the highest bidder is less than the reserve price specified in clause (d) of sub-section (7).”

(b) after section 6, the following section shall be inserted, namely :-

**Government, local authority etc to bid at reserve price in certain cases**

"**6A**. Notwithstanding anything in section 6, where the sale of immovable property for which a reserve price has been fixed under clause (d) of sub-section (7) of section 6, has been postponed on two occasions for want of a bid or due to the fact that the bid was below the reserve price, it shall be lawful for the Collector to permit the concerned Government, public authority, public officer or local authority, to which the monies are due from the defaulter, to bid for the property at any subsequent sale, at the reserve price afore mentioned."

**6. O XXXIV of the Code of Civil Procedure –dispensing with the age old procedure of a preliminary decree:**

In the cases of suits based on mortgage, O XXXIV of the Code of Civil Procedure contains a two stage procedure of a preliminary decree and then a final decree. This has led to lot of delay in the case of disposal of mortgage suits.

Such a two stage procedure is prescribed in the case of three types of suits based on mortgage:

(I) In the case of suits for fore-closure, O XXXIV Rule 2 requires that the court pass a preliminary decree:

(a) Ordering an account of what was due to the plaintiff at the date of suit towards the principal and interest, the costs of suit, if any, and other costs (with interest on such costs), or

(b) Declaring the amount due on that day and

(c) directing:

(i) that, if the defendant pays into court the amount so found (i.e. under cl.(a) after accounts are taken) or declared due – pay the amount within six months from the date on which the court confirms and countersigns the accounts taken under clause (a) or from the date of and on which such amount is declared due under clause (b), as the case may be, (and thereafter pay such

amount as may be adjudged due in respect of subsequent costs, charges or expenses as provided in Rule 10, together with subsequent interest on such sums respectively as provided in Rule 11), the plaintiff shall deliver up to the defendant etc., all documents in his possession or power and if necessary, retransfer the property.

(ii) that, if payment of the amount found due or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all rights to redeem the property.

O XXXIV Rule 3 then provides for the passing of a final decree in the foreclosure suit.

(II) Likewise, in a suit for sale, O XXXIV.R.4 provides for the passing of a preliminary decree and under Rule 5 for the passing of a final decree.

(III) Again, in the case of a suit for redemption, O XXXIV Rule 7 provides for the passing of a preliminary decree and under Rule 8 for the passing of a final decree.

In as much as the two stage procedure has been the cause of unnecessary and avoidable delays, the Commission is of the view that the procedure may be modified and that the court should straightaway pass a single decree in each of these three types of mortgage suits.

The Kerala High Court has got these Rules amended in the year 1990 and in that state, mortgage suits are now being disposed of faster than before.

Accordingly, we propose to replace Order XXXIV of the Code of Civil Procedure in full by order XXXIV as applicable in the State of Kerala as follows:

**"ORDER XXXIV- SUITS RELATING TO MORTGAGES OF IMMOVABLE PROPERTY**

**1. Parties to suits for foreclosure, sale and redemption** – Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

**Explanation:-** A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

**2. Decree in foreclosure suits.-** (1) In a suit for foreclosure, if the plaintiff succeeds, the court shall pass a decree –

(a) declaring the amount due to the plaintiff on the date of such decree for

(i) principal and interest on the mortgage;
(ii) the costs of the suit, if any, awarded to him; and
(iii) other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage-security, together with interest thereon; and

(b) directing that,-

(i) if the defendant pays into Court the amount so declared due with future interest and subsequent costs as are mentioned in rule 7 on a day within six months from the date of the decree to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such persons as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant at the cost of the defendant free from the mortgage and from all encumbrances created by the plaintiff or any person claiming under him or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property; and

(ii) if such payment is not made on or before the day fixed by the Court, the defendant and all persons claiming through or under him shall be debarred from all rights to redeem the property; and also if necessary the defendant shall put the plaintiff in possession of the property.

(2) Where, in a suit for foreclosure, subsequent mortgages or persons deriving title from, or subrogated to the right of, any such mortgages are joined as parties, the Court shall adjudicate upon the respective rights and liabilities of all the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10 as the case may be, of Appendix D with such variations as the circumstances of the case may require.

(3) On the expiry of the date fixed for payment of the amount declared due to the mortgagee, all liabilities to which the defendant is subject in respect of the mortgage

or on account of the suit shall be deemed to have been discharged.

**3. Decree in suit for sale.-** (i) In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in clause (a) and sub-clause (i) of clause (b) of sub-rule (1) of rule 2 and also directing that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after deducting the there from the expenses of the sale) be applied in payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same; and that, in case the proceeds of such sale be insufficient to pay the amount due to the plaintiff, the balance, if legally recoverable from the defendant otherwise than out of the property sold be paid by the defendant personally.

(ii) In a suit for foreclosure, if the plaintiff succeeds and the mortgage is an anomalous mortgage, the Court may, at the instance of the plaintiff or of any other person interested either in the mortgage money or in the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms.

(iii) Where in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgages or persons deriving title from, or subrogated to the rights of, any such mortgages are joined as parties the Court shall adjudicate upon the respective rights and liabilities of all the parties to the suit in the manner and form set forth in Form No. 9, Form No.10 or Form No. 11, as the case may be, of Appendix D, with such variations as the circumstances of the case may require.

4. **Decree in redemption suit. -** In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree

(a) declaring the amount due to the defendant at the date of such decree for

(i) principal and interest on the mortgage;
(ii) the cost of the suit, if any, awarded to him;
(iii) other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage – security, together with interest thereon: and

(b) directing that,

(i) if the plaintiff pays into Court the amount so declared due with subsequent interest and costs as are mentioned in Rule 7, on a day within six months of the decree to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall if so required, re-transfer the property to the plaintiff at his costs, free from the mortgage and from all encumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff in possession of the property; and

(ii) if such payment is not made on or before the date so fixed, the plaintiff shall in the case of a mortgage by conditional sale or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, be debarred from all rights to redeem the property and also, if necessary, put the defendant in possession of the mortgaged property; and that if desired by the defendant in the suit itself, in the case of any mortgage other than a usufructuary mortgage, a mortgage by conditional sale or such an anomalous mortgage as aforesaid the mortgaged property or a sufficient portion thereof be sold and the proceeds of the sale (after deducting therefrom the expenses of the sale) be applied

in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same and that, in case the net proceeds of such sale be insufficient to pay the amount due to the defendant, the balance be paid by the plaintiff personally if the balance is legally recoverable from the plaintiff otherwise than out of the property sold.

5. **Date of payment -** The Court may, upon good cause shown and upon such terms, if any, as it thinks fit, postpone the date fixed for payment under this Order from time to time.

6. **Decree where nothing is found due or where mortgage has been overpaid -** Notwithstanding anything hereinbefore contained if it appears in a redemption suit nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant if so required, to retransfer the property and to pay to the plaintiff the amount which may be found due to him; and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

7. **Costs of mortgagee subsequent to decree .-** In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure, sale or redemption the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage money such costs of the suit and other costs, charges and expenses, as have been properly incurred by him since the decree for foreclosure, sale or redemption up to the time of actual payment.

**8. Sale of property subject to prior mortgage.-** Where any property the sale of which is directed under this Order is subject to a prior mortgage the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

9. **Application of proceeds.-** (i) Such proceeds shall be brought into Court and applied as follows:-

First, in payment of all expenses incident to the sale or properly incurred in any attempted sale;

Secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and costs, properly incurred in connection therewith;

Thirdly, in payment of all interest due on account of the mortgage in consequence where of the sale was directed, and of the suit in which the decree directing the sale was made;

Fourthly, in payment of the principal money due on account of the mortgage; and

Lastly, the residue, if any, shall be paid to the persons proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(ii) Nothing in this rule or in Rule 8 shall be deemed to affect the powers conferred by Section 57 of the Transfer of Property Act, 1882."

**10. Suit for sale necessary for bringing mortgaged property to sale.-** Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, Rule 2.

**11. Mortgage by the deposit of title deeds and charges.-** All the provisions contained in this Order which apply to a simple mortgage shall, so far as may be apply to a mortgage by deposit of title deeds within the meaning of section 58 and to a charge within the meaning of section 100 of the Transfer of Property Act, 1882."

## 7. Amendment of Sec. 69 (2) of the Indian Partnership Act, 1932:

Chapter VII of the Indian Partnership Act, 1932 deals with 'Registration of Firms' and sections 56 to 65 deal with the procedure for registration. Sec. 66 refers to inspection of register, sec. 67 to grant of copies to 'any person' and sec. 68 with 'rules of evidence'. The purpose of these provisions is to protect those who deal with partnership firms in various commercial transactions. Third parties who deal with a firm by its name or with a partner or managing partner who represent the firm must be in a position to know who are the partners, what are their respective shares in the partnership, the details, if any, as to the capital investment by partners, and the details, if any, of the partnership property. That would enable them to have an idea of the competence, status and solvency of the partners of the firm.

In order to compel partners to register their partnership firms so that all relevant information could be obtained by inspection of the register or by obtaining a certified copy thereof, legislation is necessary. Under the UK Registration of Business Names Act, 1916, there was a penal provision and also a provision which created certain disability in respect of enforcement of certain rights in Courts. But under the Indian Partnership Act, 1932, there is no penal provision as in UK but there is only a provision which creates certain disabilities in respect of enforcement of rights in Courts.

Under the English Act of 1916, section 8 contained the provision which created the disability. It related to the 'rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulters in relation to the business in respect to the carrying on of which particulars were required to be furnished'.

The Indian Act of 1932 was the result of a Report of a Special Committee consisting of Shri Brojender Lal Mitter, Sir Dinshaw Mulla, Sir Alladi Krishnaswami Iyer and Sir Arthur Eggar. The Committee referred to the provisions of the UK Act of 1916 and felt that it would not be advisable to have any penal provision but that there should only be a provision creating a disability. This disability is contained in section 69.

The material part of sec. 69, which is relevant for the present purpose reads as follows:

> "Sec.69: Effect of non-registration: (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm, unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner of the firm.
>
> (2) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set – off or other proceedings to enforce a right arising from a contract, but shall not affect -

(a) …… …….. …….

(b) …… …….. …….

(4) This sec. shall not apply to -

(a) …… …….. …….

(b) …… …….. …….”

It will be noticed that sub-section (1) of section 69 bars suits by partners against the unregistered firm or against any person alleged to be or to have been a partner of such a firm. The bar applies to enforcement of -

(A) right arising out of a contract, or

(B) right conferred by the Partnership Act

On the other hand, sub-section (2) of section 69 bars suits by or on behalf of the unregistered firm against ‘third parties’. Section 2 (d) defines ‘third party’ as a person who is not a partner of the firm. Sub-section (2) bars enforcement of a

“right arising out of a contract”

Sub-section (3) applies the provisions of sub-section (1) and (2) to a claim for set off or other proceeding to enforce a right arising from a

_____, and, at the same time, exempts certain rights, namely, right to seek dissolution or accounts or realization of property of the firm – which are obviously rights created by the Act.

But the question has arisen whether the words 'enforce a right under a contract' would include rights arising out of contracts with third parties not in connection with the day-to-day business or commercial transactions entered into by the unregistered firm. In Raptakos Brett & Co. Ltd. vs. Ganesh Property (AIR 1998 SC 3085), when a landlord which was an unregistered firm, sought to evict a tenant after expiry of the lease period, the tenant claimed that the suit was barred by section 69. The Court held that sec. 69 was not applicable as the suit was for enforcement of a right to eviction created by the Transfer of Property Act. In M/s Haldiram Bhujiawala vs. M/s Anand Kumar Deepak Kumar, AIR 2000 SC 1287, the suit was laid for permanent injunction not infringe the right to a trade mark and for damages, etc. The suit was filed by an unregistered partnership consisting of the heirs of a deceased partner, whose right to the trade mark in India (except West Bengal) were declared in a deed of dissolution of an earlier partnership. While seeking injunction, the plaintiff firm (unregistered) pleaded its title to the trade mark and for that purpose, relied upon the dissolution deed. The defendant pleaded the bar of sec. 69 on the ground that the deed was a 'contract' and that no right arising out of a contract could be enforced by the unregistered firm of the plaintiffs. The Supreme Court while interpreting the words 'arising out of a contract' in section 69 (2) held that, having regard to the purpose behind section 69 (2)

as could be gathered from the Report of the Special Committee, the bar under that sub-section applied to a suit by an unregistered firm against third parties for enforcement of a right arising out of a contract, provided that, as under the English Act, 1916, the contract was one entered into with third parties in the course of its commercial transactions. It was held that the dissolution deed on which the plaintiff- unregistered-firm relied upon was not such a contract but was a contract which was only evidence of the title of the plaintiffs to the trade mark. In that connection, the court also referred to section 4 of the U.K.Business Names Act, 1985 which provides for dismissal of an action

> "to enforce a right arising out of a contract made in the course of business"

and held that the words 'arising from a contract' must be construed accordingly as referring to a contract made in the course of business. This, it was held, could be gathered from the Report of the Special Committee which proceeded the 1932 Act which referred to the English Act of 1916'.

In as much as such issues are arising in several cases and in acceptance of the view of the Supreme Court and to avoid any uncertainty, the Commission has proposed to add an Explanation below sec. 69 as follows:

> "Explanation: For the purposes of this section, the words 'a right arising from a contract' shall mean a right arising from a contract made in the course of business"

so that the bar is restricted to suits by the unregistered firm (or claims to set off or other proceedings) in respect of rights arising out of contracts entered into in the course of business and not to any and every contract which is not entered into in connection with the business of the unregistered firm.

**8. Non disclosure of factum of pending civil litigation to purchasers or transferees of immovable property to be an offence punishable with imprisonment and with fine-Insertion of section 424 B, Indian Penal Code, 1860:**

Section 52 of the Transfer of Property Act, 1882 declares that during the pendency of a suit or proceeding (which is not collusive) in which any right to immovable property is directly or specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or other proceedings so as to affect the rights of any other party thereto under any decree or order which may be made, except when made under the authority of the Act and on such terms as the Court may impose. The section contains an Explanation as to what is meant by 'pendency' of a suit or proceeding.

The result of the section is that the rights of a purchaser/transferee of any part of such immovable property which is the subject matter of a suit or proceeding is dependent upon the ultimate result of the suit. If the transferor loses in the suit, the transferee gets nothing. The provision is no doubt salutary as it tries to prevent parties to litigation from alienating the suit properties and keeping them beyond the reach of the party who may ultimately succeed in the litigation. But, as the law stands now, there is no provision which ensures that a purchaser will be informed by the seller about the pendency of any litigation in Court. Unwary purchasers pay huge

amounts of consideration and or are even put in possession whether under an agreement or a sale deed and they are never informed if there was any claim with regard to the same property pending in a court of law. Further, in regard to transactions pendente lite, the plea of the transferee being a 'bona fide purchaser without notice of the pendency of litigation' is not available in view of the provision of section 52.

In order to protect such transferees the Bombay Legislature (vide Bombay Act 41/1939) made an amendment to section 52, stating that the provisions of section 52 shall apply only if a general notice regarding the pendency of the suit or proceeding is registered under section 18 of the Indian Registration Act, 1908 giving the description of the immovable property and the court in which the matter is pending, the date of filing of the suit, etc. If any transfer is made before registering such a notice, the transferee will not suffer the disability created by the section.

The Law Commission in its 157th Report recommended that section 52 of the Transfer of Property Act, 1882 be amended on the model of the Bombay Act 14/1939. The proposal for amendment to section 52 is awaiting introduction in Parliament.

The Commission is of the view that apart from amending section 52 on the model of Bombay Act 4/1939, it is also necessary to insert a new new provision as Section 424 B, Indian Penal code, 1860 as recommended in the 157th Report to prevent such action by parties to suits or other

proceedings. This, it is felt, can be achieved by providing punishment up to a maximum of three years subject to a minimum punishment for a period of one year together with fine whenever the non-disclosure of such pendency of suits or proceedings in Courts is 'dishonest or fraudulent'. No doubt, such cases may fall under section 415 (which defines 'cheating') read with section 418. But under section 418 punishment by way of imprisonment is not mandatory. Section 418 refers to cheating with knowledge that wrongful loss may ensue to person whose interest the offender is bound to protect. Again section 423 does not apply as it refers to dishonest or fraudulent execution of deed of transfer containing a false statement of consideration and does not also cover the type of transactions which are under consideration, namely, where there is suppression of facts relating to pendency of litigation.

It is proposed that for the purpose of the proposed section, it is sufficient if it is done knowingly and not necessarily with a dishonest or fraudulent intention. It is proposed to include the proposed provision in I.P.C. section 424 B despite that mensrea is not one of the criteria referred to in the proposed Section.

It is, therefore, proposed to add section 424 B in the I.P.C. as follows:

"**424B.** Whoever knowingly executes any instrument-

(a) which is or purports to be a transfer of immovable property or any interest therein;or

(b) which is or purports to be an agreement to transfer any immovable property or any interest therein; or

(c) which creates or purports to create a charge over immovable property, and

(i) fails to refer to the pendency of any suit or proceeding, in which any right to such property is in question, in the said instrument; and

(ii) executes such instrument without the authority of the court in which any suit or proceeding in relation to or affecting the whole or any part of such property is pending,

shall be punished with imprisonment for a term which shall not be less than one year but which may extend to three years and shall also be liable to fine."

**9. Right of a person injured in an accident to sue for damages to survive to his legal representatives in the case the injured person dies thereafter on account of a cause not relatable to the accident – Amendment proposed to sec. 306 Indian Succession Act, 1925, sec. 110A of Motor Vehicles Act, 1939 and sec 166 of Motor Vehicles Act, 1988.**

In the case of a person injured in an accident, the law of torts provides a remedy in case negligence of the tort-feasor is established. Apart from that, the Motor Vehicles Act, 1939 and the Motor Vehicles Act, 1988 contain different statutory remedies for obtaining damages. Under the 1988 Act, section 140 refers to damages payable even if no fault (or negligence) is proved and this is in addition to damages that could be awarded on the basis of negligence of the tort-feasor under sec. 141. Section 163A was introduced in 1994, and it also permits damages on no fault basis to be computed in accordance with a structural formula, and this will be in substitution of the right to seek damages, as recently held by the Supreme Court.(K.Nandakumar V. Managing Director, Thanthal Periyar Transport Corporation (1996) 2 SCC 736)

In all the above situations, whether the right to claim compensation is conferred by the law of torts or by the statute, question arises whether upon the demise of the injured person on a date subsequent to the accident; his legal representatives can initiate or continue an action for compensation.

On the basis of the maxim 'actio personalis moritur cum persona', several High Courts have taken the view that the right of the injured person to seek damages is personal to him and the claim, therefore, cannot be

initiated or continued by his legal representatives, after the death of the injured person. A Full Bench of the Karnataka High Court in its judgment in Kannamma vs. Dy. General Manager ILR 1990 Karn. 4300 (FB) has held so and, in fact, recommended that the provisions of sec. 306 of the Indian Succession Act, 1925 and of sec. 110A of the Motor Vehicles Act, 1939 be amended so as to permit the survival of the right of the injured person to seek compensation to his legal representatives, irrespective of whether the cause of death was relatable to the accident or not. In a recent judgment in Baburao Sataba Manabutaker Vs. Doreswamy (MFA 4072/1998 dated 4.9.2001), a learned Single Judge of the Karnataka High Court while dismissing a claim under sec. 166 of the Motor Vehicles Act, 1988 lamented the delay in amending the law in this behalf and pointed out that the delay is resulting in grave injustice. While recommending legislation, a copy of the judgment has been forwarded to the Law Commission. The learned Judge has pointed out that the Kerala legislature has passed the Kerala Torts (Miscellaneous provisions) Act, 1976 to rectify the position. A reading of the Kerala Act, 1976, however, shows that it is based entirely upon the provisions of the English Act, namely, the Law Reforms (Miscellaneous Provisions) Act, 1934 with some additional provisions and it covers actions for damages in case of all torts (except one or two) and states that the cause of action to seek damages shall survive to the legal representatives of the victim of the tort.

The Commission has considered whether a law on the model of the Kerala Torts (Miscellaneous Provisions) Act, 1976 to cover all cases of torts

is to be enacted or whether simple amendments to sec. 306 of the Indian Succession Act, 1925 and the Motor Vehicles Act, 1939 (in respect of which some claims may still be pending in courts and which could abate upon the death of the injured person) and the Motor Vehicles Act, 1988, will suffice.

As stated above, the Kerala Act of 1976 applies to various torts and is based on the English Act of 1934. We find that subsequently further amendments in this behalf have been made in England by the Law Reform (Miscellaneous Provisions) Act, 1970 and the Administration of Justice Act, 1982. Some of these amendments have been made to get over or clarify judgments of the English courts.

The Commission is of the view that a comprehensive study of the law relating to abatement of right to compensation in the case of all torts can be taken up separately and that having regard to the urgency in remedying injustice in respect of claims under the Motor Vehicles Acts, some simple amendments can be proposed in sec. 306 of the Indian Succession Act, 1925 and in the Motor Vehicles Act, 1939 (in respect of pending claims) and the Motor Vehicles Act, 1988, immediately.

We shall, therefore, deal with these amendments seriatum:

(A) <u>Section 306 of the Indian Succession Act, 1925 and illustration (i) below the section</u>:

Section 306 of the Indian Succession Act, 1925 states that among certain other rights, the right of the injured person to seek damages is personal to him and will not survive to his legal representatives. This position so far as accident compensation is concerned, is no longer acceptable in today's social jurisprudence. In fact, such a provision has been given up in England as far back as in 1934. Indian courts have also felt that this provision in sec. 306 which does not conform to today's standards of justice and has to be deleted. We are also of the view that this provision is too anachronistic to be allowed to continue in the statute book.

Sec. 306 as it now stands reads as follows; in so far as it is relevant for the present purpose:

> "Section 306: All demands whatsoever and all rights to prosecute…any action or special proceedings existing in favour of…a person at the time of his decease, survive to…his executors or administrators; except causes of action for defamation, assault as defined in the Indian Penal Code or other personal injuries not causing death of the party."

There is an illustration below sec. 306 and it reads as follows:

> "Illustration (i): A collusion takes place on a railway in consequence of some negligent or default of an official, and a passenger is severely

hurt, but not so as to cause death. He afterwards dies without having brought any action. The cause of action does not survive."

We are of the view that the underlined words in sec. 306, namely,

(a) "assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party" shall be omitted;

(b) illustration (i) shall be omitted

(B) Section 166 of the Motor Vehicles Act, 1988: Amendment to provide for initiation/continuation of a proceeding under the Act by the legal representatives of an injured person upon his death even if the death has no relation or nexus with the accident:

The existing provisions of sec. 166 of the Motor Vehicles Act, 1988 are as follows in so far as they are relevant:

"Section 166: An application for compensation arising out of an accident of the nature specified in sub section (1) of sec. 165 may be made –

(a) by the person who has sustained the injury; or
(b) by the owner of the property; or
(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorized by the person injured or all or any of the legal representatives of the deceased, as the case may be:

provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application."

Sub section (2) and (3) of sec. 166 deal with the form, the time limit for filing the application and sub section (4) requires the police officer to file a copy of the report before the Claim's Tribunal. The Tribunal may, if it thinks necessary so to do, treat the report as if it were an application for compensation under the Act.

In the light of what we have said earlier, we propose insertion of a new sub section (5) in sec. 166 as follows:

"(5) Notwithstanding anything in this Act or any law for the time being in force, the right of a person to claim compensation for injury in an accident shall upon the death of the person injured, survive to his legal representatives, irrespective of whether the cause of death is relatable or had any nexus with the injury, or not.

Provided that in cases where the cause of death is not relatable or has no nexus with the injury, the compensation shall be restricted to the period between the date of injury and the date of death of the person injured.

(C) Section 110A of the Motor Vehicles Act, 1939 (as applied to pending proceedings in Tribunal or Courts: Transitory provision to be made to provide for initiation/continuation of a proceeding under the Act by the legal representative of the injured person upon his death, even if the death has no relation or nexus with the accident:

The Motor Vehicles Act, 1939 has been repealed by the Motor Vehicles Act, 1988 but it is possible that several proceedings initiated under that Act may still be pending either before the Motor Accident Claims Tribunal or at the appellate stage. Such proceedings are obviously saved under sec. 217(2) of the Motor Vehicles Act, 1988.

By way of abundant caution and with a view to cover such pending cases we recommend the following provision to be made.

"Section 217A– Certain pending proceedings relating to compensation under the Motor Vehicles Act, 1939 not to abate:

"Notwithstanding anything contained in the Motor Vehicles Act, 1939 or any law for the time being in force, in respect of claims for

compensation under the said Motor Vehicles Act, 1939 which are pending at any stage, at the date of commencement of this Act in any Tribunal or Court, the right of an injured person to claim compensation shall upon the death of the injured person survive to his legal representatives, irrespective of whether the cause of death was relatable or had any nexus with the injury or not,

Provided that in cases where the cause of death is not relatable or has no nexus with the injury, the compensation shall be restricted for the period between the date of injury and the date of death of the person injured."

**10. O 38 Rule 5 and Rule 6: Whether procedure of prior show cause notice to defendant in cases of 'conditional attachment' can result in the final order becoming infructuous?**

Attachment of the defendant's movable or immovable property pending decision in the suit is a device by which the Code of Civil Procedure 1908 protects the interests of a plaintiff in the event of a decree being passed in his favour ultimately. The attachment prevents the defendant from disposing of the whole or part of his property or removing the said property from the jurisdiction of the Court.

The Supreme Court pointed out in Padam Sen vs. State of U.P. (AIR 1961. SC 218) that the Court passes such orders to see that the ultimate decree does not become infructuous. Again in Govindram vs. Devi; (AIR 1982 SC 989), the Supreme Court observed:

> "The sole object behind the order levying attachment before judgment is to give an assurance to the plaintiff that his decree if made would be satisfied. It is a sort of a guarantee against decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree."

Attachment before judgment is of two kinds. One is where the Court upon being satisfied that such attachment is necessary, feels that there is no

serious urgency and that the defendant may first be asked to show cause why an order should not be passed asking him to furnish adequate security for the suit claim, or to produce and place the property before the Court by a certain date. The other is where prior notice may indeed enable the defendant to dispose of or remove the property from the jurisdiction of the Court before the Court could receive the defendant's reply to the show cause notice and before it passes an order of attachment before Judgment. This can happen where the property sought to be attached is movable property such as cash, jewellery, furniture, fabrics, machinery not embedded into the earth or which can be easily dismantled. This may also happen, in certain situations, in the case of immovable property. In the second type of cases, the Court must have the power to pass an immediate order of attachment before judgment which is provisional in nature with a simultaneous notice to the defendant as to why the interim order of attachment should not be confirmed unless adequate security is furnished. This is what is really meant by the words 'conditional attachment' though the word 'conditional' is used to describe an interim or provisional attachment which becomes plenary afterwards.

In Ramanatha Iyer's Law Lexicon (2nd Ed. 1997, p. 164) this distinction is pointed out and the meaning of 'conditional attachment' is explained by referring to a judgment of the Bombay High Court (ILR 5 Bom 643) as follows:

> "The expression 'conditional attachment' might mean an attachment to be made conditionally on the security not being furnished nor cause

shown by the prescribed day, or it might mean an immediate attachment of a provisional kind conditional to become plenary if security should not be furnished, or cause shown according to the terms of the order. The form at the end of the Code of Civil Procedure Code for a provisional attachment show that the latter was the intention of the legislature"

We shall first extract O 38. R 5 and R 6 as they stand today.

R.5. Where defendant may be called upon to furnish security for production of property.-

(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intend to obstruct or delay the execution of any decree that may be passed against him,-

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void.

R.6 Attachment where cause not shown or security not furnished.-

(1) Where the defendant fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

It will be seen from O 38 R5 that the legislature provided in Sub rule (1) of O 38 R 5 for a situation where prior notice is issued before making an order of attachment before Judgment. Sub-rule (3) of O 38 R5 refers to 'conditional attachment' without mentioning what it actually is. Its meaning can be gathered only from the second part of Form 5 of Appendix F which refers to immediate or provisional attachment being made together with a show cause notice.

The word 'conditional attachment' used in sub rule (3) of Order 38 Rule 5, has given an impression that the attachment is conditional upon

security being offered. As pointed out in Ramanath Aiyar's Law Lexicon referring to the Bombay case that that is not the true meaning of the word. In fact, the proper meaning of the word 'conditional' here is 'interim'. In other words, it was intended by sub rule (3) of Order 38 Rule 5 that the Court must have power, in certain cases, to first pass an order of interim attachment so that the property may not be moved outside the jurisdiction of the Court or may not vanish. In such a case, the Court can give a notice simultaneously requiring the person concerned to show cause why interim attachment should not be vacated.

In 1976, sub rule (4) was added in O 38 R 5 to say that any such attachment without prior notice as contemplated by sub rule (1) will be "void". This provision was introduced to resolve the conflict in judgments as to whether, the attachment would be void or voidable, where notice procedure under sub-rule (1) is not followed.

But, in as much as sub rule (4) follows both sub rules (1) and (3), some Courts have interpreted that prior notice under sub rule (1) is necessary even in cases of 'conditional attachment' falling under sub rule (3), i.e. where immediate provisional attachment is necessary. (in the recent judgment of the Supreme Court in Rajinder Singh v. Ramdhan Singh, 2001 (6) SCC 213, the Court merely referred to sub rule (4) of Order 38 Rule 5 but did not have any occasion to go into the question whether even in the case of interim attachment (loosely called conditional attachment in sub rule (3) of Order 38 Rule 5) a prior notice as contemplated by the said sub rule

was necessary. The Commission is of the view that the Supreme Court, in the above case had not laid down any principle that even in the case of interim attachment a prior notice as contemplated by sub rule (1) of Order 38 Rule 5 is necessary. On the other hand, High Courts have clearly laid down the view that sub rule (4) does not apply to cases of conditional attachment under sub rule (3) and that in such cases, a post decisional opportunity is provided by sub rule (2) of O 38 R 6 which enables the defendant to show cause and permits the Court to withdraw the conditional attachment (see N.R.Thiruvengadam Vs. Kaliannan AIR 1984 Mad 112).

The Form 5 of Appendix F to the Code which gives the format for 'attachment before judgment' refers in the first Part to 'attachment before judgment' and in the second part to 'conditional attachment'. The combination of both in a single form has also created considerable confusion.

The Commission is of the view that in cases where immediate attachment is felt necessary by the Court, if it is laid down that prior notice to the defendant under sub rule (1) of Order 38 Rule 5 is necessary, there is every likelihood that the ultimate order of attachment that man may be made may become infructuous and the ultimate decree may also be rendered useless. The Commission is of the view that in such cases, the Court must have powers to pass an order of 'interim attachment' coupled with a notice to show cause why the interim attachment should not be confirmed unless security is furnished. In case sufficient cause is shown as to why the interim

attachment should not be confirmed or where adequate security is furnished, the interim attachment can be withdrawn by the Court. As in cases of ex parte interim injunction under O 39 R 1, a procedure for ex parte attachment before judgment followed by a notice to furnish security or to show cause is perfectly consistent with principles of due process and natural justice. Post-decisional opportunity is permissible under our natural justice jurisprudence.

It is, therefore, proposed to recast O 38 R 5 and R 6 and introduce Form 5 and Form 5A in Appendix F, the former to cover cases of attachment before judgment with prior notice and the latter to deal with interim attachment first and opportunity thereafter.

For achieving the above object, it is not necessary to amend sub rule (1) or (2) of Order 38 Rule 5, but it is necessary to omit the existing sub rule (3) of Order 38 Rule 5 and instead bring in the existing sub rules (1) and (2) of Order 38 Rule 6 as sub rules (3) and (4) of Order 38 Rule 5. Thereafter sub rule (4) of Order 38 Rule 5 can be re-designated as sub-rule 5 of Order 38, Rule 5.

We can then have a separate rule 6 of Order 38 which deals exclusively with attachment before judgment.

With the above changes, Order 38 Rule 5 and Rule 6 will read as follows:

" 5. Where defendant may be called upon to furnish security for production of property –

(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him -

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, or to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) Where the defendant fails to show cause or, as the case may be, fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(4) Where the defendant shows such cause or furnishes the required security, and the properties specified or any portion of it have been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

(5) If an order of attachment is made without complying with the provisions of sub rule (1) of this rule, such attachment shall be void."

We proposed a separate rule as far as interim attachment is concerned as rule 6 of Order 38. It will read as follows:

**Interim attachment before judgment**

**6**. (1) Where the court is satisfied, at any stage of a suit, by affidavit or otherwise that the conditions referred to in sub-clauses (a) or (b) of sub-rule (1) of rule 5 are satisfied and that there is likelihood of the property or part thereof being immediately disposed of or removed from the local limits of the jurisdiction of the court in case the procedure under sub rule (1) of rule 5 is to be followed, the court may, for brief reasons to be recorded, pass an order of interim attachment without following the said procedure and shall simultaneously issue a notice to the defendant ,to show cause why the order of interim attachment should be withdrawn altogether or upon furnishing security..

(2) Where the defendant shows cause or furnishes the required security within time fixed by the Court, the Court shall direct that the order of interim attachment shall stand withdrawn or make such other order as it may think fit.

(3) Where the defendant fails to show cause or fails to furnish the security within the time fixed by the court, the court may confirm the interim attachment of the property specified or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit.

(4) The order of interim attachment shall not be deemed to be void on the ground that no prior notice to show cause as contemplated by sub rule (1) of Rule 5 has been issued before such an order of interim attachment was passed."

**(D)** in Appendix F, for Form No.5, the following Forms shall be substituted, namely:-

"No. 5

ATTACHMENT BEFORE JUDGMENT AFTER PRIOR NOTICE CALLING FOR SECURITY FOR FULFILLMENT OF DECREE

(Order XXXVIII r. 5)

To

The Baillif of the Court,

Whereas …..has proved to the satisfaction of the Court that the defendant in the above suit……;

These are to command you to call upon the said defendant …… on or before the….day of…..200 , either to furnish security for the sum of Rs…….. or to produce and place at the disposal of this court when required……..or the value thereof, or such portion of the value as may be sufficient to satisfy the decree that may be passed against him; or to appear and show cause why he should not furnish security; and you are further commanded to return this warrant on or before the ……day of …….20…with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed;

Given under my hand and seal of the Court this……day of ……..20….

……. Judge”

No. 5A

INTERIM ATTACHMENT BEFORE JUDGMENT WITH SIMULTANEOUS NOTICE TO SHOW CAUSE.

(Order XXXVIII r. 6)

“To

The defendant

Whereas …… has proved to the satisfaction of the Court that the defendant in the above suit ……..;

You are hereby commanded, by way of interim attachment, until further orders of the Court, to produce and handover the following movable property referred to in the Schedule hereto annexed to the Bailiff to enable him to keep the property under safe and secure custody

[and/or

You are hereby prohibited and restrained, by way of interim attachment until further orders of the Court, from transferring or charging the immovable property referred to in the Schedule hereto annexed by sale, gift or otherwise and that all persons be, and that they are prohibited and restrained from receiving the same by purchase, gift or otherwise,]

And you may show cause on or before ……day of….. 20…..why this interim order of attachment should not be withdrawn altogether or upon furnishing security for a sum of Rs……

Given under my hand and seal of the Court, this …..day of……20…..

Judge”

**11. Copies of decrees or orders of Courts affecting immovable property and attachments of immovable property by Courts under Revenue Recovery Act to be notified to Registration Officers under the Registration Act, 1908 to be entered in Book 1.**

Section 89 of Registration Act, 1908 deals with "Copies of certain orders, certificates and instruments to be sent to registering officers and filed." Sub section (1) of sec. 89 refers to loans granted under the Land Improvement Loans Act, 1883 sub section (2) deals with Sale Certificates issued under CPC, sub section (3) deals with loans granted under the Agriculturists Loan Act, 1884. Sub section (4) deals with sale certificates issued by Revenue Officers. These will be entered in Book I which can be inspected under sec. 57 or copies of register obtained, in so far as they relate to any particular property.

The State of Kerala has, by Kerala Act 7/1968 deleted sub section (1) and sub section (3) and added sub section (5) prescribing that copies of decrees of court affecting immovable property and of attachments made by courts under the Code of Civil Procedure, 1908 or under the Revenue Recovery Acts in force, be communicated to registering officers for purpose of being filed in Book No.1.

Other States have made other amendments to sec. 89 to cover communication of information relating to loans by co-operative banks or

other banks etc. Several States have also enacted sec. 89A to enable rules to be made for purposes of obtaining copies from the Book I.

The Commission is of the view that provisions as introduced in the State of Kerala by Kerala Act 7/68 should be introduced in the Indian Registration Act, 1908. Once the above type of documents are dealt with as above, copies can be obtained under sec. 57 of the Act.

The proposed section 89A and 89B are as follows:

**Copies of Court decrees, attachment orders, written demands under Revenue Recovery Act to be sent to Registering Offices and filed in registers:**

**"89A (1)** Every Court passing –

(a) any decree or order creating, declaring, transferring, limiting or extinguishing any right, title or interest to or in immovable property in favour of any person, or

(b)an order for interim attachment or attachment of immovable property or for the release of any immovable property from such attachment,

shall, in accordance with the rules made in this behalf, send a copy of such decree or order together with a memorandum describing the property as far as may be practicable, in the manner required by section 21, to the Registering Officer within the local limits of whose jurisdiction the whole or any part of the immovable property comprised in such decree or order is situate, and such officer shall file the copy of the memorandum in his Book No. 1:

Provided that where the immovable property is situate within the local limits of the jurisdiction of more than one registering officer, the procedure indicated in clause (b) shall be followed in respect of the property within the jurisdiction of each of such officers .

(2) Every officer issuing a written demand before the attachment of the immovable of a defaulter under the provisions of any law relating to Revenue Recovery for the time being in force, including the Revenue Recovery Act, 1890, shall -

(a) send a copy of such written demand together with a memorandum describing the property, as far as may be practicable, in accordance with the provisions of section 21;

(b) where such written demand is withdrawn or attachment of property is lifted or the property sold and sale is confirmed, send a memorandum indicating that fact and describing that property, as far as may be practicable, in accordance with the provisions of section 21, to the registering officer within the local limits of whose jurisdiction the whole or any part of the immovable property which the written demand relates is situate and such registering officer shall file a copy of the written demand and the memorandum in his Book No.1

Provided that where the immovable property is situate within the local limits of the jurisdiction of more than one registering officer, the procedure specified in clauses (a) and (b) of sub-section (2) shall be followed in respect of the property within the jurisdiction of each of such officers.

Proposed Section 89D: Power to make rules for filing copies of documents referred to in sec. 89A and 89B.

It is also proposed to introduce sec. 89B for registration of notices in respect of mortgage by deposit of title deeds under sec. 58(f) of the Transfer of Property Act and also to make any omission in that behalf punishable under the proposed sec. 89(c).

For the purpose of making rules to cover filing of documents referred to sec. 89A above and for the purpose of filing of documents which shall be referred in proposed sec. 89B, we propose to introduce a comprehensive section 89D. We shall extract the proposed sec. 89D immediately after the proposed sections 89B and 89C.

**12. Proposed sections 89B, 89C and 89D Mortgage by deposit of title deeds: Intimation to registering officers by mortgager and mortgagee. Separate register to be maintained and provision for making rules. Offence under the Registration Act, 1908 created.**

Under the provisions of section 58(f) of the Transfer of Property Act a mortgage can be created in regard to immovable property by mere deposit of the title deeds if the parties so intend, in the towns specified in the said section as also in other towns which may be identified by the State Government by notification in the official Gazette.

A mortgage by deposit of title deeds does not require to be in writing. It is a deposit of title deeds with intent to create a mortgage and not a mere deposit of title deeds for safe custody or for inspection. Parties usually prepare a memorandum recording the past transaction of deposit with intent to create a mortgage and the memorandum too does not require registration unless it is considered by the parties to be the only repository and appropriate evidence of the agreement. If the memorandum describes that a deposit of title deeds has been made, that is to say, as a past event and not one made under the memorandum, it will require no registration. Of course, there has been considerable case law upon the language employed by parties while preparing the memorandum. We are here not concerned with those aspects.

In as much as a mortgage by deposit of title deeds does not require to be in writing, it is sometimes not possible for a transferee from the same mortgagor to know if there has been a mortgage created earlier by deposit of title deeds. It is true that every purchaser is supposed to insist upon looking into the original title deeds of his vendor but in some cases, the vendor may represent to the purchaser that the title deeds are lost or are not immediately available. There may also be cases of mortgage of ancestral property for which sometimes there are no title deeds as such and the only documents that may be available and may be deposited are the tax receipts or plans etc. In law, in such circumstances, a deposit of even such documents is treated as sufficient to create a mortgage under sec. 58(f). In any event, it is proposed that there must be some public evidence of a mortgage for deposit of title deeds to prevent deliberate suppression of facts and to prevent fraud and misrepresentation.

Take the case of a vendor who enters into an agreement of sale or executes a sale-deed. He may later come forward with a case of an anterior deposit of title deeds with another person which may be wholly untrue. Such a plea may be collusive but the purchaser under the agreement or sale deed is put to the trouble of raising an issue as to the genuineness of the so called deposit of title deeds and as to whether it has not been made subsequent to the date of the agreement or sale-deed..

In order to have an authentic record of the factum of deposit of title deeds by the owner with an intention to create a mortgage on a particular

day, it is necessary to provide a mechanism by which it can be verified whether the deposit of the title deeds has in fact been made on the date upon which it is alleged to have been made. The procedure must enable anybody proposing to deal with such a person to know the date, description of property etc. in relation to such a mortgage by deposit of title deeds.

A provision for compulsory registration of every memorandum of deposit of title deeds may seriously interfere with the freedom attached to commercial transactions and we do not propose such a course.

We find that the procedure prescribed under Section 89 of the Registration Act, 1908 can be of immense help. That section requires copies of certain loans by public authorities granted under mortgage or otherwise or copies of sale-certificates to be sent to Registering Officers to be filed in Book I. Further, section 57 of the Registration Act provides for inspection and lays down the procedure for obtaining copies of the entries in Book I.

Question is whether it is possible to make a provision on the lines of sec. 89 of the Registration Act of intimation of the deposit to the registering officers which can be filed in Book I because Book I is open for public inspection and copies of entries can also be obtained. Question also arises whether such intimation should be before or after the deposit of title deeds.

It is important that any procedure that may be prescribed should not have adverse effect on commercial transactions which take place every day where they involve equitable mortages. Further, there should be little scope

for allowing State Governments to levy normal stamp duties which are otherwise leviable in the case of a mortgages reduced to writing. In fact, the transaction of mortgage by deposit of title deeds has been invented to keep the transaction free from such problems.

Apart from section 89 of the Registration Act, there is another provision which can be useful. There is a procedure of public notice as to the pendency of suit or proceeding, adopted under Bombay Act 14/1939 for purposes of sec. 52 of the Transfer of Property Act. The Bombay Legislature realized that sometimes parties purchase properties which are under litigation. The seller who is a party to the case does not disclose the pendency of the litigation. The legislature, therefore, devised a procedure of registration of a public notice regarding pendency of case before any transfer pendente lite is made. In view of that amendment, transferees pendente lite in Bombay can have knowledge of the pendency of a suit from registration offices by virtue of the registration of the notice or information sent to registering officers by any party to the suit. The Bombay Act of 1939, no doubt, made the registration of the public notice optional. If such notice is not given and registered, the purchaser pendente life does not suffer the disability referred to in sec. 52 that his sale is subject to the result of the suit.

If we prescribe that notice of a proposed deposit to be registered before a registering officer prior to the making of a deposit, there is every chance of State legislatures, which are today in great financial need, imposing the stamp duties as leviable in case of a mortgage in writing. That,

as already stated, will seriously impair the very purpose of a mortgage by mere deposit of title deeds in commercial transactions. It is, therefore, necessary that public notice must not be immediately prior to a mortgage transaction. It should be after the creation of the mortgage. A time limit of, say, thirty days can be prescribed within which a public notice of a previous equitable mortgage must be sent to the registering officers and filed in Book I.

The next question is as to what will happen if the mortgagor fails to register a public notice of that deposit, within the time prescribed, after the mortgage by the title deeds has been created? The mortgagor may indeed enter into other transactions within the thirty days with third parties without informing them about the earlier mortgage. Should it be then stated that any such transferees within that prescribed period, without notice of the mortgage, will be protected and that such subsequent transfers will not be subject to the mortgage? Or should any such transaction entered into after the date of the mortgage and before registration of the public notice be void? Or should non-registration of public notice be made punishable under the Act? There are the three alternatives available before us.

The first alternative of enabling a subsequent transferee without notice to ignore the mortgage will, in the opinion of the Commission, seriously affect commercial transactions and will be a serious deviation from existing law. If a time limit is imposed and it is said that fresh transactions entered into in that period by the mortgagor will not be subject to the mortgage, then

that may indeed encourage unscrupulous mortgagors to enter into fresh transactions collusively to defeat the anterior mortgage by deposit of title deed entered into (say) with Banks or Financial Institutions. If we make the subsequent transactions to be dependent upon the bona fides of the purchaser and want of actual notice, we will be compelling every mortgagee to raise an issue that the subsequent transfer was not bona fide or that the transferee had notice of mortgage. That will lead to lot of litigation. Therefore, the first alternative is out of question.

We are then left with the remaining two alternatives – either to make the subsequent transactions void or to penalize the transferor for suppression of the fact relating to the anterior mortgage.

In reality, we are torn between our desire to preserve the even flow of commerce of which the mortgage by deposit of title deeds is an important facet and our desire to protect subsequent transferees who have no knowledge of the earlier mortgage. Which of these is to have priority is the question?

In the opinion of the Commission, the cause of protecting commerce has to outweigh the interests of individual persons like subsequent transferees. At the same time if a subsequent transferee has been roped into a transaction by an unscrupulous seller, who has earlier mortgaged his property, the seller should not be allowed to go scot-free, if he had not put the subsequent transferee on notice.

The Commission is, therefore, of the view that in the context of the peculiar problems arising out of the present state of law of total absence of public notice in the case of mortgage by deposit of title deeds, the proper course is to combine the second and third alternatives as follows.

The transactions, if any, entered into after the date of the mortgage by deposit of title deeds and before the expiry of the time prescribed (we proposed thirty days) for registration of the public notice must be declared void and at the same time the seller must be made liable for imprisonment and there must also be a provision that the subsequent transferee will be entitled to get back his monies with interest and also to monetary compensation from his unscrupulous vendor.

It is, therefore, proposed to introduce sec. 89C into the Registration Act in Part XVI requiring the registration of a public notice in Book No. 1 within thirty days of the mortgage and also to provide that transactions subsequent to the deposit and before registration will be void but that the purchaser will be entitled to get back whatever money he has paid with interest and also to compensation. It is also proposed to add sec. 89 D to enable rules to be made in this behalf.

It is also proposed to introduce sec. 82A in Ch. XIV of the Registration Act relating to 'Penalties' to the effect that any subsequent transaction entered into by a mortgagor with a third party, without a recital

as to the mortgage by deposit of title deeds, should be punishable with imprisonment which may extend up to three years but subject to a minimum sentence of imprisonment for one year apart from fine.

The proposed sec. 89B, 89C and 89D are as follows:

**Notice to be sent to registering officers by mortgagor after creation of mortgage by depositing title deeds and provision for compensation in favour of subsequent transferee**

**89B.** (1) Every person who has mortgaged immovable property by way of a mortgage by depositing title deeds under clause (f) of section 58 of the Transfer of Property Act, 1882 shall within thirty days from the date of the mortgage, file a notice of intimation of his having so mortgaged the property, giving details of his name and address, name and address of the mortgagee, date of mortgage, amount received under the mortgage, rate of interest payable, list of documents deposited, and description of the immovable property as detailed in section 21, before the registering officer within the limits of whose jurisdiction the whole or any part of the property is situated and the said officer shall file the same in his Book I.

Provided that if the property so mortgaged falls within the jurisdiction of more than one registering officer, the procedure specified in this sub-section shall be followed in respect of the property within the jurisdiction of each such officers.

(2) If the person who has mortgaged the property as aforesaid fails to file a notice within thirty days as stated in sub-section (1) before the registering officer or officers,as the case may be, and enters into any transaction in relation to or affecting the immovable property which is the subject matter of the mortgage, with a third party; such a transaction shall be void and the third party shall be entitled to refund of any amount paid by him together with interest at twelve percent

from the date of payment and also to compensation for any damages suffered by him , from his transferor.

(3) The amount recoverable by such transferee as specified in sub-section (2) shall be a charge on the interest of the mortgagor, in the mortgaged property.

The proposed section in the Registration Act for failure to register a notice shall be as follows:

"Section 89C: Punishment for failure to register notice under sec.89B: Any person who failed to file a notice under sec.89B before the registering officer within the period specified in that section; shall be punishable with imprisonment for a period which may extend up to three years but subject to a minimum punishment of imprisonment of one year together with fine."

We also propose that sec. 89 D be introduced to enable rules to be made for filing of documents and notices contemplated under section 89A and 89B as above-stated.

**Power to make rules for filing of true copies of documents and notices referred to section 89A and 89B**

**"89C**. (1) The State Government may by notification in the Official Gazette, make rules for all purposes connected with the filing copies of documents or notices referred to section 89A and 89B, in the appropriate book under this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for –

(a) the manner in which notices or true copies of documents shall be prepared; and

(b) the manner of filing the notices or true copies.

(3) Every rule made under this section shall be laid as soon as may be after it is made, before each House of the State Legislature where it consists of two Houses or where such Legislature consists of one House, before that House."

**13. <u>Section 34 of Code of Civil Procedure, 1908: Pendente lite and Post- decretal interest to be increased from 6% to 12% and Sec. 34(2)</u>:**

Section 34 of the Code of Civil Procedure, 1908 deals with award of interest by the Court in suits for money. It reads as follows:

> "34. Interest – (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding six per cent, per annum, as the Court deems reasonable on such principal sum, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.
>
> Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent, per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalized banks in relation to commercial transactions.
>
> Explanation I – In this sub section, "nationalized banks" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970.

Explanation II – For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.

(2)Where such a decree is silent with respect to the payment of further interest on such principal sum from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest and a separate suit therefor shall not lie"

This section lays down the principles for granting interest in suits. Firstly, under sub-section (1), by using the word 'may' a discretion is given to the Court either to grant or not to grant interest for the period pending the suit, upon the principal sum adjudged. Secondly, sub-section (1) states that the Court will have discretion to award 'reasonable' rate of interest from the date of institution of suit up to the date of decree, on the principal sum adjudged. This discretion under sub section (1) is with regard to the reasonable rate both for commercial and non-commercial transactions. Thirdly, for the period after decree, the Court is again given discretion under sub section (1) to grant interest but it shall not exceed 6% p.a. in non-commercial cases. In commercial cases, the court can award post-decretal interest at a rate more than 6% p.a. but not exceeding the contract rate or where there is no contract rate, the rate at which moneys are lent or advanced by nationalized banks in relation to commercial transactions.

So far as post-decree rate is concerned, prior to 1956, the Court had a discretion to award at a 'reasonable rate' but by Act 66 of 1956, it was

restricted to 6%. By Act 104/76, a rate above 6% was permitted in commercial transactions for the period after the decree.

It is common experience that in most of the cases the Courts, in their discretion have been awarding interest only at 6% from the date of suit till the date of decree though the maximum limit of 6% is presently applicable only to the interest that may be awarded after the decree in non-commercial cases. The result is that Courts have been awarding only 6% interest per annum from the date of filing of the suit till payment.

The vast discretion that has been given to the Court and the fact that in practice only a rate of 6% p.a. is being awarded, has induced most debtors to take advantage and drive those who have lent or advanced monies to them, to Court. Further, the upper limit of 6% p.a. in non-commercial cases for the period from date of decree appears to be too unrealistic from today's standards when there is serious and continuous erosion of the value of the rupee and in the context of long delays in courts, and in the view of the Commission, sub-section (1) of sec. 34, does not keep the scales even between the plaintiff and the defendant and permits Courts to lean more in favour of the defendant in most cases.

Sub section (2) again states that where a decree is silent in respect of post-decree interest, interest is deemed to have been refused. This provision appears to be based on principles of constuctive res judi cata. There appears to be no logic why a person against whom a Court has passed a decree

should be allowed to go scot free without paying interest even if the decree is silent. The recent Arbitration and Conciliation Act, 1996 sec. 31(3) provides just the contrary. Once the award is passed, the person against whom the award is passed has to pay interest at 18% "unless the Court directs otherwise".

A Constitution Bench of the Supreme Court of India, in its latest judgment, (Central Bank of India V. Ravindra and ors JT 2001 (9) SC 101 has held that the words 'principal sum adjudged' used in sub section (1) of section 34 mean not the principal sum which was the subject matter of any contract of loan but the said sum with interest, computed upto date of suit. It is on that sum that 'interest' pendente-lite or post-decree interest is awarded by the Court.

We propose, for the reasons given earlier, that the Court may award interest from the date of suit till the date of decree at a rate of interest up to a maximum of 12% per annum and similarly that the interest payable from the date of decree till the date of payment, in non-commercial cases can be up to a maximum of 12% per annum. So far as commercial cases are concerned, the interest that may be awarded after the decree till payment can go beyond 12% per annum subject, however, that it shall not exceed the contract rate or the rate at which monies are lent or advanced by a nationalized bank. We also propose to amend Explanation I which defines nationalized banks as the corresponding new banks defined in Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 to also include the other corresponding

new banks covered by the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980.

So far as post-decree interest is concerned, we have to first refer to sec. 34(2). It states that where the decree is silent as to post-decretal interest, it must be deemed to have been refused. As stated earlier, the Commission is of the view that there is no justification whatsoever for a person who has suffered a decree, to refuse to pay interest merely because the decree is silent. The existing provisions of sec. 34(2) which are akin to a principle of constructive res judicata do not appear to render justice to the decree-holder. A judgment for money is treated in England as a judgment-debt upon which interest is payable. The post deceretal interest as introduced 1985 in England is 15% under the Judgment Debts (Rate of Interest) Order, 1985. Under sec. 44 of the Administration of Justice Act, 1970, the Court cannot award a different rate for the period after the decree (see Annual Practice, 1991 Vol. 1 page 61). (see also Halsbury's Laws of England, Vol. 26, 4th Ed. Para 553). Under American law too, post-decretal interest is mandatory under Title 28 (see American Jurisprudence, Vol. 45 para 62), even though the judgment does not contain any specific recital to that effect.

We propose to amend sub section (2) of section 34 by providing that where the judgment and decree are silent with respect to payment of further interest on the principal sum from the date of decree to the date of payment or other earlier date, the decree holder may apply to the Court within 30 days from the date of judgment before the Court which passed the decree to pass

an order with regard to the further interest payable from the date of decree to the date of payment or other earlier date.

In as much as the time for filing an appeal against the main judgment and decree is 30 days under the Indian Limitation Act, 1963 where an appeal is preferred to a Court sub ordinate to a High Court it becomes necessary to make a further provision for extension of the period of limitation for filing an appeal against the main judgment and decree, in cases where an application is filed, within 30 days of the judgment before the Court for passing an order in relation to post decretal interest as stated above. It is proposed to say that while computing the period for filing an appeal against the judgment and decree the period of 30 days for filing an appeal shall be counted from the date on which the Court passes an order on the application for grant of interest for the period after the decree.

In the light of the above proposals section 34 is proposed to be recast as follows:

**Interest**

"**34.**(1) Where and in so far as a decree is for the payment of money, the Court may, in the decree order interest to be paid on the principal sum adjudged, from the date of the suit to the date of decree at a rate not exceeding twelve percent. per annum, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding twelve percent. per annum as the Court deems reasonable on such principal sum, from the date of the

decree to the date of payment or to such earlier date as the Court deems fit:

Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed twelve percent., per annum, but shall not exceed the contract rate of interest or where there is no contractual rate, the rate at which monies are lent or advanced by nationalized banks in relation to commercial transactions.

Explanation.- I In this sub section, "nationalized banks" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980.

Explanation.- II A transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.

(2) Where a judgment and decree are silent with respect to the payment of interest on such principal sum from the date of the decree to the date of payment or other earlier date, the decree holder may apply to the Court which passed the decree for an order in relation to the liability of the judgment debtor to pay interest for the said period and as to the rate at which interest is payable for the said period and the Court shall pass a reasoned order on the said application and in case interest is awarded, the Court shall amend the judgment and decree in accordance with the said order.

(3) The application referred to in sub-section (2) shall be filed within a period of 30 days of the date of judgment and decree in the suit and while computing the period for filing an appeal against the judgment and decree under the provisions of the Limitation Act, 1963, the period between the date of the

> application referred to in sub-section (2) and the date of passing of the order thereon, shall also be excluded, irrespective whether any interest was awarded or not in such application."

The 144th Report of the Law Commission recommended in Chapter III that the court may be empowered to grant interest at a rate higher than the contractual rate, where the contractual rate is quite low, for the period during the pendency of the suit.

The Commission also noticed that section 79 of Negotiable Instruments Act, 1881 directs calculation of the contractual rate of interest until 'such date after the institution of the suit'. Some courts have held that the discretion given in section 34 will not, therefore, to apply while some other courts have held that section 79 of the Negotiable Instruments Act prevails. The Commission favored the view that the discretion under section 34 for pendente lite interest shall prevail and that section 79 of the Negotiable Instruments Act be amended by substituting the words "not later than the institution of the suit" for the words "such date after the institution of the suit" in section 79 of the Negotiable Instrument Act, 1881.

We are of the view on the first question that in the light of the proposal to increase the maximum interest up to 12% for the period during pendency of the suit, no further amendment as suggested in the 144th Report

is necessary. On the second question, we reiterate the same recommendation for amendment of section 79 of the Negotiable Instruments Act, 1881 as suggested in the 144th Report.

## 14. Section 19 of the Hindu Marriage Act, 1955

Section 19 of the Hindu Marriage Act reads as follows:

> "19. Court to which petition shall be presented.- Every petition under this Act shall be presented to the district court within the local limits of whose ordinary civil jurisdiction –
>
> (i) the marriage was solemnized;
>
> (ii) the respondent, at the time of the presentation of the petition, resides; or
>
> (iii) the parties to the marriage last resided together; or
>
> (iv) the petitioner is residing at the time of presentation of the petition, in case where the respondent is, at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of him if he were alive.
>
> [Emphasis supplied]

According to this section, a suit seeking any of the reliefs provided by the Act has to be filed either at the place (a) where the marriage was solemnized; (b) where respondent, resides or (c) where the married couple last resided together. A petition can be filed where the petitioner resides only when the respondent is residing outside India or who is not heard of

being alive for a period of seven years or more. We are concerned with a situation where the wife who has been driven out or deserted, seeks a remedy under the Act. As the Act stands now, she cannot file a suit where she resides. More often than not, such deserted/driven out wife stays with her parents or brother or some other relative, who may not reside in any of the places mentioned in clauses (i), (ii) or (iii) of section 19. Sometimes, the marriage also does not take place at the bride's place but at the place where the husband resides or some other convenient place. For a woman, in the said situation to go and file a suit in any of the places mentioned in the said three clauses means unbearable expense and inconvenience. The deserted woman has to travel long distances to file a suit and to attend hearings. It is, therefore, necessary that section 19 should be amended by amending and inserting a new clause, clause (iiia) in section 19 to the following effect:

> "(iiia) in case the wife is the petitioner, where she is residing on the date of presentation of the petition."

Such amendment will give the wife the choice of court, including where she is residing, to file a suit for redressal of her grievance and would go a long way in relieving her of the additional burden and expense now being faced by her. It would also serve to advance the cause of gender justice consistent with justice and fair play.

It may be mentioned that when the maintenance is claimed by the wife under section 125 of the Code of Criminal Procedure of 1973, the wife or husband is entitled to file petition for maintenance at the place of the residence as per clause (b) of section 126. The section reads as under:

> "126. Procedure.- (1) Proceedings under section 125 may be taken against any person in any district –
>
> (a) where he is, or
>
> (b) where he or his wife resides, or
>
> (c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.
>
> [Emphasis supplied]

Thus in any proceedings under section 125 of the CrPC, a wife is entitled to file an application for her maintenance in a court of jurisdiction where she is residing. There is no reason why section 19 of Hindu Marriage Act of 1955 be not amended to accord with the position under section 126/125 of CrPC, 1973.

I5. **Section 125 of the Code of Criminal Procedure, 1973**

Section 125 of the Criminal Procedure Code provides for maintenance of wife, children and parents, who cannot maintain themselves. The maintenance is allowed under section 125 which reads as under:

> "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 child, whether married or not, unable to maintain itself, or
> …. from the date of the application for maintenance…."

This, maintenance can only be claimed by a female who is a wife or who has been divorced or has obtained divorce from her husband or is legally separated and is not remarried. The pith and substance of the section is that a woman is entitled to maintenance only if she is or has been legally married to the respondent.

There have been many cases where the man misrepresents to the girl that he is unmarried or is divorced or is widowed and goes through the formalities required by Hindu Marriage Act or the custom governing him. Subsequently, when the woman finds out that she was misled into marriage by false representation, she cannot even claim maintenance. Because she

has to be legally married before she is entitled to maintenance under section 125, her claim for maintenance fails.

It is relevant to note section 5 of the Hindu Marriage Act of 1955 which lays down the conditions for a lawful marriage. Clause (i) in the section requires that "neither party has a spouse living at the time of marriage" and under section 11, a marriage solemnized contrary to the said requirement, after the Act came into force, is null and void. In view of this legal position, the Supreme court has held that even if a woman is cheated into a marriage, she is not his lawful wife as the earlier marriage subsists and, therefore, she is not entitled to maintenance (see Yamunabai v. Anantrao, 1988 (1) SCC p.530). The Supreme Court, while dismissing the appeal of Yamunabai, held that the marriage was void and, therefore, she was not entitled to any maintenance observed as follows:

> "It is also to be seen that while the legislature has considered it advisable to uphold the legitimacy of the paternity of a child born out of a void marriage, it has not extended a similar protection in respect of the mother of the child. The marriage of the appellant must, therefore, be treated as null and void from its very inception."

The Supreme Court further observed that:

> "The legislature decided to bestow the benefit of the section even on an illegitimate child by express words but none are found to apply to a de facto wife where the marriage is void ab initio."

The court held further that even if the second wife was unaware, at the time of her marriage that husband was already married and has a wife living, even then she cannot claim maintenance under section 125.

The Hindu Marriage Act while not giving protection to a female who enters into a wedlock on the basis of a misrepresentation does give legitimacy to the children born out of void or/and voidable marriages. By an amendment effected in 1976, section 16 was amended to read as under:

> "16. Legitimacy of children of void and voidable marriages.- (1) Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage is held to be void otherwise than on a petition under this Act."
>
> (sub-sections (2) and (3) omitted as unnecessary)

Similarly, clause (b) of section 125 of CrPC entitles illegitimate children a right of maintenance as mentioned above.

Since the illegitimate children are entitled to maintenance, it is reasonable to say that their mother who though not legally married but has been a de facto wife should also be allowed to claim maintenance. Such amendment apart from protecting the victim of false representations would also deter a man from making false representations about his marital status.

It is, therefore, in section 125, sub-section (I), in the Explanation, in sub-clause (i) of clause (b), after the words "and has not remarried" the following shall be inserted, namely:-

> "or whose marriage is void under section 11 read with sub-section(1) of section 5 of the Hindu Marriage Act, 1955 or under clause (a) of section 4 read with section 24 of the Special Marriage Act, 1954 or under section 4 of the Parsi Marriage Act, 1936, or under any other provision contained in any enactment corresponding to the aforesaid provisions as may be notified by the Central Government in this behalf, and has not remarried."

**Position under section 18 of the Hindu Adoptions and Maintenance Act**

The position of a Hindu wife whose marriage is void under section 11 of the Hindu Marriage Act does not appear to be better either. Sub-section (2) of section 18 of the Hindu Adoptions and Maintenance Act sets out the grounds upon which a Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance. Section 18 reads as follows:

> "18. Maintenance of wife.- (1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.
>
> (2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance,-
>
> (a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or willfully neglecting her;
>
> (b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;
>
> (c) if he is suffering from a virulent form of leprosy;
>
> (d) if he has any other wife living;

(e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;

(f) if he has ceased to be a Hindu by conversion to another religion;

(g) if there is any other cause justifying her living separately.

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she in unchaste or ceases to be a Hindu by conversion to another religion."

It is evident that ground (d) enables a wife to live apart and yet claim maintenance if the husband has any other wife living. It is possible to argue on the basis of the decision of the Supreme Court in Yamunabai referred to hereinbefore that the second marriage being void, clause (d) of section 18(2) is not satisfied even where, as a fact, the second 'wife' is living with the husband. The argument can be that the second 'wife' has not really acquired the status of a 'wife' within the meaning of section 18(2)(d). This aspect needs to be put beyond doubt even though, it is true, some High Courts have upheld the first wife's claim for maintenance on the ground of second marriage performed after the commencement of the Hindu Marriage Act. Questions may also arise as to the right of the second wife to claim maintenance in certain circumstances where too the husband can seek to non-suit her on the ground that her marriage being void under section 11 read with section 5(i) of the Hindu Marriage Act, she is not a "wife" within the meaning of section 18(2)(d) of the Hindu Adoptions and Maintenance Act. It is necessary to clarify both these aspects consistent with the present-day societal values.

Two questions arise in this behalf, namely, (i) whether a wife (first wife) can claim maintenance on the ground that the husband has contracted a second marriage after the commencement of the Hindu Marriage Act? In such a case, should she be deprived of the right given by section 18(2)(d) on the ground that since such a second marriage is void under section 11 of the Hindu Marriage Act, she cannot invoke clause (d) of sub-section (2) of section 18 of the Maintenance Act, and

(ii) whether the second wife whose marriage has taken place after the commencement of Hindu Marriage Act, at a time when the first wife was alive, is entitled to claim maintenance under section 18 of the Maintenance Act? The argument on behalf of the husband can be the same viz., her marriage being void under section 11 of the Marriage Act, she is not a "wife" within the meaning of section 18(2) of the Maintenance Act.

These two questions may be dealt with separately.

1) So far as the right of the first/validly married wife to claim maintenance on the ground that the husband has married again after the commencement of the Hindu Marriage Act is concerned, we see no justification to refuse her claim for maintenance on the ground that the second marriage is void in law when, as a matter of fact, she is suffering all the disabilities, humiliations and harassment resulting from such second marriage. We cannot shut our eyes to the reality and continue the suffering

of the first wives. The first wife should be held in such a case to be entitled to live apart and yet claim maintenance. Such a provision would also deter the husbands from marrying again during the lifetime of the first wife. More important, it is not consistent with public policy or interests of society to make the first wife not only suffer the harassment and indignity flowing from the second marriage of her husband but also to disable her from claiming maintenance on the said ground. We are therefore of the opinion that section 18 should be amended and it should be clarified that first wife is entitled to claim maintenance on the ground that the husband has married again after the coming into force of the Hindu Marriage Act.

2) So far as the right to claim maintenance of a woman who has married a person knowing that he is already married, is concerned, it stands on a different footing. But here again there may be cases where the second wife may have been innocent and has married that person without knowing that he is already married and that his wife is alive. In such cases, the equities are in her favour as pointed out hereinabove while dealing with section 125 of the CrPC. We are therefore of the opinion, for the reasons mentioned while discussing the position under section 125 CrPC that it is just and equitable to provide that a woman who has married a person, who has already a wife living, without knowing that he is already married and that his wife is living, should be held entitled to maintenance. This would be an instance of advancing gender justice consistent with the principles of fair play and equity. Now so far as the other category is concerned, namely, a woman who marries a person knowing that he is already married and that his

wife is living, there can be two opinions: one is that since she has knowingly entered into a void marriage, there is no reason to entitle her to claim maintenance, that too on the ground that the other wife is living. The second view may be that in the conditions prevailing today in Indian society, it would not be just to deprive such second wife of maintenance even where she has been deserted or driven out by the husband. May be she is not entitled to claim maintenance on the ground that the other wife is living, yet there may be some equities in her favour if her case falls under clauses (a), (b), (c), (e) and (f) of sub-section (2) of section 18. On a consideration of the contending points of view we are inclined to accept the second line of thinking and to provide that though a woman, who has married a person knowing that the husband is already married and has a wife living, shall not be entitled to claim maintenance on the ground mentioned in clause (d) of sub-section 2 of section 18, yet she would be entitled to do so on the grounds mentioned in clauses (a), (b), (c), (e) and (f) of the said sub-section. Such a provision would act as a deterrent against the husbands ill-treating or deserting second wives with impunity under the impression that since their marriage is void in law, they can be treated like dirt. This would again be a case of advancing the cause of gender justice consistent with fair play and justice.

Accordingly, the following amendments are suggested to section 18 of the Hindu Adoptions and Maintenance Act, 1956:

In the Hindu Adoptions and Maintenance Act 1956, in section 18, in sub-section (2),

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

"(d)if he has any other wife living, whether the marriage of the other wife had been solemnized before or after the commencement of the Hindu Marriage Act, 1955."

(ii) after clause (g) the following Explanations shall be inserted, namely:

"Explanation.-1 A woman who marries a person without knowing that he is already married and that his wife is living shall, without prejudice to claim maintenance on the ground mentioned in clause (d) , be entitled to live separately from her husband.

Explanation.-2 A woman who marries a person knowing that he is already married and that his wife is living, shall be entitled to live separately from her husband without forfeiting her claim to maintenance on any of the grounds mentioned in clauses (a), (b), (c), (e), (f) and (g)."

So far as other personal laws dealing with maintenance are concerned, the Commission will make a separate report.

## 16. Problem of hostile witnesses and the need to ensure a fair investigation

Certain recent happenings, widely reported in the Press, call for introducing measures to ensure that a criminal trial does not end in a fiasco on account of the eye-witnesses or the material witnesses, as the case may be, turning hostile at the trial. At the same time, it is equally imperative that a fair investigation is assured and room for manipulation at the stage of investigation should be eliminated as far as possible. The experience shows that where the accused happens to be rich and/or influential persons or members of mafia gangs, the witnesses very often turn hostile either because of the inducements offered to them or because of the threats given to them or may be on account of promises that may be made to them. To protect public interest and to safeguard the interests of society, measures need to be devised to eliminate, as far as possible, scope for such happenings.

The 14th Law Commission had referred to this aspect while submitting its report (154th Report) on the Code of Criminal Procedure. After considering the earlier reports of the Commission, the reports of the National Police Commission and the responses it received pursuant to the circulation of its Working Paper, the Commission suggested the following measures:

(a) "It is necessary to amend section 164 CrPC so as to make it mandatory for the investigating officer to get statements of all material witnesses questioned by him during the course of

investigation recorded on oath by the magistrate. The statement thus recorded will be of much evidentiary value and can be used as previous statement. Such recording will prevent the witnesses turning hostile at their free will. Such a change will also help the Police to complete the investigation and submit a final report on the basis of such statements made on oath and on other facts and circumstances stated as recovery, etc." Accordingly, the Commission suggested introduction of sub-section (1A) in section 164. The Commission however felt that adoption of this course would require recruitment of a good number of additional magistrates, which course, it thought may not be immediately feasible - though this course was the most desirable one.

(b) The other alternative measure suggested by the 14th Law Commission was to retain the existing provisions in sections 161, 162 and 172 of the Code of Criminal Procedure and to provide some checks against the witnesses turning hostile. The suggested measures were: taking the signature of the witness, if he is literate, on his statement, giving a copy of the statement to the deponent under acknowledgement and thirdly to send copies of the statements to the appropriate magistrate as well as to the superior Police officers.

We appreciate the difficulty pointed out by the 14th Law Commission in recruiting as many more magistrates as may be required, if the first measure suggested by it were to be introduced. We therefore thought of a

third alternative. Inasmuch as the evil of witnesses turning hostile is more in vogue in serious offences and because this evil must first be checked in serious offences and also because such a measure is being introduced for the first time now after a long number of years, we suggest the following alternative: in all offences punishable with ten or more years imprisonment (with or without fine) including offences for which death sentence can be awarded, the Police shall have the statements of all important witnesses recorded under section 164 by a magistrate. Indeed, it would be more appropriate, if this is done at the earliest opportunity i.e. at the very inception of the investigation. It is well-known that generally witnesses stick to truth at the early stages but may change in course of time. If their statement is got recorded by a magistrate at the earliest opportunity, that will also furnish guarantee of the truth of the statement as well. This is the general belief, though this cannot be stated as a definite or universal proposition. Adopting this course would not require recruitment of a large number of additional magistrates. The present number would suffice.

We must, however, hasten to add that the above measure by itself would not suffice. Whether the statement is recorded before the magistrate under section 164 (or whether the signature of the witness is taken on his statement recorded under section 161 as suggested in the 154$^{th}$ Report), they remain merely former statements of witnesses. So far as statements recorded under section 161 are concerned, the restrictions placed thereon by section 162 would also operate. So far as the statements recorded under section 164 are concerned, they would be no more than former statements of

witnesses which can be used either for corroboration or contradiction. Obviously, there can be no question of cross-examination of these witnesses at the stage of investigation or at the stage of recording their statements under section 164. It is therefore necessary to provide a further measure, namely, that if a witness whose statement is recorded by a magistrate under section 164 CrPC departs from that statement at the trial, it should be open to the trial judge (sessions judge) to treat his statement recorded under section 164 as relevant evidence at the trial, subject to the provisions of the Evidence Act. It is obvious that the trial judge would do so only when he is satisfied, in the facts and circumstances of the case, that the statement of the witness before the magistrate recorded under section 164 CrPC was true and that his statement at the trial does not represent the truth. Of course, he should also be satisfied that the statement under section 164 was made voluntarily. We may in this connection recall the provision contained in section 288 of the Criminal Procedure Code, 1898, which does not find a place in the present Code. Under the old Code, all important witnesses were examined (giving an opportunity to the accused to cross-examine them) in the committal court and in case these witnesses turned hostile at the trial before the sessions court, section 288 enabled the trial judge to treat the evidence of the witness given in the committal court as substantive evidence at the trial subject of course to the provisions of the Indian Evidence Act, 1872.

We are aware that the measure suggested by us is rather radical, inasmuch as a statement, untested by cross-examination, is sought to be

made admissible as evidence for all purposes – even in a case of murder. But the justification behind this measure is (a) 'necessity'- a doctrine which is well-accepted in jurisprudence, examples of which are the several instances mentioned in clauses (1) to (8) of section 32 of Evidence Act; (b) the safeguards mentioned hereinabove viz., recording of the statement by a magistrate which itself is a guarantee, to a large extent, that the statement was voluntary and hence true and the further provision that the trial judge will treat such statement (u/s 164) as evidence at the trial only if and when he is satisfied in all the circumstances of the case that the statement recorded u/s 164 was voluntary and appears to be true.

So far as offences punishable with less than ten years imprisonment (with or without fine) are concerned, the existing procedure may be followed subject to the following modifications: the statement of a witness under section 161 of the Code shall be recorded as far as possible in the language in which the witness deposes; after the statement is recorded, it shall be read over to the witness by the officer recording it and the signature or thumb impression, as the case may be, of the witness shall be obtained on the statement; the statements shall be recorded in the Case Diary and not upon loose sheets of paper; copies of statements recorded under sub-section (3), shall be sent immediately to the Magistrate competent to take cognizance of the offence and to the Superintendent of Police of the District; the Case Diary shall be a bound book, duly paginated and maintained in the regular course of official business. If this measure is adopted, it will not only ensure that the investigation is fair, it would also eliminate room for any

manipulation by the investigating officers which is the common complaint of the accused. Frequently allegations are made that the scene of offence is changed, the time of offence is altered, the witnesses are shuffled or substituted, the names, numbers and identities of the accused are changed and so on. The adoption of the above course would help eliminate room for such complaints and would not only assure to the accused a fair investigation but would also lend credibility to the investigation process and would indeed increase the present poor rate of conviction. The measures suggested herein should indeed be followed in all cases (i.e., even in case of offences punishable with ten years or more imprisonment), which would go a long way in improving the quality of this phase of criminal legal system.

We are also of the opinion that for a proper and effective implementation of the above measures, the prosecution should seek to concentrate their attention on important cases instead of frittering their energies on all and sundry cases. The recommendation made by the 14th Law Commission in their 154th Report regarding introduction of the procedure of 'plea bargaining' and increasing the number of offences which can be compounded, should be implemented without any further delay. In chapter 13 of the 154th Report, the Law Commission had recommended that the facility of plea bargain should be made applicable, to start with, to offences which are punishable with imprisonment for less than seven years and/or fine including the offences covered by section 320 of the Code. It was clarified that plea bargaining can also be in respect of nature and gravity of offences as well as to the quantum of punishment. It was also suggested

that the process of plea bargaining shall be set in motion after issue of process and when the accused appears, either on a written application by the accused to the court or suo motu by the court. Indeed, the said chapter sets out in detail the procedure to be followed in this behalf which we do not think it necessary to reproduce here. Similarly, chapter 12 of the said Report recommends increasing the number of offences which can be compounded without the permission of the court and also those offences which can be compounded with the permission of the court.

If the concept of plea bargaining is so implemented in respect of offences punishable up to seven years imprisonment (with or without fine), a large number of less serious offences can be settled without the requirement of a trial.

Accordingly, we recommend the following amendments to the Code of Criminal Procedure:

(a) Insertion of sub-section (1A) in section 164 CrPC:

Evidence of material witnesses to be recorded by Magistrate in certain cases

> **"164A** (1) Any police officer making an investigation into any offence punishable with imprisonment for ten years or more (with or without fine) including an offence which is punishable with death,

shall in the course of such investigation, forward all persons whose evidence is essential for the just decision of the case, to the nearest Magistrate for recording their statements.

(2) The Magistrate shall record the statements of such persons forwarded to him under sub-section (1) on oath and shall keep such statements with him awaiting further police report under section 173.

(3) Copies of such statements shall be furnished to the investigating officer.

(4) If the Magistrate recording the statement is not empowered to take cognizance of such offence, he shall send the statements so recorded to the magistrate empowered to take cognizance of the case.

(5) The statement of any person duly recorded as a witness under sub-section (1) may, if such witness is produced and examined, in the discretion of the court and subject to the provisions of the Indian Evidence Act, 1872, be treated as evidence."

(b) Insertion of section 311A:

S.311A: The statement of the witness duly recorded under sub-section (1) of section 164 of this Code may, in the discretion of the presiding judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872.

Implementation of the recommendations of the 154$^{th}$ Report of the Law Commission with respect of introduction of plea bargaining and

enlargement of compoundability of the offences, may also be taken up immediately.

There is another very important measure, which too was recommended in the 154th Report of this Commission, which needs to be implemented without further delay. It relates to establishment of a separate investigating agency and an independent prosecuting agency set out in chapters 2 and 3 of the said Report. Since the reasons in support of the said recommendations are duly stated in the said Report, we do not think it necessary to repeat them here. Suffice it to say that we endorse and commend the said recommendations which would go a long way in ensuring fair and prompt investigation and would also contribute to the increase in the rate of conviction which is appallingly low at present.

17. **Section 161, 162 Sec.173(5): Code of Criminal Procedure, 1973: Need for transmission of statements of persons to Magistrate immediately**.

Chapter XII of the Code of Criminal Procedure, 1973 (containing sections 154 to 176) deals with 'information to the police and their powers to investigate'. Section 160 refers generally to the powers of the police "to require attendance of witnesses" who appear to be "acquainted with the facts and circumstances of the case". Section 161 refers to the "examination of witnesses by the police" of any person "supposed to be acquainted with the facts and circumstances of the case" and states that the said person is bound to answer all queries other than questions, the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. The police officer is to reduce into writing any statement made to him in the course of an examination under this section. Under section 162, it is stated that this statement need not be signed by the person making the statement and that it cannot be used as evidence except to contradict such witnesses in the manner provided in section 145 of the Evidence Act, 1872. Explanation to section 162 states that an omission to state a fact or circumstances in the statement may amount to a contradiction.

These sections do not speak of forwarding the statement given under sec.161 immediately to a Magistrate. That is however, provided in sub section (5) of sec. 173 which states that the statements under sec. 161 have

to be sent to the Magistrate but only at the stage of filing the final report of the police. If the statements are thus allowed to be filed after long delay, there is scope for several malpractices and manipulations. In fact, as stated below various other sections in this Chapter require statements or record, etc. to be sent to the Magistrate forthwith:

(i) Section 164 refers to the procedure for recording `confession and statement before any Metropolitan Magistrate or Judicial Magistrate. Under sub-section (6) of section 164, the Magistrate recording the confession or statement shall forward it to the Magistrate by whom the case is to be inquired into or tried.

(ii) Section 165 refers to search by police officer and under sub-section (5) record of the search as made under sub-section (1) or sub-section (3) is to be sent to the nearest Magistrate empowered to take cognizance of the offence. Section 166(4) also requires similar record to be sent to the Magistrate, where the search is made by another officer, referred to in section 166(1).

(iii) Section 166B refers to letters of request received from a country or place outside India to a Court or an authority for investigation in India. Sub-section (2) requires all evidence taken or collected or authenticated copies thereof, to be forwarded by the Magistrate or police officer to the Central Government for transmission to the Court or the authority issuing the letter of request.

(iv) Section 167 which refers to a situation where investigation cannot be completed in twenty four hours, also refers to the need for the police officer to transmit dairy entries to the nearest Judicial Magistrate.

(v) Section 172 requires the Police officer to send his diaries to the Court but the accused or his agents will not be entitled to see them unless they are used by the police officer to refresh his memory or if the Court uses them, for the purpose of contradicting such police officer. The provision of section 161 or of section 145 of the Evidence Act shall apply to such diaries.

Therefore, there is no reason why the statements recorded under section 161 of the Code should not be directed to be sent to the Magistrate immediately.

The Commission has, therefore, felt that it should be required by statute that these statements be sent to the Magistrate "forthwith", and if that is done, pre verification by witnesses or witnesses turning hostile can be prevented.

In the 154th Report of the Law Commission (1996) in Ch.IX, various recommendations were made in connection with "Examination of witnesses and record of their statements; section 161 and 162". In Ch. XXII, which contains the summary of recommendations, it is stated as follows: (see para 20): "20. The statements of material witnesses recorded under section 164

which could be more authentic and also prevent and witnesses from turning hostile. Further, Section 161, 162, 164 and 172 be amended on the way suggested in Ch. IX, para 7. This course is more salutary and will prove to be very effective in rendering criminal justice in a speedy manner. However, the changes contemplated, namely, setting up and separating the investigating agency, and structuring the same and appointment of large number of magistrates will take some time. We, in the alternative, recommend to retain the provisions of sections 161, 162 and 172 as they are but with some checks in the direction of improving the authenticity of such statements recorded by the police and also obtaining signatures of the persons examined, if they are literate. Further, a copy of the statement should be given the deponent under acknowledgement and also send them to the Magistrate and to other superior officers. That provisions would ensure against any error or malpractice being committed by the officer (paras 7,8,11,12,13 & 15 of Ch. IX)."

It is clear from a reading of Ch. IX of the Report and the paras above referred to that two alternative procedures were suggested in the 154th Report and it was felt that the first alternative would take considerable time for implementation because of the dearth of the required number of Magistrates and therefore, the second alternative was suggested for immediate implementation, namely,

(1) that sections 161, 162 should be retained as they are,,
(2) that if the witness is literate his signature be obtained.

(3) that copy of the statement recorded should be given to the witness under his signature, under acknowledgement,

(4) that statement of witness should be sent to the Magistrate and superior officers.

As the Commission is proposing in the present report certain amendments which can be brought immediately to prevent witnesses turning hostile, and which would ensure that there is no manipulation of the statements, it is recommended that the "other alternative" suggested in the 154th Report be put in action immediately, with the further rider that each statement so recorded under sec. 161 must contain the date and time of the recording of the statement and the place where it is recorded and that the statement should be sent to the Magistrate 'forthwith'.

We, therefore, recommend as follows:

(A ) Sec. 161 can be retained as it is.

(B ) So far as sec. 162 is concerned, heading of the section which at present reads "Statement to police not to be signed: use of statements in evidence", should be changed. The body of sec. 162(1) has also to be amended. The following sub-section (1), (1A) and (1B) may be substituted for the existing sub-section (1) of section 162:

"Sec.162 **Statement to police to be signed: Transmission to Magistrate: Use of statement in evidence**:

" (1) The statement made by any person to a police officer in the course of an investigation under this chapter shall, if reduced to writing, be signed by the person making it if the person who has given the statement is literate and in case the person is not literate, his thumb impression shall be obtained and in every case, a true copy of the statement shall be furnished to the person who gave the statement, immediately under acknowledgement.

(1A) Every such statement recorded under section 161 shall contain the date and time as to when the statement was recorded and the place where it was recorded, and shall be forthwith forwarded to the Magistrate.

(1B) Any such statement or record thereof or any part of such statement or record whether in a police diary or otherwise, shall not be used for any purpose, save as hereafter 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; 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 of explaining any matter referred to in his cross-examination."

(C) Sub-section (2) of sec. 162 and the Explanation below sub-sec.(2) shall be retained.

18. **Sec.174: Proposal to requires statements of persons examined at the Inquest to be sent forthwith to the Magistrate along with Report:**

This is yet another section which if properly amended, can contribute to the elimination of subsequent manipulation of the evidence or record and also eliminate witnesses turning hostile.

The section deals with the statements of persons who are examined at, what is known as the 'inquest', in the case of offences involving death of any person. No doubt, these statements are also statements which fall under section 161 but, we propose to make a separate provision in regard to such statements on the same lines as proposed in respect of sec. 161.

Under sub-section (1) of section 174, a report is to be submitted by the officer-in-charge of a police station or some other police officer specially authorized by the State Government – in regard to the 'apparent cause of death'. He is to give intimation to the nearest Executive Magistrate empowered to hold inquest, before proceeding to the place where the dead body is found. He shall have to make the investigation in the presence of two or more respectable inhabitants of the neighbourhood. The Report must contain the apparent cause of death, details of wounds, fractures, bruises, and other marks of injury as may be found on the body, and the manner, by what weapon or instrument, if any, such marks appear to have been inflicted.

Under sub-section (2) of section 174, the "Report" is to be signed by the police officer and other persons, or by so many of them as concur therein and 'shall be forthwith forwarded to the District Magistrate or the Sub-divisional Magistrate.

Sub-section (3) deals with sending the body for postmortem and sub-section (4) deals with conferment of certain powers on the Magistrates.

During the investigation under section 174, statements are recorded from several persons, some of whom may ultimately turn out to be prosecution witnesses. These statements would be of great importance, being statements given soon after the death of the person in regard to whom the offence is suspected.

If the statements of these persons are statutorily directed to be sent to the District Magistrate or the Sub-Divisional Magistrate, along with the Report referred to in sub sec.(1) of sec. 174, that will ensure that there are no manipulations or malpractices in regard to those statements. As at present, a Report could be loosely worded giving scope for improving upon it in the statements that may be sent ultimately to the Magistrate under section 173(5), along with the final report.

It is, therefore, further proposed to amend section 174 (2) as follows by adding such sub sec. 2(A), below sub sec.(2):

"Section 174(2A): The statements of the persons recorded at the inquest by such police officers shall be forwarded forthwith to the Magistrate.

(2B) The signature or thumb impression, as the case may be, of the person making the statement shall be obtained on his statement.

## 19. Amendment of Chapter XIX of the Code of Criminal Procedure

Chapter XIX of the Code provides for trial of warrant cases by Magistrates. This chapter is sub-divided into two parts – Part-A (governing the cases instituted on a police report) and Part-B (governing cases instituted otherwise than on police report). The main difference in the procedure is that in cases governed by Part-A, the magistrate can frame charges straightaway after pursuing the police report and the accompanying documents. Section 239, no doubt, empowers him to examine the accused if he thinks it necessary and also to give an opportunity of hearing to the accused before framing the charge or discharging the accused, as the case may be, but this is only discretionary and not obligatory. Whereas in cases governed by Part B, (i.e., in cases instituted otherwise than on Police report), the procedure is different and more elaborate. In such cases, the magistrate has to first hear the prosecution and take all such evidence as may be produced in support of the prosecution and on consideration of such evidence, he may either discharge the accused, if the complaint is found groundless or frame the charges, if he thinks there is material to show that accused has committed the offence triable under the said chapter. Thereafter the accused is asked whether he pleads guilty and if he denies the charge he will be asked to cross-examine the witnesses and the trial proceeds.

There is a very good reason behind the distinction made by the Code between cases instituted on police report and cases instituted otherwise than on police report. A police report is filed pursuant to and as a result of

investigation done by an independent agency i.e., the police, whereas in case of a private complaint, such an assurance is absent. It is for this reason that the distinction between the two procedures was upheld by the Supreme Court in Budhan Choudhary vs. State of Bihar (AIR 1955 SC 191).

It is however brought to our notice that where the authority under the Income Tax Act, Central Excise Act, Customs Act, FERA/FEMA, Employees State Insurance Act, 1948 and the Companies Act, 1956 files complaints before a criminal court for prosecuting the persons under those enactments, the Courts are following the procedure in Part B of Chapter XIX, treating these cases as cases filed otherwise than on a police report. The course adopted by the Court appears to be unobjectionable on the language now employed in the chapter. In our opinion, however, this requires to be changed. It must be provided that where a complaint is filed by the appropriate authority under any of the aforesaid enactments or similar enactments it should be proceeded with under Part A. This is for the reason that appropriate authorities under these enactments also file complaints after a good amount of investigation, inquiry and verification. Take for example, a criminal complaint filed under section 276 C of the Income Tax Act. According to this section "If a person willfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under this Act, he shall, without prejudice to any penalty that may be imposable on him under on any other provision of this Act be punishable…." by a criminal court. It is obvious that such a complaint will not be filed merely on the filing of the Return by the assessee but only after

the appropriate authority is satisfied that there has been such a wilful attempt to evade the tax, penalty or interest chargeable/imposable under the Act. Indeed, no complaint can be filed under section 276-C – as a matter of a fact under any of the Sections 275-A, 276, 276-A, 276-B, 276-BB, 276-CC, 276-D, 277 and 278 – except with the previous sanction of the Commissioner, Commissioner (Appeals) or the appropriate authority (as defined in Explanation to sub-section (1) of section 279(1)) by virtue of the provision contained in section 279 of the Act. The requirement of sanction of a higher official is a check against misuse of or frivolous resort to, the power to prosecute. In fact, the I.T. Act provides greater safeguard against misuse of this power than the code of criminal procedure. Even under the other enactments referred to above, a good amount of enquiry is made before launching the prosecution – it is never a matter of course. Treating the complaints filed after such elaborate enquiry ought not to be equated with the complaints filed by private individuals and should not be subjected to the procedure in Part B of Chapter XIX. Applying Part-B is resulting in inordinate delay in processing these complaints, which in fact relate to economic offences, which must be given priority over the ordinary law and order crimes. It is, just and appropriate that the complaints filed by the appropriate authorities under taxing enactments and other enactments mentioned hereinabove, should be governed by the procedure contained in Part A of Chapter XIX.

For achieving the above purpose it is necessary to amend the heading of 'Part A'. The present heading should be substituted by the heading

"**Cases instituted on a police report or on a complaint made by a public servant acting or purporting to act in the discharge of his official duties."** It is equally necessary to amend section 238 to provide that in any warrant case instituted upon a complaint made by a public servant, when the accused is brought before a Magistrate at the commencement of the trial, the Magistrate shall satisfy himself that all the relevant documents constituting the basis of the complaint or referred to therein, have been furnished to the accused. At present, section 238 requires that "when in any warrant case instituted on a police report, the accused appears or is brought before a Magistrate at the commencement of the trial, the Magistrate shall satisfy himself that he has complied with the provisions of Section 207". Section 207 requires that in proceedings instituted on a police report, the magistrate shall, without delay, furnish to the accused, free of cost, copy of the police report, FIR, statement recorded under section 161(3), confessions and statements, if any, recorded under section 164 and any other document or relevant extract thereof forwarded to the magistrate with the police report under section 173(5). A new section 207A is proposed to be inserted to provide that the Magistrate shall without delay, furnish to accused, free of cost, a copy of the complaint and documents on which it is based and other documents referred to therein. This is a salutary provision and must be observed even by the authorities under the taxing and other enactments whose complaint is now suggested herein to be equated with the police report. The consequential amendments required to be carried out in other provisions of the Code are as follows:-

**Amendment of section 190**

1. After clause (b) of sub-section (1) after the words "such facts" the following words shall be inserted, namely: -

> "or upon a complaint of facts which constitute such offence made by a public servant acting or purporting to act in discharge of his official duties;"

**Substitution of the heading of Part A under Chapter XIX**

2. The existing heading of Part A under Chapter XIX shall be substituted as follows:-

> "A.- Cases instituted on a police report or on a complaint made by a public servant acting or purporting to act in discharge of his official duties."

**Insertion of new section 207A**

3. After section 207 of the principal Act, the following section shall be inserted, namely :-

> "207A. In any case, where the proceeding has been instituted on a complaint made by a public servant acting or purporting to act in the

discharge of his official duties, the Magistrate shall without delay furnish to accused, free of cost, a copy of the complaint and documents on which it is based and other documents referred to therein."

Provided that if the Magistrate is satisfied that any document referred to in the complaint is voluminous,he shall instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in court. "

**Amendment of section 238**

4. Section 238 of the principal Act shall be renumbered as sub-section (1) and after sub-section as so renumbered, the following sub-section shall be inserted namely:-

"(2) When, in any warrant-case instituted upon a complaint made by a public servant acting or purporting to act in the discharge of his official duties, the accused is brought before a magistrate at the commencement of the trial, the Magistrate shall satisfy himself that he has complied with the provisions of section 207A."

**Substitution of section 239**

5. For section 239 of the principal Act the following section shall be substituted, namely:-

> " 239. If, upon considering the police report and the documents sent with it under section 173 or upon considering the complaint made by the public servant acting or purporting to act in the discharge of his official duties and the documents sent with it 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."

**Substitution of heading B below section 243**

6. The existing heading "B" below section 243 shall be substituted as follows:-

> "B.-Cases instituted otherwise than on police report or on a complaint made by a public servant acting or purporting to act in discharge of his official duties"

**Amendment of section 244**

7. In section 244 of the principal Act, in subsection (1) for the words, "When in any warrant case instituted otherwise than on a police report, the accused appears" the words "When in any warrant case instituted otherwise than on a police report, or upon a complaint made by public servant acting or purporting to act in the discharge of his official duties, the accused appears" shall be substituted.

**Amendment of section 249**

8. in section 249 , for the words, "When the proceedings have been instituted upon complaint, and on any day fixed for the hearing of the case,

the complainant is absent," the words "When the proceedings have been instituted upon complaint other than a complaint made by a public servant acting or purporting to act in the discharge of his official duties, and on any day fixed for the hearing of case, the complainant is absent," shall be substituted.

**Amendment of section 256**

9. In section 256 of the principal Act, in sub-section (1), for the words, " If the summons has been issued on complaint and on the day appointed for the appearance of the accused," the words " If the summons has been issued on complaint, other than a complaint made by public servant acting or purporting to act in the discharge of his official duties, and on the day appointed for the appearance of the accused," shall be substituted.

If the above suggestion is implemented it will cut down a good amount of delay which is occurring in prosecutions lodged under taxing enactments and other enactments like those referred hereinabove. It will advance the public interest and interests of justice without any manner compromising or affecting the legitimate rights of the accused.

This Report deals with various enactments of which some, like the Code of Civil Procedure, 1908 and the Code of Criminal Procedure, 1973, are procedural while some others, namely, the Partnership Act, 1932, Hindu Marriage Act, 1955, Hindu Adoption & Maintenance Act, 1956 etc. concern substantive laws. (Of course, some proposals relate to new offences which are created and these cannot be retrospective). We, therefore, felt that it is necessary to set out in detail which of these provisions apply to pending suits, appeals under the Code of Civil Procedure and which provisions shall apply to the inquiries and judicial proceedings under the Code of Criminal Procedure and to what extent some of the proposals for amendment of the substantive laws shall apply to pending proceedings. We have, therefore, accordingly formulated these matters under sec. 15 with the heading, "Transitory Provision".

The amendments in the Code of Criminal procedure, 1973, recommended in the 177$^{th}$ report on 'Law of Arrest', also need to be implemented along with the amendments recommended in the Criminal Procedure Code, 1973, in the Law Reform (Miscellaneous Provisions Amendment) Bill, 2002, annexed with this report.

CONCLUSION:

Our recommendations cover various enactments and with a view to translate these in to statutory provisions, we have prepared a consolidated Bill under the name " Law Reforms (Miscellaneous Provisions Amendment) Bill, 2002" on the pattern of the U.K. Law Reforms (Miscellaneous Provisions) Act 1934. The Bill is enclosed with this report.

We recommend accordingly.

(Justice B.P. Jeevan Reddy)
Chairman
(Justice M.Jagannadha Rao)
Vice Chairman

(Dr. N.M. Ghatate)
Member

(Mr. T.K.Viswanathan)
Member-Secretary

Dated: 14.12.2001